

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30900
Docket No. MW-29113
95-3-89-3-547

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

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Loram, Inc.) to perform roadbed maintenance work (cleaning ballast) on the Western Branch between Ridgeway and Bowling Green, Ohio and on the Cleveland to Indianapolis Main Line between Ridgeway and Bowling Green, Ohio from July 5 through July 23, 1988 (System Docket MW-108).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days' advance written notice of its intention to contract out said work.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, three (3) senior Columbus Division machine operators on furlough during the claim period shall each be allowed one hundred seventy (170) hours of pay at their straight time rates."

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.

On the dates set forth in the claim, the Carrier utilized a contractor (Loram Company) to clean ballast by removing dirt and replacing the cleaned stone back on the roadbed. The Carrier defended its actions on the grounds that the contractor had been used by the Carrier since approximately 1970 performing the same work over the Carrier's entire system through use of the contractor's Shoulder Ballast Cleaners (which the contractor only allows its personnel to operate) without the Carrier giving notification to the Organization and without prior complaint by the Organization.

Assuming for the sake of discussion that the Organization's arguments are all contractually correct, (i.e., that notice was required and not given and that the work fell within the purview of the scope rule), nevertheless, on the basis of the evidence before us, this claim must be denied.

In the past, and without prior objection by the Organization, the Carrier extensively utilized a contractor to perform the work in dispute. The lack of objection by the Organization for similar kinds of action effectively lulled the Carrier into presuming that such contracting out was permissible. Under the circumstances, no affirmative relief could be awarded even assuming that the Carrier's assumption was contractually incorrect.

AWARD

Claim denied.

O R D E R

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 8th day of June 1995.