

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32308
Docket No. MW-31405
97-3-93-3-395**

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
(Southern Pacific Transportation Company
((Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (W. T. Byler, Inc.) to perform routine track maintenance work clearing the right of way, drilling holes in rail, replacing track bolts, regauging track, replacing spikes and angle bars and installing ties on the main track and siding at West University between Wakeforest and Wesleyan on West Park Drive, Houston, Texas, on April 21 through 28, 1992 (System File MW-92-115/MofW 92-131 SPE).**
- (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 Article 36.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Laborers E. Valdez, P. G. Martinez, J. C. Jones, R. G. Guzman and J. B. Garcia shall each be allowed forty-eight (48) hours' pay at their straight time rates of pay and twelve (12) hours pay at their time and one-half rates of pay."**

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.

Between April 21 and April 28, 1992, certain repair work was performed by a contractor on a siding owned by the Carrier and leased to a shipper. The lease, the major part of which was made available to the Organization, gives the Carrier ultimate control over the leased siding and permits the Carrier's use of the siding for specified limited purposes. The leased siding is principally for the use of the shipper. The lease, however, states specifically:

"Industry [lessee], at Industry's expense, shall maintain such track."

The Organization asserts the following: It was the Carrier, not the lessee, who contracted for the repair work; the purpose of the work was to "clean up" the siding, which was to be used to store special cars in connection with a visit from the Carrier President; and the lease was "short term . . . for only a minimal amount of money for the sole benefit of the Carrier and to abrogate our current Agreements."

The Carrier, in contrast, asserts: The lessee, not the Carrier, undertook to have the track maintenance work assigned to a contractor; there was no connection between the President's visit and the repair work, and no special cars were involved; the repairs were made more than two years after the commencement of the lease, so that it can hardly be said that the lease was simply for the purpose of making the repairs.

If the record provided convincing evidence of the Organization's assertions, the Organization may well have demonstrated Rule violation both in the failure to give

notice and the assignment of the work to a contractor. The difficulty is that no proof is so demonstrated.

The record provided the Board does not include any documentation as to the arrangements for the contractor's work, so the Board cannot resolve for certain as to whether the lessee or the Carrier contracted for the work.

There is no doubt as to the Carrier's right, unfettered by any Agreement Rule cited here, to lease its property. When this occurs, it is equally well established that work on such leased property does not fall under the Agreement terms when performed by and on behalf of the lessee. There is no indication here that the lease was for other than the legitimate purpose of providing a siding to the lessee in order to receive and transport freight by way of the Carrier's track. The lease agreement specifically assigns track maintenance to the lessee. Finally, as noted above, the Organization offers no documentary support for its assertion that the Carrier, rather than the lessee, undertook the contracting.

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 13th day of November 1997.