

**SPECIAL BOARD OF ADJUSTMENT NO. 1016**

**AWARD NO. 148  
CASE NO. 148**

**PARTIES TO  
THE DISPUTE:** Brotherhood of Maintenance of Way Employees

**vs.**

**Consolidated Rail Corporation**

**ARBITRATOR:** Gerald E. Wallin

**DECISION:** Claim sustained

**DATE:** July 9, 2001

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on March 21, 1996 when it assigned outside forces (C. C. G. Enterprises) to plow snow from the parking lot at the Sandusky Yard and the right of way between the Sandusky and Fairlane Yards rather than assigning Class II Operator R. K. Nelson who was available to perform such work (System Docket MW-4469).
2. The Carrier further violated the Agreement when it failed to provide advance written notice of its intention to contract out the Maintenance of Way work described in Part (1) hereof.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. K. Nelson shall receive '... (8) hours at the time and one half rate for a Class II Operator, all benefits and credits due to him, for March 21, 1996.'"

**FINDINGS OF THE BOARD:**

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

It is undisputed in the record that Claimant was available to perform overtime service on the claim date. In addition, it is undisputed that his backhoe machine was available for his use. Carrier also concedes that its forces represented by the Organization have performed snow removal work in the past. Finally, there is no evidence that the Organization was provided advance notice of the Carrier's intent to contract out the work in question.

Carrier defends this Claim for essentially two reasons: First, it maintains that an emergency existed such that the use of the contractor was necessary for safety reasons to provide safe access to its facilities; second, the Carrier asserts that other crafts have performed the same work in the past.

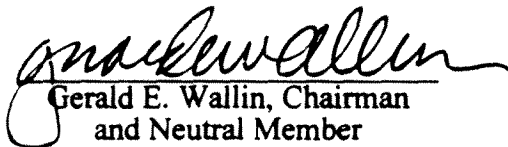
Carrier's defenses are in the nature of affirmative defenses. As such, it must shoulder the entire burden of proof to establish their validity if refuted by the Organization.. The Organization did make assertions refuting both defenses, thus triggering Carrier's obligation to prove its defenses.


On this record, there is no evidence to support the Carrier's assertion that emergency circumstances existed. Carrier's mere bare assertions are not sufficient to establish the defense.


Carrier's exclusivity defense also lacks merit. It is well settled that past performance of the same kind of work is sufficient to establish scope coverage *vis a vis* outside contractors.

AWARD:

The Claim is sustained.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
R. C. Robinson,  
Organization Member

  
D. L. Kerby,  
Carrier Member