

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30079
Docket No. MW-30056
94-3-91-3-451

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement on December 21, 22, 23, 26 and 28, 1989 when it assigned outside forces (Delta Contracting) to perform snow removal work on the Youngstown Line from CP 1 to CP 38 at Ashtabula, Ohio (System Docket MW-1292).
- (2) The Carrier further violated the Agreement when it failed to provide advance written notice of its intention to contract out the track maintenance work described in Part (1) hereof.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator M. Rodriguez shall be allowed fifty (50) hours at the machine operator's Class II rate for his lost work opportunity."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The issue to be decided in this case is whether the Carrier violated the Agreement when it assigned outside forces to perform snow removal work on the Youngstown line at Ashtabula, Ohio.

The threshold issue before the Board is whether the Organization has shown, by a preponderance of record evidence, that the particular snow removal work performed by a subcontractor on claim dates accrues to maintenance of way employees. This proof could have been established either by reference to specific Agreement language, or by a persuasive showing that the maintenance of way forces have specifically and historically performed said work.

There is no express reservation of the disputed work in the Scope Rule, therefore the Organization must show such reservation by evidence of custom, practice and tradition. However the record does not even show exactly what work was performed by the outside forces. The Organization asserts that work of clearing snow from around switches always has been performed by maintenance of way employees. Assuming, without necessarily deciding that this is a fact, it does not add anything to our understanding of this case. Carrier responds that the work performed on claim dates was of a type regularly performed by outside parties. The Board thus has insufficient evidence to make an informed decision and the evidentiary standoff works against the Organization, which has the burden of proof on each material element of its claim. The Organization was unable to shoulder that burden, therefore, we cannot find that the Carrier violated the Scope Rule provision of the Agreement. Carrier's defense that this was "emergency" work was not refuted, thereby obviating that part of the claim which alleged violation of the meet and notice requirement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 15th day of March 1994.