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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37164
Docket No. MW-35795
04-3-99-3-794**

The Third Division consisted of the regular members and in addition Referee Dana Edward 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 (Puline Contracting) to perform Maintenance of Way work (grading and ditching for a water catch basin) in the Dunkirk Yard, Dunkirk, New York on the Chicago Line on May 7 and 8, 1998 (System Docket MW-5264).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plan to assign said work to outside forces.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class 2 Machine Operator D. S. Rancka shall be allowed twenty (20) hours' pay at his Class 2 Machine Operator's 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 were given due notice of hearing thereon.

In this case, the Organization alleged that, without prior notice to the Organization, the Carrier contracted out the construction of water drainage ditches and holding basins adjacent to the main line in Dunkirk Yard. If the Organization had persuasively established its allegations by a preponderance of probative record evidence, a sustaining award like that rendered in recent Third Division Award 37046 might well have been issued.

In the initial claim, the Organization described the work as "grading for a water catch basin." During the appeals, however, the Organization variously described the work and its location as "grading along the back lead track" and later as "grading the yard roadway and installing water catch basins." The Organization represented that the latter description was based on an alleged hearsay conversation between one of the employees and the equipment operator employed by the contractor. For its part, in denying the claim at Step 2 and thereafter, the Carrier insisted that the work in question was "subgrade and drainage on the access road located within Dunkirk Yard."

As the moving party in this Scope Rule/notice case, the Organization bears the initial burden of establishing the material facts necessary to make out a prima facie violation of the Agreement. Based on the record before us in this case, however, we are unable to render an informed judgment concerning what work was done by the outside contractor and where it was done. Thus, we are compelled to dismiss the claim due to irreconcilable conflict of material fact.

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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 28th day of September 2004.