

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33941  
Docket No. SG-34813  
00-3-98-3-523**

**The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.**

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(Wheeling and Lake Erie Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling & Lake Erie Railway Company (W&LE):**

**Claim on behalf of D.L. Redford and J.A. Hatfield for payment of 16 hours each at the straight time rate and 15 hours each at the time and one-half rate, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when it used a contractor to perform covered maintenance and repair work on the track at Lodi, Ohio, on May 20 and 21, 1997 and deprived the Claimants of the opportunity to perform this work. Carrier’s File No. 97-BRSMW.009. General Chairman’s File No. 231/970714A. BRS File Case No. 10641-W&LE(M).”**

**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.**

On this property there exists a contracting out agreement of sorts incorporated in the Scope Rule of the Agreement. This Rule is unique to this property. Most other contracting out Awards before this Board dealt with the 1968 National Agreement involving contracting and the Berge-Hopkins letter of 1981. They are of little precedential value to this dispute.

On the claim dates, the Carrier leased two pieces of equipment it does not own, with an operator for each. It is not known what hours the contractor's people worked exactly, but the Carrier stated Claimant was operating a Carrier owned backhoe and did work alongside the contractor's employees.

Claimant Redford worked 12 hours, 30 minutes on May 20, and 18 hours on May 21. (Hours in excess of eight worked on each date was paid at the overtime rate.)

The second Claimant, Hatfield, was off on a scheduled vacation. In other words, he was off on a paid leave of absence. He was not considered available by the Carrier, and is not considered a viable Claimant in this case.

The pertinent Rule is 1(c) cited by the Carrier. That Rule reads as follows:

**"C. This shall not prevent the carrier from contracting services requiring special skills or equipment not available to the carrier i.e., ballast cleaner, Sperry rail defect detector, road asphalt equipment, etc . . . ."**

The Carrier argues it has carte blanche authority to lease any equipment with an operator that it does not own. The Organization's argument is that the exclusion to the Rule only was meant for special equipment that required a skilled operator, such as the machinery listed as an example.

Unfortunately, the Rule in its current form does not support the Organization. Special skills relates only to the operator and not the machine. Secondly, who can say a bulldozer operator or a front end loader operator does not require someone with special skills.

The Carrier, in its Submission, argued the contracting was done under emergency conditions. The Organization argued that Carrier's defense, i.e., an emergency existed, was first advanced in its Submission before this Board and cannot now be considered.

The Board agrees that the characterization of the work as "emergency" is a new argument raised for the first time before this Board, thus it cannot be considered. But the facts set forth on the property are that Claimant did work 30 hours, 30 minutes over a two day span. Such service requirements speak for themselves. Obviously, whatever was done had to be done quickly otherwise why would the Carrier require that almost four days work be done in two.

Finally, there are no viable Claimants. Claimant Redford operated a backhoe with the contractor's employees, working the same hours, sharing in the work, and not only was Claimant Hatfield on paid vacation, there is no showing that he had the skills necessary to operate either the front end loader or the bulldozer.

The Organization has not satisfied the burden of proof all petitioners must advance to have a successful claim before this Board.

**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 22nd day of February, 2000.