

Award No. 10079
Docket No. MW-8592

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: *Claim of the System Committee of the Brotherhood that:*

(1) The Carrier violated the effective Agreement when, on May 11, 12 and 13, 1955, it assigned certain excavation work to an individual holding no seniority rights in the Maintenance of Way Department, and failed and refused to utilize the services of furloughed Machine Operators;

(2) Bulldozer Operator Zane Radibaugh be allowed eight (8) hours pay at his straight time rate, on each of the three (3) dates in question, account of the violation referred to in part one (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On April 2, 1954, claimant, Bulldozer Operator Zane Radibaugh, was furloughed account of force reduction.

Some two (2) or three (3) days prior to May 11, 1954, the Carrier was informed that a fire in their roadbed on the Hudson Coal Company's property, Pennsylvania Division, was smoldering.

On May 11, 1954, the Carrier contracted with John Booth, Inc. for the services of a Bulldozer and an Operator thereof, assigning such individual, who held no seniority rights under the effective Agreement, to the work of excavating in the railroad embankment, to extinguish this smoldering fire. This outside individual worked eight (8) hours per day on each of the dates May 11, 12 and 13, 1954.

Claim as set forth herein was filed and, under date of June 29, 1955, the Carrier's highest Operating Officer designated to handle claims advised "Claim denied account not supported by agreement rules.", as will be noted in the following quoted letter:

Award 757

"* * * ordinarily such exception appears in the Scope Rule, but the decisions likewise recognize that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement."

Award 5848

"The Third Division has in previous awards held that work so covered by the Scope Rule could not be contracted out with impunity unless there are specific exceptions or special emergencies justifying a departure from ordinary procedures."

In Award 6251 claim was denied based on the emergency situation involved.

The emergency involved in the instant case had to be taken care of as promptly as possible. Under the principles set down by the Board, as indicated in above awards, this work clearly comes within the unwritten exceptions to the Scope Rule and the carrier respectfully requests that claim be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made part of the particular question in dispute.

OPINION OF THE BOARD: This claim is based on the contention of the Organization that the Carrier's highest designated officer Mr. C. H. House, who is Manager of Personnel, failed to comply with the specific requirements of Article V of the August 21, 1954 Agreement when, in his letter of June 29, 1955, he merely advised the General Chairman that "Claim denied account not supported by agreement rules." The Organization claims that no reason was given by the Carrier for disallowing the claim. The claim is also based on the contention that the Carrier violated the Agreement, because the work performed was not of an emergent nature.

The factual situation, out of which this claim arises, is as follows: The claimant was a bulldozer operator occupying the status of a furloughed employee. On May 11, 12 and 13, 1954, the Carrier assigned certain excavation work to an independent contractor, who furnished a bulldozer and an operator to perform certain service on the Carrier's Racket Brook Branch near Bushwick, Pennsylvania, in extinguishing a fire on the Carrier's right-of-way.

The Carrier states it ascertained that this fire was smoldering on May 10, 1954; that its bulldozing equipment was in use on other parts of the property; that the closest bulldozer was 200 miles distant from the fire; and that the Carrier could not rent a bulldozer to perform this operation without the use of the independent contractor's operator.

The Organization states that the Carrier had notice at least two or three days prior to May 11, 1954 that this fire was smoldering; that the Carrier could have used its own equipment in the extinction of the fire; and that the

Carrier could have rented a bulldozer and used the claimant to operate the rented bulldozer.

From a careful reading of the submissions and briefs, the Board finds that the Organization has failed in its proof to show that the Carrier had notice of this smoldering fire two or three days prior to May 11, 1954. The Organization merely asserts that the Carrier knew, without stating how or what employe of the Carrier knew, of the smoldering fire. The Organization has failed in its proof to show that the Carrier could have brought its own bulldozer to the scene of this fire on May 11, 1954. The Organization has failed in its proof to show that the Carrier could have rented a bulldozer and used the claimant to operate the rented bulldozer.

The Carrier, by an affidavit which is part of its submission to this Board, has shown that the smoldering fire was not discovered until May 10, 1954; that it was impossible to have any of its equipment moved to the scene of this smoldering fire the following day; that it contracted with an independent contractor to use a bulldozer to extinguish this fire and that the independent contractor would not rent his bulldozer without his own operator operating said bulldozer.

The contention of the Organization that the highest designated officer of the Carrier did not state any reason for denying this claim and therefore the claim should be allowed under Article V of the August 21, 1954 Agreement is not well taken, because the Organization did not raise this question on the property. The question was not raised by the Organization until it filed its submission with this Board. The Organization relies upon Award No. 4529, in which a similar contention was sustained by this Board, but under different circumstances. The factual situation that resulted in Award 4529 set forth that the question of the Carrier not giving reason for denying the claim was raised on the property by the employes, and that is the violation that was taken to this Division. This Board finds that the question of the Carrier not giving a reason for the denial of this claim is not properly before this Board, because the question was not raised on the property. This Board, therefore, cannot consider this contention of the Organization.

The Board finds that the extinction of fires threatening the property of Carrier is work of an emergent nature. Therefore, the work performed on claim dates was of an emergent nature and the contract was not violated.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September, 1961.