

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35588
Docket No. MW-32496
01-3-95-3-394**

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 outside forces (Bert Klapec, Inc.) to excavate an existing ditch along the east side of the Youngstown Line single track between Mile Posts 44 and 43 on June 10, 11, 14, 15 and 16, 1993 (System Docket MW-3436).**
- (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, Claimant J. P. Agnew shall be allowed forty (40) hours' pay at the Class 1 Machine Operator's rate and he shall 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 excavation work in an existing ditch on the Youngstown Line on the claim dates by use of an outside contractor and equipment and, admittedly, without prior notice. The record reveals that there had been a build up of drift and other debris in the ditch in question causing flooding on an adjacent landowner's property for at least three or more years prior to the claim date. There is also evidence that employees had been scheduled to clean this ditch on a number of occasions prior to February 1989 as a result of the landowner's complaints to the Carrier, but that the assignments were canceled.

The claim is based upon the fact that the Carrier, with knowledge of the flooding problem, neglected cleaning the ditch continuously over a period of time, when the work could have been accomplished by employees including the Claimant. The Carrier's reason for the contracting was that there was an urgent need to complete the excavation quickly as the landowner demanded that the flooding be cleared up immediately, that its forces were being utilized elsewhere and were unavailable, that specialized equipment was necessary and could not be leased on such a short term basis without an operator. The record reflects that the Carrier contracted for use of a Mitsubishi Hoe and operator, who worked eight hours per day on Thursday and Friday, June 10 and 11, 1993, and again on Monday through Wednesday, June 14 - 16, 1993.

The Organization contends that the work in dispute is scope covered work that has been traditionally and customarily performed by employees. It argues that the Carrier failed to support its allegation of an emergency situation, and therefore has no excuse for not giving prior notice of contracting. Further, the Organization asserts that the Carrier owns the necessary equipment to perform the work and the Claimant is fully qualified to operate it. It notes that the Carrier's admitted failure to provide advance written notice requires a monetary remedy even to fully employed Claimants, relying on Public Law Board No. 3781, Award 7; Third Division Awards 31752, 31871, 32190, 32320, 32335, 32344, 32505, 32508 and 32858.

The Carrier argues that substantial flooding to the adjacent landowner's property and his demand that it be cleared immediately constituted an emergency situation as

noted by the language of the Scope Rule itself. It asserts that its forces and equipment were employed elsewhere and were unable to meet the urgent need, and that it was relieved from the prior notice requirement as a result of the emergency nature of the situation. The Carrier also contends that, in any event, the Claimant was unavailable on June 10 and 11, 1993 as he was on vacation, and was fully employed on June 14 - 16, 1993, thereby suffering no pecuniary loss, making a monetary remedy inappropriate, citing Third Division Awards 18295, 25347, 28889, 28924, 28943, 30839 and 30844.

A careful review of the record convinces the Board that the Scope covered nature of this work has clearly not been contested by the Carrier on the property in this case. Rather, the Carrier argued that it complied with the Scope Rule and focused its claim denial on the emergency nature of the work and the Claimant's unavailability for remedy purposes. The contention that an emergency existed necessitating the contracting and excusing the Carrier from complying with the prior notice requirement is an affirmative defense that the Carrier bears the burden of proving.

In this case, the Organization took issue with the Carrier's contention that the situation involved an emergency, furnishing a written statement from a former employee concerning the Carrier's knowledge of the continuous existence of the ditch condition causing flooding on the adjacent property and repeated complaints about it over a period of time, with no action being taken by the Carrier. On the record before us, the Carrier failed to meet its burden of proving the existence of an emergency situation or why the clean up work could not have either been accomplished by scheduling regular forces prior to, or after, the claim dates. The fact that the contractor worked no overtime and only on weekdays, taking the weekend off in the middle of the time the Carrier asserted the emergency existed, undermines the Carrier's contention that this was a true emergency situation excusing it from serving proper notice of contracting on the Organization. See, e.g., Third Division Award 32344. Therefore, there is, at a minimum, a violation of the notice provision of the Scope Rule.

With respect to the Carrier's argument that the Claimant is entitled to no monetary relief because he suffered no pecuniary loss, the Board is of the opinion that this situation represents a true loss of work opportunity that could have been scheduled at another time when the Claimant could have performed the work in issue. There is precedent on this property for an award of damages regardless of the Claimant's "fully employed" status. See, Special Board of Adjustment No. 1016, Awards 34 and 41; Third Division Awards 31521, 31752, 32335 and 32798.

Form 1
Page 4

Award No. 35588
Docket No. MW-32496
01-3-95-3-394

AWARD

Claim sustained.

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 24th day of July, 2001.