

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32341
Docket No. MW-32044
97-3-94-3-426**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Downing Inc.) to perform work (clean up trash, weeds and debris) along the Delaware Avenue Industrial Track at Richmond and Cumberland Streets, Philadelphia, Pennsylvania beginning on September 21 through 28, 1992 (System Docket MW-2903).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notification of its intent to contract out said work to outside forces as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. W. A. Cropper, E. Benjamine, W. T. Brown, A. Nixon, J. H. Dennis, W. L. Medley, J. L. Taylor, D. A. Sabo and O. F. Hines shall each be allowed forty-eight (48) hours' pay, at their respective straight time rates, for the time the outside forces spent in performing the work in question."**

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.

This dispute involves Carrier's contracting of right of way cleanup, trash and other solid waste material disposal and removal of weeds and brush cutting work, allegedly without prior notification to the Organization.

The correspondence on the property establishes that from the outset the Organization claimed that Carrier had failed to serve any notice of its intention to contract out the work in dispute and Carrier claimed that the work in issue was performed on non-operating property, thus taking it outside the coverage of the Scope of the Agreement. The Organization responded that the Scope Rule did not differentiate between work to be performed on Carrier's operating or non-operating property, and that employees routinely removed solid waste from non-operating property owned by Carrier.

At one point, Carrier claimed that it served a notice on June 4, 1992 covering the removal of the non-hazardous solid waste portion of an overall project, but when the Organization requested a copy of said notice, failed to furnish it. Carrier apparently abandoned any argument that proper notice was served before the Board, relying instead on the fact that no notice was required since the work was not Scope-covered. In the final piece of correspondence exchanged on the property, Carrier stated that the parcel of land was deemed abandoned and designated for major development, and that the Organization's claim was factually incorrect in that the work in issue was performed by a different contractor (Del-Tray Construction) on different dates (October 1-November 11, 1992). It argues that the Organization's failure to establish the basic factual aspects of their case supports its denial, citing Special Board of Adjustment No. 1016, Award 24; Third Division Awards 27853, 29062, 27629.

The Organization argues that this type of work has previously been held to be within the Scope of the Agreement, and that the principles of stare decisis and res

judicata should apply. See Third Division Awards 27333, 27185, 27014, 27012, 16545, 26544, 26480, 26314, 23036, 23034. The Organization contends that Carrier's failure to provide advance notice of such contracting supports a monetary award, even to "fully employed" Claimants. Special Board of Adjustment No. 1016, Awards 34 and 41; Third Division Awards 31521, 31798, 31754, 31752, 27189, 26593.

Carrier contends that the Organization failed to meet its burden of proof by alleging the wrong contractor and incorrect dates in its claim, and that work performed on abandoned property not used for railroad purposes is not encompassed within the scope of the Agreement, and thus required no notice. See Third Division Awards 31522, 21993, 19994, 19253, 19636.

While the Board does not find that the defect in time and identity of contractor performing the work in issue fatal to this claim since Carrier was made sufficiently aware of the work in issue and its location for the parties to fully discuss the issues involved on the property, we do hold that the Organization has failed to sustain its burden of proving that the work was performed on property which fell within the coverage of the Agreement. Although Carrier did not give specifics concerning the alleged abandonment of the property or its intended use, its claim that the property was abandoned and not used for railroad purposes was not rebutted or contested in any way by the Organization on the property. In such circumstance, Carrier's assertion must be taken as fact without holding it to strict proof of its affirmative defense. Such fact is dispositive of the issue based upon the reasoning of the Board in Third Division Awards 31522, 19994 and 12918 that Carrier-owned property which is not used for purposes involving the operation or maintenance of the railroad does not come under the Scope Rule of the Agreement.

Accordingly, the claim is denied.

AWARD

Claim denied.

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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 13th day of November 1997.