

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35822
Docket No. MW-32758
01-3-96-3-59**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Western Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Dobbas Construction Company) to break up and remove concrete, excavate, remove and load soil, construct a Ground Water Treatment Plant, install extraction wells and pump and treat the system in conjunction with electrical control, concrete slabs and security fencing at the Waste Water Treatment Plant at Roseville, California beginning July 22, 1994 and continuing (Carrier's File BMW 95-46 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants listed below shall ' . . . each be paid his proportionate share of one thousand six hundred and forty (1,640) man-hours of additional compensation at the applicable pro-rata rate of their respective assigned Carrier positions and, in addition thereto, that each named Claimant be paid his proportionate share of three hundred and seventy-two (372) man-hours at the applicable time and one-half (overtime) rate of his regularly assigned position because of the Agreement violation cited and outlined above.'**

**D. R. Shelley
R. D. Holgren
V. Bravo
J. W. Beaver
L. E. Wood
A. D. Landsaw"**

**T. J. Ferina
R. D. Robinson
K. D. Christian
J. C. Schindehette
J. R. Bovard**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimants hold seniority in their respective classes on the Western Seniority District within the Water Service Subdepartment. On the dates pertinent to the instant dispute, they were all regularly assigned to Water Service Gang No. 10 headquartered in Roseville Yard, Roseville, California. The present dispute concerns the claim that these Water Service Subdepartment employees were contractually entitled to perform subcontracted work of excavating and loading into gondolas approximately 25,000 to 30,000 cubic yards of contaminated soil in connection with the remediation of an outdated waste water treatment plant in Roseville Yard.

In that connection, by letter dated June 13, 1994, pursuant to Article IV of the May 17, 1968 National Agreement, the Carrier's Manager Labor Relations sent the BMW General Chairman written notice of intent to subcontract and invitation to conference, reading in pertinent part as follows:

"This construction will involve the excavation and loading into gondolas of approximately 25,000 to 30,000 cubic yards of contaminated soil, along with the installation of extraction wells, pumping and treating system and associated work involving electrical control, concrete slabs, security fencing, etc.

It is the Carrier's intention to handle the soil excavation and loading into gondolas by an outside contractor. At the present time, there are no furloughed water service employees on this seniority district.

Currently employed water service personnel will be used to install the entire mechanical system at this location as described above. Also, Company Electrical

forces and Bridge & Building forces will handle all work associated with their respective crafts at this location."

A timely conference was requested by the Organization and the parties did meet and confer to discuss the Carrier's subcontracting plan, but they reached no mutual understanding. Following the conference, the Carrier went ahead and contracted out the work of excavating and removing the 25,000-30,000 cubic yards of contaminated soil. The General Chairman then filed the instant claim, reading in pertinent part as follows:

"Commencing on Friday, July 22, 1994, and subsequent dates thereto, the carrier, by choice and at its own peril, elected to engage the services of the Dobbas Construction Company and its work force (employees) for the purpose of dismantling, by excavation thereof, existing holding ponds which to accomplish and finish the project consisted of breaking of cement, excavation, loading and transporting of approximately twenty-five thousand (25,000) to thirty thousand (30,000) cubic yards of contaminated soil and other component materials with the loading thereof in gondolas appropriately covered with plastic in preparation for shipment to a disposal site. The work project also encompassed the installation of extraction wells, pumping and treating the system with electrical control, pouring and finishing of concrete slabs, and security fencing; all to serve the Ground Water Treatment Plant at Roseville, California.

* * *

Claimants listed and identified on Attachment "A" of this record were able, fully qualified, available, and willing to perform any and all of the work that was performed by the Dobbas Construction Company and its employees, and would have enthusiastically and gladly performed such work had the Carrier's Subordinate Officers authorized and responsible for delegating said work would have called, assigned and used them to do so, inasmuch as work of the type and nature described within the body of this correspondence is work which is commensurate with the duties, responsibilities, characteristics and other requirements of the positions held and maintained by Water Service Subdepartment personnel, and is work that has customarily, historically and traditionally been performed by such employees, often times on a daily basis during their regular tour of duty as manifested by the herewith enclosed individual statements . . .

* * *

It is our contention that the Carrier violated the terms and provisions of the current Collective Bargaining Agreement when commencing on July 22, 1994 and subsequent days thereto it completely, totally and willfully ignored and disregarded Claimants accumulated seniority rights within their respective Classes, Subdepartment, seniority District and Division. That it further violated that Agreement when on the claim dates it contracted out work of the type and nature customarily, historically and traditionally performed by employees of the Water Service Subdepartment (Electrical and Mechanical) to the Dobbas Construction Company and its employees who have neither established nor hold seniority rights within any craft or Subdepartment within the Railroad Industry, and that it compounded said Agreement violation when the work performed in the instant dispute outlined herein was contracted out without benefit of a genuine good faith attempt or effort being made in reaching a prudent and reasonable understanding concerning said contracting."

The Carrier denied the claim on various grounds and the matter remained unresolved until appeal to the Board.

Belated arguments by the Organization that the Carrier failed to give adequate good faith notice under Article IV and/or to confer in good faith under the Berge/Hopkins Letter Agreement, raised de novo at the Board level, have not been considered in this case. It is also noted that so far as the present record shows, currently employed Agreement-covered Water Service personnel were used by the Carrier to install the mechanical systems at this location, as described above, and that Carrier Electrical forces and Bridge & Building forces were utilized for all work associated with their respective crafts in this project. The focus of the claim then is on the subcontracting of breaking of cement, excavation, loading and transporting of approximately 25,000 to 30,000 cubic yards of contaminated soil and other component materials with the loading thereof in gondolas appropriately covered with plastic in preparation for shipment to a disposal site.

Careful consideration of the undisputed record evidence reveals a "mixed practice" of both Agreement-covered Water Department employees and subcontractor employees having performed such excavation and gondola-car loading of contaminated soil in connection with water treatment remediation projects. The record shows that on large-scale projects like the one here under consideration, the Carrier has in the past subcontracted the work; whereas on some projects of lesser scale, the Agreement-covered Water Department employees have also done the excavation, soil removal and site preparation tasks, in addition to the installation of extraction wells and pumps, which they performed in this case. In that connection, in the course of handling the dispute on the property, the Organization offered statements by employees that they had loaded contaminated soil into gondola cars in the past. In response,

the Carrier presented a statement from Utility Supervisor Strickland, conceding that employees of the Carrier had performed similar work in the past on smaller scale jobs, but that such large-scale work had been subcontracted, as follows:

“The Roseville Water Services have never done a job of this size at the Roseville Waste Water Plant area. On October 29, 1984 a job of the same nature and in the same area was started and completed on July 1, 1985. The job that was done in 1984 and 1985 consisted of removal of approx. 11,435 yards of sludge and contaminated soil. The work in 1984 and 1985 was performed by an outside contractor, I.T. Corporation, see attached copy dated May 31, 1985.”

The Organization offered some evidence of some past performance of the work at issue, but did not prove reservation by custom, practice or tradition. To the contrary, in handling on the property the Organization neither denied nor refuted the Carrier’s countervailing evidence of “mixed practice” under the general Scope Rule of the controlling Agreement. This claim is therefore denied for failure to persuasively prove a violation of the Scope Rule. See Third Division Awards 33516, 32602, 32296.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 14th day of November, 2001.