

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31619
Docket No. MW-31173
96-3-93-3-175**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former
(Louisville and Nashville 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 to build new tracks in the Piggy Back Facility and install switches on the R&D Track at Mile Post 799.7 to 801.2 in Gentilly Yard, New Orleans, Louisiana, on October 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, November 1, 2, 3, 4, 5, 6, 7, and 8, 1991 [System File 14(37) (91)/12(92-244) LNR].

2. The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plans to contract out said work in accordance with Article IV of the May 17, 1968 National Agreement.

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, the regularly assigned and furloughed employees* listed below shall be allowed ten (10) hours' of pay at their respective straight time rates of pay for each claim date listed in Part (1) above.

*	D. H. Ray	A. Travis
	L. Hawkins	T. Summers
	N. Parish	W. McClain
	A. Mitchell	E. G. Williams
	C. J. Dison	L. R. Hawkins
	J. Ulrich	M. T. Hopkins"

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 waived right of appearance at hearing thereon.

In October and November 1991, outside forces constructed new track and installed switches in Gentilly Yard, New Orleans, Louisiana. Carrier maintains that this conduct did not violate the Agreement because the property at issue was leased to another company. Carrier recognizes that the lessee was a related company, as both it and Carrier were subsidiaries of the same parent corporation. Carrier argues, however, that the two companies were operated independently, that Carrier could not control the decisions of the lessee, and that our prior Awards recognize that work controlled by a lessee is not subject to the Agreement.

The Organization contends that Carrier violated the Agreement by assigning to outside forces work reserved to the employees, and by failing to give the Organization notice of its intent to contract out the work. The Organization accuses Carrier of "double breasting" and attacks the bona fides of the lease. The Organization urges that the Board give no consideration to, what it characterizes as, "Carrier's affirmative defense," because Carrier failed to provide the Organization with a copy of the lease. Although the purported lease was attached to Carrier's Submission, the Organization urges that we disregard it because it was not considered on the property.

The record is clear that during handling on the property, the Organization requested that Carrier provide it with a copy of the lease. Carrier failed to do so. Carrier attached a copy of the purported lease to its Submission to this Board. However, we are barred from considering the lease because it was not presented on the property. Under these circumstances, this Board consistently has held that a carrier's failure to produce a copy of the lease upon request by the Organization bars Carrier from relying on the lease as a defense. See Third Division Award 28430 and Awards cited therein. Accordingly, we find that Carrier violated the Agreement.

With respect to remedy, Carrier urges that no monetary relief is warranted because no actual damages were sustained. The Organization counters that a monetary remedy is in order because of lost work opportunities. We agree with the Organization. Many of the Claimants were furloughed at the time of the incident. Although others were employed, the record contains no evidence that they could not have performed the work in question, for example by adjusting their schedules or on an overtime basis. See, e.g., Third Division Awards 30064, 28851, 27788. In accordance with Third Division Award 28430, we will direct that compensation be paid for wages in the amount of hours worked by the contractor during the relevant period. In the absence of available records of such hours, the claim will be sustained as presented.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 31619

DOCKET NO. MW-31173

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: (CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

This matter has been returned to the Board on the request of the Organization for an interpretation. In Award 31619 we found that the Agreement was violated when outside forces constructed new track and installed switches in Gentilly Yard, New Orleans, Louisiana. Carrier had defended contending that the property at issue had been leased to another company. We held that we were barred from considering this defense because, during handling on the property, the Organization had requested a copy of the lease and Carrier had failed to provide one. Accordingly, we sustained the claim and, in accordance with Third Division Award 28430, we directed that "... compensation be paid for wages in the amount of hours worked by the contractor during the relevant period. In the absence of available records of such hours, the claim will be sustained as presented."

After issuance of Award 31619, Carrier obtained a statement from the contractor, Midway Railroad Construction Co. Inc., detailing the dates, number of employees and hours of work performed on the job. Carrier advised the Organization of the specific payments to be made to each Claimant based on the contractor's statement. The Organization, however, contends that the claim must be sustained as presented because Carrier failed to challenge the relief requested during handling on the property and because Carrier did not produce any records of its own detailing the number of hours worked on the job by the contractor's employees.

Carrier did not obtain and submit the contractor's statement in an effort to raise an impermissible new argument. Rather, Carrier obtained and submitted the

contractor's statement in response to this Board's Award. It was our determination in Award 31619 that the claim should be sustained but that the appropriate remedy was to pay the Claimants for the number of hours worked by the contractor. The claim was to be sustained as presented only in the absence of available records of the number of contractor hours worked. The Award clearly placed the burden of obtaining and producing such records on the Carrier.

We are not persuaded by the Organization's argument that Carrier could only meet its burden by producing its own records of the number of hours worked by the contractor. The Award did not so limit the types of records that could be used to calculate the remedy, nor is such a limitation implied in the Award. On the contrary, Carrier's defense was that the property had been leased and Carrier did not engage the contractor. Although we held that Carrier failed to preserve this defense because it failed to provide the Organization with the requested copy of the lease, it certainly was possible that Carrier's contention that it had not engaged the contractor was factually accurate. In such a case, Carrier would have no records of the number of hours for which the contractor was paid and would have to obtain a record of the number of hours worked from the contractor.

There is no reason to believe that the contractor's statement is not genuine. Accordingly, we conclude that the contractor's statement is an available record that establishes the amount of hours worked by the contractor during the relevant time period, and that by compensating the Claimants for wages in the amount of those hours Carrier complies with the Award.

Referee Martin H. Malin who sat with the Division as a neutral member when Award 31619 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of September 1998.