Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39913
Docket No. MW-38129
09-3-NRAB-00003-040009
(04-3-009)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (load and haul spilled grain and debris from right of way) between Mile Posts 1197.4 and 1197.1 in the vicinity of Belton, Montana beginning March 27 and continuing through April 3, 2001, instead of Foreman K. Johnson, Group 2 Operators G. Florin, R. Kolodejchuk, S. Barta and Truck Drivers R. Van Quekelberg, E. White, R. St. Goddard, B. Albro, G. Sinclair, K. Reed and J. Gollehon (System File B-M-863-0/11-01-0267 BNR).

(2) The Carrier further violated the Agreement when it failed to provide the General Chairman with an advance written notice of its plan to contract out the aforesaid work as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants K. Johnson, G. Florin, R. Kolodejchuk, S. Barta, R. Van Quekelberg, E. White, R. St. Goddard, B. Albro, G. Sinclair, K. Reed and J. Gollehon shall now each be compensated at their respective straight time rates of pay for

an equal and proportionate share of the five hundred fifty (550) man-hours expended by the outside forces in the performance of aforesaid work."

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.

The Organization maintains that the Carrier violated the Agreement when it failed to give notice to the Organization of contracted work. The Carrier responds that notice was not required and the work is not work exclusive to Organization-represented employees.

On February 15, 2001, a train derailed near Belton, Montana. Nineteen cars derailed, 17 of which were stacked and piled. Two of the cars were anhydrous ammonia tank cars. Although damaged, the chlorine cars did not leak. BMWE-represented Carrier forces initially responded and performed some cleanup and repair.

Contemporaneous notes of Manager Environmental Operations Perrodin indicated approximately 800 gallons of diesel were spilled. Among the numerous notifications at the derail, the Montana Department of Environmental Services was notified.

The Carrier contracted for the cleanup of spilled grain and fouled ballast at the derailment site. This work occurred from March 27 through April 3, 2001. The Carrier did not provide advance written notice to the Organization.

The question before the Board is whether the Carrier was required to provide notice to the Organization of contracting the work. The Carrier argues that because the handling of regulated substances is not scope covered work, the Carrier was not required to give notice. In addition, OSHA requires that employees have specialized training and Carrier employees do not have that training. The Organization maintains that clearing the right-of-way of damaged or spilled material is properly the work of BMWE-represented employees. According to the Organization, even if the Carrier believes that its forces do not possess the skills required to perform certain work, it still must provide the advance written notice and enter into good faith discussion. It follows that the Carrier violated the Agreement when it failed to notify the Organization of the contracting.

In order for the Rule 55 notification requirement to be implicated, the Organization must first show that the disputed work falls within the purview of the Scope Rule. Arguably, the Organization made a showing that removal of debris is work that accrues to Maintenance of Way employees. However, the work here is not simply removal of debris.

The Carrier contends that, because the debris here was diesel fuel-contaminated debris, that distinction is significant under the notification requirement of Rule 55. Carrier forces are not qualified to remove diesel fuel-contaminated debris because of OSHA requirements.

Particularly instructive is Third Division Award 34213 which addressed the contracting of fuel-contaminated soil removal and excavation at a Carrier facility. Therein the Board recognized that the removal of hazardous materials is not within the sole discretion of the Carrier. The removal of hazardous materials is regulated by OSHA and Carrier forces were not trained pursuant to OSHA regulations. The Carrier uses outside forces to perform OSHA-regulated cleanups.

Here, the statements of BMWE-represented employees do not address whether they were OSHA trained and, therefore, qualified to perform the cleanup. Rather, the statements indicate a dispute over whether the wreck actually involved hazardous materials and whether the contractors used protective practices in the cleanup. The statements discuss that the anhydrous ammonia tanks were not damaged, but do not discuss the diesel fuel. The statements also indicate that at least one of the employees had worked a cleanup of fouled ballast. However, none of the statements indicate that the employees were qualified under OSHA regulations.

The Board carefully reviewed the record evidence and concurs with the Carrier on this very narrow issue. The Carrier and the Organization devoted substantial portions of their Submissions discussing the scope of work and whether the instant work belongs to Maintenance of Way forces. However, as the Organization correctly points out, the issue is not whether the Carrier could subcontract the work; the issue is whether notice is required. The Carrier is regulated by OSHA for hazardous materials cleanup and removal and Carrier forces were not qualified. Federal regulations require OSHA trained personnel to perform the cleanup. It is undisputed that Carrier forces do not have that training. Therefore, they are not qualified under Federal regulation to perform the work. Given the facts of record before the Board, the notice requirement was not implicated. Accordingly, the instant claim lacks merit and is denied.

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 31st day of August 2009.