

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32878  
Docket No. MW-32203  
98-3-94-3-634**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Baltimore and  
( Ohio 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 (Harold Jefferies, Inc.) to perform Maintenance of Way work (removed timbers, tamped ties, spiked ties, filled cribs with ballast, graded and blacktopped crossings) between Mile Post 81.8 and Mile Post 114, Cumberland Subdivision on September 1, 2, 3, 7, 8, 9, 10, 13, 14, 15, 16 and 17, 1993 [System File B-TC-9020/12(94-139) BOR].**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intent to contract out the work performed by the outside forces as required by Addendum 13.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. M. A. Carr, J. D. Gaither, F. T. Asbury and L. R. Trail shall each be compensated for ninety-six (96) hours' pay at the trackman's straight time rate and twenty-one and one-half (21.5) hours' pay at the trackman's time and one-half rate and Claimant R. L. Nine shall be compensated for ninety-six (96) hours' pay at the machine operator's straight time rate and twenty-one and one-half (21.5) hours' pay at the machine operator's time and one-half rate.”**

**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 claim challenges the propriety of the notice given, and the failure to hold a conference, concerning paving and other track-related work performed by an outside contractor on various dates in September 1993.

The record on the property reveals that by letter dated March 25, 1993, Carrier served notice of its intent to contract the paving of 30 grade crossings on the Metropolitan and Cumberland Subdivision, between Mile Post 9.7 and 138.9 during the time period April 12 - November 30, 1993. That notice states, in pertinent part:

“This work involved will be performed as it has been in the past, in conjunction with our track renewal program for 1993. Track forces will perform all trackwork related to this paving.”

By letter dated April 1, 1993, the Organization objected to this contracting, asserting that its employees could, and have, performed blacktopping in the past, and requested a telephone conference to discuss the matter. It appears that no conference was held in this matter.

The instant claim, dated November 1, 1993, protests the fact that the contractor not only did the paving, but also the track-related work of upgrading the crossing, removing timbers, tamping and spiking ties and filling the cribs with ballast. The claim was denied by Carrier on the basis that Claimant Asbury was working on an SPG gang

and was not furloughed until September 10, 1993, the other Claimants were working on the claim dates, and the employees have no exclusive right to this paving work.

In its February 1994 appeal, the Organization again reiterated the language of the notice indicating that only the paving would be contracted, and asserted that the contractor did the track-related work (including at overtime rates), which was traditionally performed by Carrier's employees. Carrier's denial repeated its previous assertions, and added that the Organization failed to explain the cited Rule violations.

The Organization contends that Carrier failed to give any notice of its intent to contract out the track-related work, and failed to respond to the Organization's request to conference the paving notice. The Organization asserts that Carrier did not dispute the facts it presented, nor proffer any defense to its contracting on the property. It argues that, under such circumstances, its requested monetary remedy is appropriate for all Claimants, (especially Asbury who was furloughed for part of the time) and has been upheld, citing Third Division Awards 32702, 32701, 32699, 32125, 31867, 31755, 28851, 27485, 19924, 19846, 19324, 19268, 14982, 14004 and 13349.

Carrier argues that it gave notice of its intent to contract out the work encompassed by this claim, a mixed practice has been established for performing paving work on this property, the work was of the magnitude that required contracting as there were no employees furloughed who could perform it, no Rule violations were cited or proven, and all Claimants were fully employed, negating the appropriateness of any monetary relief. Carrier relied upon Third Division Awards 32523, 31483, 30963, 30773, 30608, 30213, 30194, 29824, 29741, 29432, 29430, 29262, 29202, 26766, 21858, 21441, 20573, 16482, 16288, 14853, 14693.

It is clear from reviewing the on-property handling of this matter, that Carrier never challenged the Organization's assertion that the contractor performed track-related work over and above the paving, nor defended the contracting on the basis of the magnitude of the work involved. The Board is not permitted to consider arguments raised for the first time in a party's Submission, and is bound to decide the case based on the facts and arguments raised during the handling on the property. See Third Division Award 27614 and cases cited therein.

A careful review of the record convinces the Board that the notice given by Carrier in this case covered only the paving work, and that with respect to that aspect

of the work performed by the contractor, the Organization requested that a telephone conference be held. While the Organization argues in its Submission that Carrier failed to respond to this request, the Organization's on-property handling of this claim focuses on the other track-related work performed by the contractor and not covered by the notice and does not specify any attempts on its part to initiate or give a date for such a telephone conference. As in Third Division Award 31483, we are unable to find that the Organization sustained its burden of proving that it was Carrier who defaulted on its conference responsibility in this case.

With respect to the contractor's performance of the track-related work alleged and not rebutted herein, the record is clear that Carrier not only failed to give notice of its intent to use a contractor, but gave affirmative assurances in its March 25, 1993 notice that such work would be performed by its track forces. Such action prevented the Organization from specifically requesting a conference on this work, which has routinely been performed by employees. Cases on other Divisions of this Carrier establish that while there may be a mixed practice for performing paving work, employees routinely perform the track reconditioning work associated with it. See Third Division Awards 32523, 31876, 30608, 29824, 29432, 29430.

Accordingly, we conclude that Carrier violated Addendum 13 by failing to give the Organization prior notice of its intent to contract out track-related work performed by the contractor on the claim dates. While the record reveals that only Claimant Asbury was furloughed after September 3, 1993, under the circumstances of this case, we believe it appropriate to compensate all Claimants for the hours worked by the contractor in performing non-paving, track-related work on the claim dates, in accord with on-property Third Division Awards 32702, 32125 and 31755. This matter is remanded to the property for the parties to determine the number of hours spent by the contractor performing work other than paving on the claim dates. If Carrier's records do not permit the parties to ascertain this number, the claim is to be paid in its entirety.

### **AWARD**

**Claim sustained in accordance with the Findings.**

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**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 21st day of October 1998.**