

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35084  
Docket No. MW-31067  
00-3-93-3-10**

**The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employes**  
**(Delaware and Hudson 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 (LaDuke Construction Company) to perform Maintenance of Way work with a front-end loader (dismantling and disposing of the Car Repairman’s building and collecting and piling scrap track materials at Rouses Point, New York and dismantling and disposing of the old Maintenance of Way Toolhouse at Port Henry, New York) on September 3, 4 and 5, 1991 (Claim No. 62.91).**
- (2) As a consequence of the violation referred to in Part (1) above, S.E.O. M. L. Brankman shall be allowed twenty-four (24) hours’ pay at the S.E.O. rate of pay for the time spent by the outside forces performing said 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.

This case involves a claim by the Organization that the Carrier violated the Agreement when it utilized an outside contractor to operate a front end loader to demolish and dispose of refuse from buildings at Port Henry and Rouses Point, New York, and to collect and pile scrap track material at Rouses Point. According to the Organization, such maintenance work customarily and historically has been assigned to and performed by the Carrier's forces. It asserts that the Claimant was available and qualified to perform the work, and would have performed the work had he been assigned. Asserting that the disputed work occurred over the course of three days, the Organization seeks 24 hours' pay at the S.E.O. rate on the Claimant's behalf.

Further, the Organization claims that the Carrier failed to provide the General Chairman 15 days advance written notice of the contracting transaction as required under Rule 1.4. According to the Organization, failure to award damages for the Carrier's violation of the notice Rule will authorize the Carrier to ignore its notice obligations in the future.

The Carrier, on the other hand, asserts that it did not violate the Agreement. It concedes that an outside company provided a front end loader and operator to assist BMW forces in demolition and removal of materials at two locations. It argues, however, that all similar Carrier-owned equipment was being utilized at the time this work was performed. The Carrier maintains that it rented equipment an operator to ensure that the necessary work on the property would be completed.

According to the Carrier, moreover, there is a past practice of renting equipment and operators to which the Organization has acquiesced. Thus, because the Organization failed to demonstrate that the work belongs exclusively to BMW-represented employees, the Carrier maintains there was no Scope violation. So, too, it argues, because there was no Scope violation, it did not have any notice obligations.

After carefully reviewing the record evidence, we have determined that the Organization's claim must be denied. We find that the Carrier did not violate the Scope Rule. Record evidence demonstrates that the Carrier has established a past practice of renting equipment and an operator when its own equipment is unavailable. We therefore conclude, under the facts of this case, that the Carrier's use of an outside contractor did not violate the Agreement.

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**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 15th day of November, 2000.**