

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29515
Docket No. MW-29199
93-3-90-3-63

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(Brotherhood of Maintenance
of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (Railroad Contractors Co., Inc. and Tectonic Contractors) to perform track dismantling, roadbed rebuilding, track rebuilding and building construction work at Elizabeth Yard, Elizabeth, New Jersey, beginning August 31, 1988 (System Docket MW-230).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

(3) As a consequence of the violations in Parts (1) and/or (2) above, each of the thirty-seven (37) employees named below* shall be allowed pay at the appropriate rate for eight (8) hours per day, five (5) days per week (Monday through Friday) beginning August 31, 1988 and continuing for as long as the contractors' forces performed the work identified in Part (1) above.

*J.	Mentesana	Track Foreman
H. C.	Aulet	Class 2 Machine Operator
A. J.	Costa	Class 2 Machine Operator
E. J.	Hollock	Class 2 Machine Operator
F. R.	Moser	Class 2 Machine Operator
R. C.	Fogel	Class 2 Machine Operator
W.	Faust	Class 2 Machine Operator
G.	Buchman	Class 2 Machine Operator
B.	Lebitz	Class 2 Machine Operator
K.	Bristol	Class 2 Machine Operator
J.	Barreiro	Trackman
A.	Cunningham	Trackman
J.	Burgos	Trackman

D.	Vernon	Trackman
J.	Hill	Trackman
G.	Santiago	Trackman
F.	Cueva	Trackman
O.	Smith	Trackman
G.	Vanderpool	Trackman
B.	Davis	Trackman
P.	Rojas	Trackman
D.	Thomas	Vehicle Operator
F.	Gray	Vehicle Operator
S.	Vaughan	Vehicle Operator
B.	Rose	Vehicle Operator
C.	Falcoa	Vehicle Operator
B.	Barrett	Vehicle Operator
T.	DaCosta	Vehicle Operator
J.	DaCosta	Vehicle Operator
J.	Lamberti	B&B Foreman
R.	Freed	B&B Mechanic
G.	Muso	B&B Mechanic
G.	Sell	B&B Mechanic
S.	Takas	B&B Mechanic
M.	Gittens	B&B Mechanic
P.	Clark	B&B Mechanic
P.	Rivas	B&B Mechanic"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

This is a contracting out case which turns on the issue of whether or not the tracks on which the work was performed by the contractor was under the control of Carrier or leased to another enterprise at the time that the disputed work was performed. Carrier, from the outset, maintained that the track was leased, and while it refused to furnish the Organization with a copy of the lease because of confidentiality considerations it did make a copy

available for inspection by the Organization. The Organization did not avail itself of the inspection opportunity.

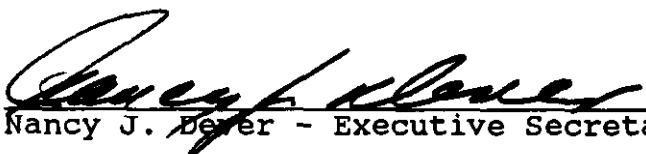
The failure of the Organization to take advantage of the opportunity to inspect the lease flaws its argument that the trackage on which the contractor worked was under the control of Carrier. Accordingly, in these circumstances the Board must accept Carrier's position as correct.

The Claim will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February 1993.

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LABOR MEMBER'S DISSENT
TO
AWARD 29515, DOCKET MW-29199
(Referee Fletcher)

FEB 12 1995

THIRD DIVISION

This award is erroneous and inconsistent with the precedent of this Board.

The premise of this Claim was quite simple and uncomplicated. The Organization contended that the Carrier contracted out track work belonging to the employees represented by BMW. The Carrier contended that the track was leased. The Organization requested a copy of the lease and the Carrier flatly refused to supply it. That constituted the handling of this dispute on the property.

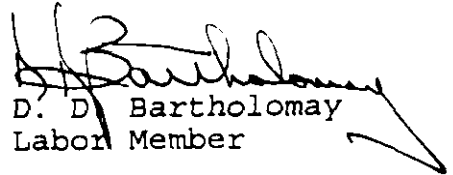
On January 31, 1990, the Organization submitted a letter of intent to the Third Division which closed the file. Under date of February 13, 1990, the Carrier allegedly submitted another letter to the General Chairman which indicated that a copy of the alleged lease would be available at the Carrier's headquarters for his examination should he so desire. The Organization, in its letter of objection, properly pointed out that the letter was not part of the handling of this dispute and not properly before the Board for consideration. Moreover, the offer made in the letter was not made during the handling on the property.

While I have only been a Board Member for a little over ten years, the Labor Members that initiated me had been here for a much longer period of time and were quite emphatic about the principles

established here including the exclusion of new material from the Board's consideration. The Majority here deemed it appropriate to consider new argument and, by doing so, violated the precedent of the NRAB. Hence, this award is erroneous and of no precedential value.

Therefore, I dissent.

Respectfully submitted,


D. D. Bartholomay
Labor Member