

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32397
Docket No. MW-31967
97-3-94-3-290**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (John Curtis) to perform Roadway Equipment Subdepartment work (plowing and snow removal) between Union Junction, Oregon (Mile Post 302) to Telocaset, Oregon (Mile Post 316) on January 4, 5, 6, 7, 8, 11 and 12, 1993, instead of calling and assigning furloughed Roadway Equipment Operator M. D. Bundrock to perform said work (System File H-33/930376).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Connies Inc.) to perform Roadway Equipment Subdepartment work (plowing snow) around the LaGrande, Oregon Depot, Company parking lot and Company roads in the LaGrande Yards on December 26, 27, 28, 31, 1992, January 1, 2, 6, 7, 8, 9, 19 and 20, 1993, instead of calling and assigning furloughed Roadway Equipment Operator N. L. Milner to perform said work (System File H-45/930417).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Connies Inc.) to perform Roadway Equipment Subdepartment work (plowing snow) from Perry, Oregon (Mile Post 285) to Lone Tree, Oregon (Mile Post 296) on January 6, 14, 19, 20, 23, 27 and 31, 1993, instead of calling and assigning**

furloughed Roadway Equipment Operator M. D. Bundrock to perform said work (System File H-40/930382).

- (4) The Agreement was violated when the Carrier assigned outside forces (Rick Franklin Company) to perform Roadway Equipment Subdepartment work (plowing snow) on right of way roads, track cuts, road crossings and rail yards from Mission, Oregon (Mile Post 220.00) through Huntington, Oregon (Mile Posts 390.00/538.00), on the Joseph Branch (Mile Posts 0.00 to 28.00) and on the New Meadows Branch (Mile Posts 0.00 to 84.5) beginning January 12 through February 19, 1993, instead of calling and assigning Messrs. F. B. Murray, M. F. Garner, M. A. Smietana, R. R. Knox, M. D. Bundrock, D. W. Dacus, B. L. Hathaway, N. L. Milner, C. M. Gossage, C. J. Hood and M. D. Newnom to perform said work (System File H-39/930383).
- (5) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of Maintenance of Way forces as required by Rule 52(a) and the December 11, 1981 Letter of Understanding.
- (6) As a consequence of the violation referred to in Parts (1) and/or (5) above, furloughed Roadway Equipment Operator M. D. Bundrock shall be allowed fifty-five and one-half (55.5) hours' pay at the roadway equipment operator's straight time rate for the work performed by the outside forces.
- (7) As a consequence of the violation referred to in Parts (2) and/or (5) above, Roadway Equipment Operator N. L. Milner shall be allowed eight (8) hours' pay at the appropriate Class 2 Roadway Equipment Operator's rate for each day worked by the outside forces in the performance of the work in question.

- (8) As a consequence of the violation referred to in Parts (3) and/or (5) above, furloughed Roadway Equipment Operator M. D. Bundrock shall be allowed seventy-two (72) hours' pay at the appropriate Class 2 Roadway Equipment Operator's rate for the work performed by outside forces.
- (9) As a consequence of the violation referred to in Parts (4) and/or (5) above, Mr. F. B. Murray shall be allowed one hundred seven (107) hours' pay at the Group 8, Class (a) Extra Gang Foreman's straight time rate and one hundred eight (108) hours' pay at the time and one-half rate; Mr. M. F. Garner shall be allowed one hundred four (104) hours' pay at the Group 8, Class (a) Extra Gang Foreman's straight time rate and eighty-eight (88) hours' pay at the time and one-half rate; and Messrs. M. A. Smietana, R. R. Knox, M. D. Bundrock, D. W. Dacus, B. L. Hathaway, N. L. Milner, C. M. Gossage, C. J. Hood and M. D. Newnom shall each be allowed one hundred forty-two and twenty-two one-hundredths (142.22) hours' pay at the Group 21, Class (a) straight time rate and one hundred fifteen and fifty-five one-hundredths (115.55) hours' pay at the time and one-half rate for each day worked by the outside forces in the performance of the work in question."

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 asserts that the various contractors engaged by the Carrier performed snow removal work which was Scope protected. The Organization asserts that the procedure used by the contractor to remove the snow was "similar" to that performed by the Carrier's forces. Such work has customarily and traditionally been assigned and performed by the employees. As this was not an emergency and the Organization was not sent proper notification to allow conference and agreement, the claims have merit.

Carrier argues that it violated no Agreement Rule in that the work complained of was performed during emergency conditions. It takes issue with Claimants' availability, the availability of equipment, specific qualifications which it argues that Claimants were lacking, the locations where Claimants' lived making furlough recall doubtful to the locations of this claim. Carrier further argues that it has Award support for its instant actions (Third Division Awards 29999, 30000).

The evidence in this record is extensive. The Organization has provided argument that the contractors lived hundreds of miles from the snow scene. The Organization has provided a record to indicate that the snowfall was average and not an emergency condition. There is certainly no record to support an emergency as an affirmative defense requires. There are no newspaper accounts, documentation from weather sources, train delay reports or the equivalent. This is not the situation faced by the Board in Awards 29999 and 30000 where the Board found no dispute that emergency conditions existed and all forces and equipment were overtaxed by snow, floods and derailments. Those conditions do not herein exist. The record shows equipment available, no derailments and a lack of any evidence to support emergency snow removal extending over the period of dates herein disputed.

In our full review of the Agreement, facts and arguments, the Board notes that the Carrier never denied on the property that this was the work of the employees. The Carrier never introduced any rebuttal to the Organization's arguments that this was their work by custom, tradition and performance. Certainly we find no evidence on the property that this work had ever been contracted out before under same circumstances and references in Submission are improper. Accordingly, after full consideration to the issue of remedy, the Board sustains the claim as presented.

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 30th day of December 1997.