

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 31799  
Docket No. MW-31359  
96-3-93-3-379**

**The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.**

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

**STATEMENT OF CLAIM:**

- “(1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (Stuber Co.) To perform track maintenance work (cleaning culverts) at Mile Post 180.81, Corning Secondary and from Mile Posts 218 to 220, Buffalo Line on January 27, 28, 29, 30, 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14, 1992 (System Dockets MW-2512, MW-2513, MW-2514, MW-2515 AND MW-2516).**
- (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 referred to in Parts (1) and/or (2) above, furloughed B&B Mechanics J. R. Hummel, R. R. Houser, S. F. Miller, A. F. Fantaskey and R. L. Winner shall each be allowed one hundred twenty (120) hours' pay at the B&B mechanic's straight time rate and they shall each receive credit for benefit and vacation purposes.”**

**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.

Item 2 of the Statement of Claim, contending that Carrier did not serve notice of its intent to contract the work that is the core of this dispute is not well founded. The Carrier, in its letter dated September 25, 1992, stated:

“... you were provided notice ... of Carrier’s intent to contract this work. We advised you in our notice and at our conference, that we do not possess this type of equipment, nor could we rent same without an operator....”

The Organization did not challenge the aforequoted. Unrebutted assertion of facts become facts before this Board. If the Carrier’s position regarding the notice is incorrect, the time to challenge that position is on the property. It is too late to do so before this Board.

The Carrier’s position is that it used a Hydro-jet and a vacuum truck to clean culverts, equipment it does not own, nor are there any trained operators of such equipment on the roster.

The cleaning of culverts and the use of special equipment have been the core of more than a few disputes between the parties. See Third Division Awards 30088, 29558 and 29024.

In Third Division Award 30088, the Board found as follows:

“The Carrier claims it was necessary to contract out this work because it did not own the specialized equipment required to perform this task. The Carrier also states it was unable to lease the equipment without being required to also use the equipment owner’s operators. The Carrier further avers it has a history of contracting out such work.

We find the situation in this case similar to Third Division Award 29558 involving these same parties in which this Board held:

**'In this instance, the Carrier relies on long-established practice of contracting out this particular work. There is no clear prohibition to the Carrier's use of the special equipment, particularly in view of past practice in doing so. The Carrier also asserts that the Claimant, who was otherwise fully employed at the time, was not qualified to operate such special equipment. Given these circumstances, the failure to provide advance notice is not sufficient to warrant the Claim.**

**Beyond and apart from the question of notice, the Organization has not established a clear Rule violation in these particular circumstances.'**

**In the case herein, the Organization has not shown, either through a clear and unambiguous provision in the Scope Rule or through a system-wide history of the work being performed by covered employees to the exclusion of all others, that this work is within the scope of the Agreement. Accordingly, we find no violation of the Agreement...."**

**Besides the cleaning of culverts with specialized equipment, the Carrier has contracted in situations other than culvert cleaning that required specialized equipment not available for lease without a qualified operator and this Board has not found that Carrier was in violation of the Scope of the Agreement nor any other Rule. See Third Division Awards 30913, 29558, 28891, 26850.**

**The Agreement was not violated.**

**AWARD**

**Claim denied.**

**ORDER**

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 26th day of December 1996.**