

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40810
Docket No. MW-40758
10-3-NRAB-00003-080645**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Union Pacific Railroad Company (former Chicago
(& North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Herzog) to perform Maintenance of Way and Structures Department work (ditching right of way) in the vicinity of Mile Post 8.3 on the Milwaukee Subdivision on May 14, 15, 16, 17, 18, 21, 22 and 23, 2007 (System File B-0701C-103/1481524 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Alexander shall now be compensated for eighty (80) hours at his respective straight time rate of pay."**

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.

Although the Organization alleged the Carrier failed to serve notice and refused to respond to the General Chairman's request for a conference, later correspondence from the Organization nullifies these contentions. The record establishes that the Carrier did service notice by Service Order No. 36327 dated March 2, 2007. The parties did engage in a conference on the notice on March 14, 2007. Accordingly, on the record before the Board, we must reject the portion of the Organization's claim that alleges a violation of the applicable notice requirements.

Turning to the merits of the claim, we do not find the record to establish that the ditching work in question was unusually difficult or peculiar in any manner whatsoever. The notice merely describes the work as follows:

"Specific Work: providing all supervision, labor and equipment necessary for the operation of a ditch cleaner to perform grading and sloping of drainage area near track structures on an 'as needed' basis."

The remainder of the record does not amplify the character of the ditching work beyond the description set forth in the notice.

Given the nature of the work contracted, it is clear that Scope Rule 1(B) lies at the focus of the dispute. It reads, in pertinent part, with underscoring supplied for emphasis, as follows:

"Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the

operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or, time requirements must be met which are beyond the capabilities of Company forces to meet."

Prior precedent between these same parties has established that the first paragraph of Scope Rule 1(B) specifically reserves all described work to covered employees. By its terms, the described work may not be performed by non-covered employees unless one or more of the five listed exceptions in the second paragraph is established. Moreover, the Carrier has the burden of proof to establish the existence of any claimed exceptions. See, for example, Public Law Board No. 1844, Awards 16 and 17, as well as Third Division Award 37103.

It is undisputed that the contractor used a piece of equipment that the Carrier did not own. The record described it as a "... car top mounted back hoe type piece of equipment. . . ." According to the record and its Submission, the Carrier relied upon the "special equipment" exception of Rule 1(B) to justify its decision to contract out the ditching work.

For its part, the Organization challenged the validity of the special equipment exception. According to the record and its Submission, the Organization asserted that the Carrier did own several pieces of equipment that had been used by covered employees to perform that same kind of ditching work in the past. None of the Organization's assertions in this regard was effectively refuted by the Carrier. Accordingly, the Board must accept the Organization's assertions as proven fact for purposes of analyzing the instant record.

As worded, Scope Rule 1(B) demands that two separate elements of proof be satisfied before the special equipment exception may be invoked by the Carrier. First, the equipment must be special. Second, the use of the special equipment must be required to accomplish the work.

We thoroughly examined the record before the Board and carefully considered the relevant circumstances depicted therein. That review compels us to find that the Carrier failed to establish its affirmative defense that the equipment provided by the contractor was either special or required within the meaning of Scope Rule 1(B). To be sure, the record shows that the contractor's equipment was different from the ditching equipment that the Carrier owned. But this does not, in and of itself, establish that the contractor's equipment was special or required. The record does not even attempt to explain why the contractor's equipment was necessary to perform the work. It follows, therefore, that the Carrier violated the Agreement when it contracted the work as it did.

The remedy issue has been well settled between these parties. That precedent bars the award of compensation to claimants who have been fully employed. See, for example, Public Law Board No. 1844, Award 13 and Third Division Award 37103. The record establishes that the Claimant was fully employed on the claim dates. Accordingly, no proven loss has been shown. Moreover, nothing in the record demonstrates that the Carrier has been a flagrant violator of Scope Rule 1(B). As a result, while the claim must be sustained in part, we make no monetary award.

AWARD

Claim sustained in accordance with the Findings.

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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 15th day of December 2010.