

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32344
Docket No. MW-32057
97-3-94-3-433**

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement on February 16, 17 and 18, 1993 when it assigned outside forces (Gra-Hill Construction Company) to provide a pick-up truck with snow plow attached and a driver to plow snow at Clearfield Yard, Cherry Tree Secondary, Wallaceton Secondary, Mills Industrial and the Snow Shoe Industrial tracks (System Docket MW-2970).**
- (2) The Carrier further violated the Agreement when it failed to provide advance written notification of its intention to contract out the Maintenance of Way work described in Part (1) hereof.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed employee M. P. Perry shall be allowed '...eight hours straight time for each date claimed, and in addition eight hours overtime on February 16 and 17. (Total of 24 hours straight time and 16 hours time and one half) Also, all lost benefits and/or credits normally due must be allowed.'"**

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 snow removal work from its property roadbeds on the claimed dates without prior notice to the Organization.

The substance of the Organization's argument is that snow removal work falls within the Scope of its Agreement, and that Carrier was therefore required to give the General Chairman 15 days prior notice before contracting, relying on Public Law Board No. 3781, Award 7; Third Division Awards 31752, 19899. It contends that Carrier's failure to do so is sufficient grounds upon which to sustain the claim, noting that Claimant was a furloughed employee available to perform the work in issue. See Third Division Award 31871. While the Organization does not dispute Carrier's asserted need for additional snow removal equipment on the dates in question, it argues that Carrier's inclusion in its 1992-1993 Winter Program of a Contractor Agreement for both equipment and operators for snow removal on an as needed basis reveals a premeditated violation of the Agreement. The Organization contends that Carrier should have contracted for equipment without operators as it does during the production season, since it knows that there is a surplus of furloughed qualified employees during the winter months. It offered proof that such short term equipment use was available from a specific contractor without operators on the dates in issue.

In response to this claim, Carrier argued on the property that such work was not covered by the Scope of this Agreement, was routinely performed by other craft employees and contractors and that, even assuming the Scope clause was relevant, it was entitled to act as it did since this was an emergency situation. In its October 25, 1993 denial Carrier asserted that "the storm involved was of such a magnitude that the Governor of the State declared a state of emergency." Carrier also argues that as a furloughed employee Claimant is not available to perform this type of work, relying upon Public Law Board No. 3477, Award 6.

In rebuttal, the Organization took issue with Carrier's contention that the situation involved an emergency, furnishing a letter from the Pennsylvania Emergency Management Agency revealing that the Governor did not issue a Proclamation of Emergency during the period February 14-21, 1993, and that the heavy snowfall was considered routine. The Organization also notes that it was the only craft whose Agreement contains heavy snow removal and specifies the type of equipment needed for it therein.

A careful review of the record convinces the Board that this claim must be sustained. First, a majority of the Board Awards have held on this property that snow removal is work that comes under the Scope Rule of this Agreement, and thereby requires notice prior to contracting. Third Division Award 31752. The facts of the cases cited in Carrier's dissent to that award are clearly different from those presented in this record. While the Board found no express reservation of the disputed work in the Scope Rule in Third Division Award 30079, it relied upon the Organization's failure in that case to sustain its burden of proving that its employees performed the work by custom or practice, or even to specify the exact work in issue in denying the claim. Both Special Board of Adjustment No. 1016, Award 42 and Third Division Award 26482 rely upon records establishing the fact of a derailment causing an emergency situation.

In the instant case, although Carrier asserted that an emergency situation existed necessitating the contracting and excusing it from the prior notice requirements, such claim was effectively rebutted by the Organization on the property. On the record properly before us, we find that Carrier failed to meet its burden of proving its affirmative defense of an emergency situation, Third Division Award 31521, thereby removing its asserted excuse for non-compliance with the prior notice provisions. Under such circumstances, the Board finds that Carrier violated the Agreement by failing to give the Organization the requisite prior notice of this contracting transaction. We will sustain the claim as we do not find the named furloughed employee to be an improper Claimant herein.

AWARD

Claim sustained.

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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 13th day of November 1997.