

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33324
Docket No. MW-32263
99-3-95-3-69**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former
(Toledo Terminal 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 (Heritage Construction Company) to perform Bridge and Building Subdepartment work [removed air conditioners, removed and replaced thirty-seven (37) windows and repaired plaster] in the Presque Isle Dock Office Toledo, Ohio, beginning November 15 through 28, 1993 (System File C-TC-9810/12(94-249) TTR).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work or discuss the matter in conference in good faith prior to contracting out the work as required by Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding described in Part (1) above.**
- (3) As a consequence of the violations referred to in Parts (1) and /or (2) above, Foreman T. Agoston and Carpenters L. Dannenberger, P. Villarreal, D. Gurzynski and T. Hilding shall each be allowed pay, at their respective rates, for an equal proportionate share of the seven hundred fifty-two (752) man-hours expended by the outside forces in the performance of said work.”**

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.

Beginning on November 15, 1993 and continuing until completed November 28, 1993, the Carrier utilized the Heritage Construction Company to remove window air conditioners, to remove and replace windows, and to repair plaster around the windows. The Organization argues that this work belonged to CSXT employees. As Scope protected work, the Carrier was obligated to utilize the Claimants for the performance of the work, which by history and Agreement belonged to the Carrier's employees. Without Notice of Intent to contract out the work, the Carrier assigned the work to outsiders. The Organization maintains that the 752 hours expended by the contractor is due Claimants.

The Carrier maintains that it lacked the forces to perform the work. As it was mandatory that these windows be replaced on schedule and concurrent with ongoing remodeling, the contracting out was absolutely required. The Carrier argues that all Claimants were performing scheduled and necessary bridge maintenance. It further notes that there were no furloughed employees in the seniority district and the Claimants were not available to perform the work. The Carrier maintains there is no proof whatsoever that the outside contracted forces worked the hours alleged.

The Board studied the work and the record developed on the property. There is no dispute in this record that the work was Scope protected. The Claimants had initially been told they would perform the work. They had gone to the building, measured the windows and contacted the local provider for their manufacture. The language of Rule 41 is the same as Article IV of the May 17, 1968 National Agreement. We find nothing

in this record to support the Carrier's position. The facts are that the Carrier did not provide notice of its intent to contract out work that was Scope protected. Accordingly, the merits of the claim must be sustained.

There is dispute between the parties as to the availability of the Claimants, their right to compensation as they were fully employed and the burden of proof in showing that the outside contractor utilized 752 man hours. The Organization argues that the employees were available and that the hours were expended by outside forces. The Carrier argues that the Claimants were not available, fully under pay with no loss of compensation due to the Carrier's actions and that there is no proof of the asserted hours used by the outside forces.

The Board finds that in this instant case, the Claimants lost work opportunities and must be compensated. There is no evidence of record that the work could not have been rescheduled or a time found for the Claimants to have performed it. That is what would have been properly discussed if there had been notice. The Board would have the Claimants compensated for the hours expended by the outside contractor in performing Scope protected work. The Carrier is to utilize its records, or that of the outside contractor if it has none, to compensate Claimants to the extent that the Heritage Construction Company did work belonging to the Carrier's employees. In the absence of records, the claim that is sustained as presented. See Third Division Award 31619 and Interpretation No. 1 to that Award.

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 17th day of May 1999.