

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36719
Docket No. MW-36257
03-3-00-3-477

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen 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 Agreement was violated when the Carrier assigned outside forces (Serafini Trucking) to perform routine Maintenance of Way work (hauling, spreading and tamping stone) for roadbed repair in Kenmore Yard at Kenmore, New York on May 20, 21, 24, 25, 26, 27, 28, June 1 and 2, 1999 [Carrier's File 12(99-741)].**
- (2) The Carrier further violated the Agreement when it failed to provide a proper advance notice of its intent to contract out the Maintenance of Way work described in Part (1) hereof.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Foreman L. A. Mages, Class 2 Machine Operator E. F. Suflita and Vehicle Operators R. J. Downey, J. E. Kilian and D. L. Gellerson shall now each be compensated for seventy-two (72) hours' pay at their respective straight time rates 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 were given due notice of hearing thereon.

This case presents a dispute over the Carrier's assignment of outside contracting forces to perform certain work on claim dates with dump trucks, a bulldozer and a roller within the confines of Kenmore Yard. It is undisputed that this was no "emergency" and that the Carrier contracted this work without notice or consultation with the Organization. Thus, the sole issue presented for determination is whether the specific work in question was, in the words of the Scope Rule, "work within the scope of this Agreement," a material point on which the Organization has the burden of proof as the moving Party in this contract interpretation case.

Careful consideration of the available evidence shows that the Organization did not successfully shoulder its burden of making out a prima facie case on this record. That the work involved hauling, spreading and tamping of stone does not appear to be disputed, but in its claim and throughout handling, the Organization insisted that the performance of this work was in connection with "roadbed repair"; whereas the Carrier denied the claim on grounds that the work was not "roadbed repair" but rather delivering, spreading and rolling stone to make an access road. At best the material facts are in dispute and at worst the evidence, including a written statement from an Organization witness, supports the Carrier's assertion of the facts. In either event, the claim must be denied for failure of proof that outside contractor employees performed the work of "roadbed repair."

AWARD

Claim denied.

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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 17th day of September 2003.