

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33208
Docket No. MW-32428
99-3-95-3-308**

The Third Division consisted of the regular members and in addition Referee John H. Abernathy 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 Carrier violated the Agreement when it assigned outside forces (CES) to perform Track Department work (cleaning the right of way of coal, loading the coal into trucks to be transported to a nearby site and reloading into gondola cars) at Mile Post 244, Danbury, Ohio, commencing January 31, 1994 and continuing (System Docket MW-3374).**
- (2) The Carrier violated the Agreement when it assigned outside forces (CES) to perform Track Department work (cleaning the right of way of coal, loading the coal into trucks to be transported to a nearby site and reloading into gondola cars) at Mile Post 244, Danbury, Ohio, on February 7, 8, 9, 10 and 11, 1994 (System Docket MW-3370).**
- (3) The Carrier further violated the Agreement when it failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out the work described in Parts (1) and (2) above as required by the Scope Rule.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants D. Canas, R. I. Tate, H. Caudill, J. Mowka and J. Manning shall each be allowed eight (8) hours' pay at their**

respective straight time rates for each day worked by the outside contractor commencing January 31, 1994 and continuing.

- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above:
- (a) Claimants D. Canas, J. E. Bryan, E. W. Wegman, D. A. Stevens, C. J. Baughman, D. L. Gelacek, J. R. Bumbaugh, J. Mowka, R. Isaac, D. Hamlin and J. A. Flegle shall each be allowed twenty-four (24) hours' pay at their respective straight time rates for February 7, 8 and 11, 1994.
 - (b) Claimants D. Canas, J. E. Bryan, E. W. Wegman, D. A. Stevens, C. J. Baughman, D. L. Gelacek, J. R. Bumbaugh, J. Mowka, R. Isaac, D. Hamlin and J. A. Flegle shall each be allowed sixteen (16) hours' pay at their respective straight time rates and sixteen (16) hours' pay at their respective time and one-half rates for February 9 and 10, 1994.
 - (c) Claimants S. Marvin, S. Desko, R. J. Carpenter and H. Caudill shall each be allowed sixteen (16) hours' pay at their respective time and one-half rates for February 9, 1994 and sixteen (16) hours' pay at their respective time and one-half rates for February 10, 1994."

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.

As a result of a derailment at Danbury, Ohio, in late January 1994, the Carrier's mechanical and MW employees were recalled from furlough and utilized to clear the mainline and repair the track damage.

Once that had been accomplished, the Claimants were again furloughed.

Beginning January 31, 1994 and continuing, Consolidated Environmental Services (CES) began loading and hauling away coal that had spilled as a result of the derailment. CES used their own equipment (two dump trucks, two front-end loaders, and one dozer) and employees to perform this work.

The Organization claims CES moved the spilled coal from one side of the track to the other, loaded the coal into dump trucks and hauled the reclaimed coal four miles to Gypsum, Ohio, where it was loaded into gondola cars and transported to a recycler for cleaning.

The Carrier contends that CES owned the spilled coal and was salvaging their own property for resale. Salvaging material by the owner is not customarily done by the Organization (See Third Division Awards 19994, 30901, 31522). As the work done by CES is not customarily done by the Organization, then there is no need to give notice. (Third Division Awards 27626, 27629, 30088, 30515.)

This Board holds that the Organization has the burden of proof in this instance. To meet this burden the Organization must do more than make assertions and rely on assumptions. The Organization must provide persuasive evidence showing that the work in question accrues to them by contract right as customary performance. The Organization failed to provide such evidence. The record shows that the spilled coal was owned by CES and CES was salvaging the spilled coal for resale. There is no evidence in this record that the recovery of a salvage product owned by another company is customarily done by the Organization. Under these conditions no notice is required.

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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 21st day of April 1999.