

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32307
Docket No. MW-31402
97-3-93-3-299**

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(CP Rail System (former Delaware and Hudson
(Railway Company)

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 to perform Maintenance of Way work (applying rip-rap) between Mile Post 98 and Mile Post 99 on January 7, 8, 9, and 10, 1992 (Claim No. 26.92 DHR).**
- (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 and discuss the matter in good faith as required by Article IV of the May 17, 1968 National Agreement and Appendix H.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed employe J. Hurlburt shall be allowed eight (8) hours' pay plus any and all overtime, at the SEO straight time or overtime rate, for each of the days worked by the outside forces.”**

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.

This dispute involves the use of leased equipment, required by the lessor to be operated by its own operator. This was part of a project which was, in fact, undertaken by Carrier forces.

The Organization contends that the Carrier failed to provide the required advance notice to the General Chairman. The Carrier includes documentation in its Submission as to notification and report of a conference with the General Chairman as to "drainage improvement." The Organization points out that such documentation was not included in the on-property claim handling and cannot now be considered by the Board. The Board concurs. In addition, examination of the exchange of letters leaves some doubt as to its applicability to the January 7-10, 1992 occurrence here under review.

The documentation nevertheless does give some support to the Carrier's contention that the Organization had knowledge of previous incidents of leasing special equipment with operators supplied by the lessor.

The Carrier raises the argument of "exclusivity;" that is, the Organization did not show that employees it represents have performed the work to the exclusion of all others. This argument has been shown repeatedly and convincingly to be non-determinative in contracting matters (appropriate as it may be in disputes between various crafts and classifications).

In sum, the Board is persuaded that there was failure to provide notice of use of an outside contractor (whether or not an actual "contract" was signed). Given the Carrier's unrefuted assertion that its use of leased equipment with an operator had been undertaken without challenge in the past, a monetary remedy is inappropriate.

Specifically, the Board sustains the claim with the exception of Paragraph (3). Clearly, however, the Carrier is now on notice as to the need for specific notice and discussion.

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 13th day of November 1997.