

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 35169  
Docket No. MW-33713  
00-3-97-3-167

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employes  
(Burlington Northern Santa Fe Railway Company (former  
( St. Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Neosho Construction Company/Lee Catt) to perform Maintenance of Way work (using a track loader, 2 dump trucks, 4Uks, 1 dozer, 1 backhoe, and 1 grader in construction of a T. O. F. C facility) at Harvard, Arkansas on March 22 through April 29, 1995 (System File B-1635-1/MWC 95-06-23AC SLF).
- (2) As a consequence of the violation referred to in Part (1) above, Special Equipment Operator (SEO) C. E. Green and the ten (10) senior employees entitled to perform the work in question shall each be compensated three hundred twenty hours (320) hours' pay at their respective straight time rates”

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.

In support of its claim, the Organization contends that portions of the following Rules and Agreement are relevant:

**“ Rule 1. Scope Rule**

- (a) These rules govern the hours of service and working conditions of employees in the Sub-Departments listed in Rule 5; and the following employees when work handled is under the jurisdiction of the Maintenance of Way Department:

- (1) B&B Supply Yard Foreman and Laborers
- (2) Timber Treating Plant Laborers
- (3) Hoisting Engineers other than Brown Hoist Engineers

\* \* \*

**Rule 5. Sub - Department Defined**

- (a) The following Seniority Subdepartments are established:

- (1) B&B Subdepartment
- (2) Water Service Subdepartment
- (3) Welding Subdepartment
- (4) Fuel Subdepartment
- (5) Steel Bridge Subdepartment
- (6) Track Subdepartment
- (7) System Rail Laying Subdepartment”

**AGREEMENT MW-12 Between the St. Louis - San Francisco Railway Co. And its Employees Represented by The BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES (Dated June 13, 1974)**

The Carrier, its defense, raises the following:

1. The work performed was on behalf of a Lessee
2. The Organization has failed to establish that the work in question was exclusively reserved to bargaining unit members.
3. All claimants were otherwise employed at the time the work was performed.
4. All the equipment under the control of the Carrier, necessary to the operation, was fully utilized at this and other locations.
5. At best, the sole claimant involved in the grievance is C.E. Green."

The first question to be resolved is whether the work at issue is that which is exclusively performed by bargaining unit personnel. The Organization sets forth in its letter of May 24, 1995, the claim that the work has historically been performed by the employees covered under the provisions of the Agreements. This contention is coupled with the Agreement reached between the parties on June 13, 1974. It is found that the work in question has been historically performed by the bargaining unit members.

The next issue relates to whether work being performed on behalf of a lessee of the Carrier is covered by the contract. The record indicates that bargaining unit members performed at least a portion of the work on the project in question and that the work was done under the control of the Carrier. In addition the Carrier was in control of the premises during the time the work was being performed. The close connection which the Carrier had with the work dictates a finding that such work is covered by the Agreement.

The Carrier contends that it was under a tight schedule; that it did not have the necessary equipment; and that the employees seeking relief were continuously

employed during the period in question. From the information presented it is clear the Carrier knew well in advance of the job requirements. The Carrier did have at its disposal a majority of the equipment required and has not refuted the Organization's contention that it could have leased whatever else was needed. The fact that the employees were regularly employed during the period in question does not relieve the Carrier from its responsibility to comply with the terms of the collective bargaining Agreement. It is determined that the Carrier is in violation of the Agreement.

The last matter to be resolved relates to the number of Claimants. The initial claim set forth in the Organization letter of May 24, 1995 asserts that Charles Green and the ten oldest employees in seniority eligible for the work are to be paid for the time the contractor worked from March 22, 1995 to April 29, 1995. Thereafter, on June 20, 1995 the Carrier responded by referring to the claim filed on behalf of Mr. Green. Subsequent letters refer to Green only. On November 18, 1996, Green directed a letter to the Organization, referring solely to himself in the context of the claim. On January 10, 1997, the Organization in response to the conference of this matter in a letter to the Carrier referring to the claim filed on behalf of Green and others and referring to the attached seniority roster. There is no indication that the Carrier was not aware that the claim included not only Green, but an additional ten employees.

The claim is granted on behalf of Green and the ten most senior employees. The Organization claimed 320 hours for each employee, but has not introduced any evidence to substantiate such claim. This matter is returned to the parties for the purpose of determining the ten most senior employees in addition to Green and also to determine the actual hours worked. When this has been done, the Claimants shall be compensated at their then regular hourly rate of pay for a proportionate share of the hours in question.

#### AWARD

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 20th day of December, 2000.