

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36603
Docket No. MW-33815
03-3-97-3-296**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(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 (Guardian Construction) to perform the work of digging a ditch to install an underground air line at the Pavonia Engine House in Camden, New Jersey on August 24, 1995 and continuing (System Docket MW-4242).**
- 2. The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plan to contract out the work referenced in Part (1) as required by the Scope Rule.**
- 3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. M. D. Tallarida, G. A. Golden and R. J. DiMatteo shall each be compensated for eight (8) hours' pay per day at the B&B mechanic's rate and that the Carrier discontinue assigning and using outside forces to perform scope covered 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.

On August 23, 1995, a hydraulic piston on a backhoe failed during the digging of a ditch for the installation of an underground air line in the vicinity of the Pavonia Engine House in Camden, New Jersey. On August 24, 1995, and without notice to the Organization, the Carrier brought in Guardian Construction to complete the job. This claim followed. It has merit.

First, the Scope Rule provides that "[i]n the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto." Exclusive performance of the work by covered employees is not required in contracting out disputes. According to the Rule, all that has to be shown by the Organization is that ". . . work within the scope of this Agreement" has been contracted out. See also, Third Division Awards 28513, 25819 and 19899 (and Awards cited in those cases). Clearly, ditch digging work involving use of a backhoe falls ". . . within the scope of this Agreement . . ." for these covered Maintenance of Way employees.

Second, in the Scope Rule, the Carrier's notification obligations are excused "in emergencies." According to the Rule, "[e]mergencies applies to fires, floods, heavy snow and like circumstances." The circumstances in this case do not rise to that level. Here, a backhoe broke down and, as a result, there was an open ditch. While that condition may be a safety concern, it is not an emergency as defined by the Rule ("... fires, floods, heavy snow and like circumstances"). In any event, the record indicates that the Carrier had another backhoe within the vicinity and, if that backhoe could not have been used, there is nothing to show that the Carrier attempted without success to rent a backhoe for use by a covered employee. Further, according to Claimant Tallarida, the backhoe that broke down was defective because it had only one tooth on the claw for over a year and could not break the hard ground, thereby indicating that lack of maintenance may have contributed to the breakdown. The Carrier has the burden to show the existence of an emergency. Under the circumstances, the Carrier has not met that burden.

Therefore, by failing to give the Organization the required advance notice of the contracting out of the backhoe work, the Carrier violated the Agreement.

With respect to the remedy, the record sufficiently establishes that the contractor worked for four hours. The record further shows that Claimants Golden and DiMatteo were assigned as B&B Mechanics at the Carrier's Ann Street facility and were not, like Claimant Tallarida, assigned at Pavonia. The claim shall therefore be sustained for four hours at the appropriate contract rate for Claimant Tallarida. The fact that Tallarida may have been working on the day in dispute does not relieve the Carrier from the compensation requirement. Compensation is required under this Award for the loss of a work opportunity.

AWARD

Claim sustained in accordance with the Findings.

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 29th day of July 2003.