NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 31544
Docket No. MW-30883
96-3-92-3-735

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

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

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

(1) The Agreement was violated when the Carrier improperly assigned and used two (2) C&S employes to operate a ditch witch in connection with the installation of a drain for the camp cars at Enola Camp Car Siding, on March 14 and 15, 1991, instead of assigning said B&B Subdepartment forces to perform said work (System Docket MW-2040).

(2) As a consequence of the violation referred to in Part (1) above, B&B Plumbers E. W. Maerki and S. Wentzel shall each be allowed sixteen (16) hours' pay (eight hours per day), at their 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 waived right of appearance at hearing thereon.

This claim arose when the Carrier assigned two C&S employees to operate a ditch witch to excavate for a drainage line at Enola, Pennsylvania on March 14 and 15, 1991. The Organization took exception to the assignment and filed the instant claim on behalf of the Claimants contending that the Claimants, E. W. Maerki and S. Wentzel, have established and hold seniority as B&B plumbers and should have been assigned the B&B plumber's work in question. Furthermore, the Organization contends that the Claimants were available and fully qualified to perform the work.

The Carrier denied the claim contending that in order to dig "a long, uniformly, narrow, shallow trench, which was the exact requirement needed for the project," the Carrier determined it had to use the "ditch-witch." The only Carrier department that has this type of equipment is the C&S department, and therefore, it made sense to the Carrier to utilize C&S employees to operate such equipment.

The parties being unable to resolve the issues raised by the claim, this matter comes before this Board.

This Board has reviewed the record in this case and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it assigned two C&S employees to operate a ditch-witch in connection with the installation of a drain on March 14 and 15, 1991.

The record reveals that the Carrier, in making preparations to install a new drain line, determined that a ditch-witch was necessary to loosen the soil. The ditch-witch is operated by C&S employees who are qualified on that machinery. The record reveals that the B&B Department does not possess the ditch-witch equipment nor does it have the skilled manpower necessary to perform the work with that equipment. The Carrier contends that the Maintenance of Way Department did not have the necessary equipment to perform the work as needed and it was the Carrier's decision to have the ditch-witch used for the specific purpose in this case.

Moreover, the Carrier points out that the subsequent excavation and plumbing work that was necessary for the preparation of the drain line was performed by Maintenance of Way employees.

Although the Organization takes the position that the work could have easily been performed by a Maintenance of Way employee utilizing a backhoe, it is not necessary

that the Carrier take its direction as to what equipment to be used for a specific purpose from any Organization. The Carrier in this case determined that a ditch-witch was necessary and it assigned the work to the employees who operate the ditch-witch, i.e. the C&S employees.

This Board cannot find that the Carrier violated the Agreement.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of July 1996.

LABOR MEMBER'S DISSENT
TO
AWARD 31544, DOCKET MW-30883
(Referee Meyers)

The Majority clearly failed in its responsibility to review and render a proper decision in this docket. The record in this case was crystal clear in that the Carrier assigned an employe represented by the Brotherhood of Railroad Signalmen to perform sewer line laying work. During the handling of this dispute on the property, the Carrier never denied that it assigned C&S employes to perform the work; therefore, the need to prove that the work was performed outside of the Maintenance of Way Agreement was unnecessary. The Carrier defended its violation on the bare assertion that inasmuch as the ground where the sewer line was laid was so hard, it determined that it was necessary to use a "ditch-witch" to "loosen the ground". On this basis, the Majority made its erroneous findings of:

> "Although the Organization takes the position that the work could have easily been performed by a Maintenance of Way employee utilizing a backhoe, it is not necessary that the Carrier take its direction as to what equipment to be used for a specific purpose from any Organization. The Carrier in this case determined that a ditch-witch was necessary and it assigned the work to the employees who operate the ditch-witch, i.e. the C&S employees."

It was pointed out on the property, and never disputed by the Carrier, that the work of laying sewer lines accrues to the employes of the Bridge and Building Department. The purpose of the work determines which class of employe performs such work and inasmuch

as the digging of the sewer line involved here was performed in connection with the performance of Maintenance of Way work, the Carrier's assignment of such to C&S employes was clearly improper and in violation of the Agreement. Moreover, it was pointed out that this Board has already determined that the Agreement is for the work, not the tools, materials or machinery used in the performance thereof.

This Board must not sit and dispense its own version of industrial justice and ignore the well-established principles previously set forth by this Board. This Board is empowered to interpret the language of the Agreement, guided by the prior determinations made by this Board to reach its decision. In this case, the Majority certainly did not do so here. Inasmuch as the findings of this award were not drawn from the essence of the Agreement and applicable Board precedent, it stands as an anomaly and worthless as precedent. Therefore, I dissent.

Respectfully submitted,

Roy J. Robinson
Labor Member