

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35414
Docket No. MW-32454
01-3-95-3-351**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (Nittany Mountain Cleaners) to perform camp car attendant’s work (cleaning camp cars) near Cresson Yard beginning April 11 through April 14, 1994 (System Dockets MW-3391, MW-3389 and MW-3390).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Camp Car Attendants R. G. Shaffer, T. D. Whiteman and R. A. Simpson shall each be allowed thirty-two (32) hours’ pay at the camp car attendant’s straight time rate and they shall each receive credit for benefit and vacation purposes.”**

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 claim involves the contracting out of pre-production season cleaning of camp cars on the claim dates near Cresson Yard, and was filed on behalf of three furloughed Camp Car Attendants. There is no dispute that during the production season, a major function of Camp Car Attendants is to keep the kitchen, dining and camp area of the camp cars in a clean and sanitary condition.

The Organization contends that the work in dispute is Scope-covered work since Camp Car Attendants are specifically listed in Rule 1 under the Track Department, and their position description contained in job postings identifies this type of cleaning work as belonging to them. It notes that the Organization need not prove exclusivity of performance for work to be Scope-covered, citing Special Board of Adjustment NO. 1016, Award 9, and that the Carrier's admitted failure to provide advance written notice requires a monetary remedy, relying on Third Division Award 27012 among others. The Organization asserts that the Carrier failed to provide any proof on the property that this work has been contracted in the past without notice, and did not rebut its assertion that this type of work had been customarily performed by employees.

The Carrier argues that the Organization failed to meet its burden of proving that employees ever performed this pre-production season cleaning of camp cars, thereby negating any claim that it is Scope-covered work or has been customarily performed by employees, relying on Third Division Award 33420. It notes that the Organization failed to rebut its assertion that this work has always been contracted out, thereby raising the assertion to the level of fact, citing Third Division Awards 30515, 32341. While the Carrier does not dispute that Camp Car Attendants clean camp cars during the production season, it contends that since the preseason cleaning work has not been shown to fall within the Scope of the Agreement, it was permitted to contract it without notice to the Organization.

The language of the Scope provision of the Agreement does not specifically include the disputed cleaning work, and lists Camp Car Attendants' primary duties as "Assist Camp Cook." The Camp Cooks' duties are listed as "Prepare and serve camp meals." However, there is no doubt that Camp Car Attendants are responsible for keeping camp cars clean during the production season, and that such work falls within

the Scope of the Agreement. The Carrier claims that the preseason work herein is different than the normal cleaning performed by Camp Car Attendants since it requires industrial strength cleaners and specialized equipment which it does not possess and which employees do not have the skill to operate. The Organization asserts that there is no reason why employees could not perform this work if given appropriate cleaning materials.

The issue in this case boils down to whether Camp Car Attendants normally and customarily (not exclusively) perform the preseason cleaning work involved so as to bring it within the Scope of the Agreement, thereby requiring advance written notice of contracting, or whether the work involved was substantially identical to production season cleaning which is admittedly covered by the Scope clause. The Organization has the burden of proving these material facts which are necessary to make out a *prima facie* claim of a Scope-Rule violation. A careful review of the record convinces the Board that it has failed to meet that burden. The Carrier herein clearly challenged the Scope coverage of this preseason cleaning work asserting that it has always contracted such work, such work is different than normal cleaning, and that employees have never performed it. In such circumstance, it was incumbent upon the Organization to offer proof that Camp Car Attendants have customarily and historically performed this same type of work, even if the Carrier failed to support its assertion on the property with direct evidence of prior contracting. The Organization's failure to rebut the Carrier's assertion with contrary evidence is a substantive flaw in its case, and requires that the claim be denied. Third Division Awards 32343, 30515, 31605.

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 26th day of April, 2001.