

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36319
Docket No. SG-35896
02-3-99-3-913**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Wheeling & Lake Erie Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling & Lake Erie Railway Company:

Claim on behalf of D. L. Redford for payment of 20 hours at the time and one-half, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when on September 15 and 16, 1998, it utilized a contractor to level and repair the roadway in the yards in Brewster, Ohio. General Chairman’s File No. 231/981023G. BRS File Case No. 11130-W&LE(M).”

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.

The Organization represents, among others, employees who perform maintenance of way work for the Carrier. RULE 1 - SCOPE RULE of the Agreement reads in part:

“This agreement governs the rates of pay, hours of service and working conditions of all employees engaged in . . . repairing . . . the following owned by the Railway:

- A. All . . . roadbeds, rights of ways . . . and in yards . . . as well as any other work generally recognized as maintenance of way . . . work.**
- B. Operating . . . roadway equipment . . . used to perform work covered by this Scope. . . .**
- C. This shall not prevent the carrier from contracting services requiring special skills or equipment not available to the carrier, i.e., ballast cleaner, Sperry rail defect detector, road asphalt equipment, etc.**

* * *

- E. This rule shall not prohibit the contracting for brush removal, painting, fencing, mowing or other maintenance of way work when mutually agreed by the Director of Human Resources and the General Chairman. . . . (Emphasis added)**

The Carrier engaged a contractor, Glick Excavating, to grade and repair its roadway in the Brewster, Ohio, yards on September 15 and 16, 1998. The contractor used a bulldozer to perform the work. Claimant Redford, an Operator (Class A off track), complained that the Carrier's failure to assign him to this project was a violation of the Scope Rule. There was no "mutual agreement" between the parties to permit this use of a contractor.

It is clear that grading a roadway with a bulldozer is "maintenance of way work" within the meaning of Rules 1A and 1E. It is also clear that the contracting out was not the result of "mutual agreement" within the meaning of Rule 1E. Given these circumstances, the critical issue in this case is the applicability of Rule 1C. The Carrier alleges that 1C is applicable because this grading project required "equipment not available to the carrier" and that therefore it was free to contract out. The Organization disagrees.

To begin with, Rule 1C refers to "special . . . equipment" such as "ballast cleaner, Sperry rail defect detector, road asphalt equipment." This is the type of equipment a carrier would need only on occasion and would not ordinarily have in its immediate possession. No doubt that is why the draftsmen described this exception as "special . . .

equipment.” There is nothing “special” about a bulldozer, the equipment used by the contractor in this case. Rule 2(M) refers to the Operator (Class A)’s “primary duties,” one of which is to “operate . . . bulldozer.”

True, the Carrier apparently did not own a bulldozer in the Brewster area. But Rule 1C speaks of “availability,” not ownership. Carriers sometimes lease equipment in order to meet their obligation to avoid the use of a contractor. Nothing in the evidence suggests that the Carrier could not have leased a bulldozer for two days for this particular project or that the cost of such a lease would have been prohibitive. To permit the Carrier to escape its obligations under Rule 1 by simply not bothering to own (or lease) commonly used pieces of equipment which are a recognized part of an Operator’s job would seriously undermine one of the basic purposes of Rule 1.

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 13th day of November 2002.