

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 37644  
Docket No. MW-36599  
05-3-01-3-93**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**PARTIES TO DISPUTE:** ( (Brotherhood of Maintenance of Way Employees  
(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 (Rick Franklin Inc.) to perform Maintenance of Way and Structures Department work (operate track hoe to install culvert pipes and related work) in the vicinity of Mile Posts 130.5 and 133.7 on the Spokane Subdivision on November 4, 1999 instead of Roadway Equipment Operator W. A. Cleaver (System File J-9952-260/1219345).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant W. A. Cleaver shall now be compensated for a proportionate share of the total hours' worked by the contractor from 6:00 A.M. to 4:30 P.M. on November 4, 1999 in the performance of the aforesaid work at his respective straight time and time and one-half 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.

The Claimant, who holds seniority as a Roadway Equipment Operator on the Northwest District, was assigned and working as such when the instant dispute arose.

On November 4, 1999, the Carrier assigned an outside contractor (Rick Franklin Inc.) to perform routine right-of-way work using a track hoe. The outside contractor's employee excavated and backfilled the installation of two culvert pipes at Mile Posts 130.5 and 133.7 on the Spokane Subdivision. According to the Carrier, an emergency arose that required immediate attention in order to prevent tracks from washing out. In order to respond to the unforeseen conditions and to ensure traffic flow on an important portion of the system, the Carrier hired the contractor who had the necessary equipment to open the culverts. Due to the alleged emergent nature of the project, no advance notice was given to the General Chairman regarding the use of the contractor, but the Carrier did provide advance notice that it intended to contract for operated equipment to assist railroad forces under these circumstances.

Pursuant to that notice and subsequent discussions, the Organization contends that the Agreement was violated when the Carrier assigned Rick Franklin Inc. to operate a track hoe and backfill terrain on its right-of-way. According to the Organization, the work is specifically reserved to BMW-represented employees. In addition, the Carrier violated the Agreement when it did not provide advance

notice to the General Chairman. The Organization contends that no emergency existed and, therefore, such is not a proper justification for its lack of notice.

The Organization further contends that this work is consistent with the Scope Rule. According to the Organization, Maintenance of Way personnel were fully qualified and capable of performing the work. The work performed by Rick Franklin Inc. is within the jurisdiction of the Organization and, therefore, the Claimant should have performed said work. Because the Claimant was denied the right to perform said work, the Organization argues that the Claimant should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that this was an emergency situation and as such, no notice was necessary. The Carrier contends that the work does not belong to BMW-employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent has upheld its position.

After a review of all relevant evidence, the Board cannot find that the Organization has been able to meet its burden of proof in the instant matter. The Carrier prevailed in showing that an emergency did in fact exist. Therefore, it was within its rights to contract out the work. Further, it was within its rights to not provide advance notice to the General Chairman.

However, beyond the question of whether the instant situation was a bona fide emergency, the Carrier has also shown that the work was "such that the Company is not adequately equipped to handle. . . ." In the instant situation, the Organization has not been able to refute the Carrier's position that the Carrier's equipment was not of sufficient capacity or that other rental equipment was not available.

Thus, having determined that an emergency existed and that the Carrier did not have sufficient equipment to perform the work, we find that the Organization has not met its burden of proof and the claim is therefore denied.

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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 7th day of December 2005.**