

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35413  
Docket No. MW-34696  
01-3-98-3-346**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**PARTIES TO DISPUTE:** ( **Brotherhood of Maintenance of Way Employes**  
( **CSX Transportation, Inc. (former Louisville and Nashville**  
( **Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned an outside contractor (Midway Construction) to perform ditching work at Mile Posts T-32.6 and T-33.8 on the LCL Subdivision on March 7, 1997 [System File 8(45) (97)/12(97-1558) LNR]**
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to give the General Chairman 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, furloughed Machine Operators J.G. Wiglesworth and L.B. Hansel shall each be allowed eight (8) hours’ pay at their Rank No. 3 straight time rate and two (2) hours’ pay at the Rank No. 3 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.**

**The Claimants hold seniority as Rank No. 3 Machine Operators in the Track Subdepartment on the LCL Subdivision. At the time this issue arose, both Claimants were furloughed.**

**During the first week in March 1997, there was flooding on several of the Carrier's Subdivisions in both Tennessee and Kentucky. Pertinent to this dispute, a private contractor, Midway Construction, was used to remove rock, mud and trees from portions of track at the Pendleton, Kentucky.**

**On April 15, 1997, the Organization submitted a claim alleging the Carrier violated Rules 1, 2, 3, 4, 5, 6, 9 and 30, the May 17, 1968 National Agreement and the December 11, 1981 Letter of Agreement. Specifically, the Organization contended that the work that Midway performed was work within the Scope of the Agreement and, therefore, accrued to the Claimants. The Organization further asserted that the Carrier failed to provide any advance notice to the General Chairman in connection with the March 7, 1997 assignment of Midway Construction to perform work at Mile Posts T-32.6 and T-33.8 to the "exclusion" of the furloughed Claimants.**

**The Carrier denied the claim, maintaining that because of the flooding an "emergency" existed requiring "immediate attention." According to the Carrier, no fewer than nine trains were held and "operations were halted" until the mainline was restored. The Carrier attached copies of reports from its Operations Center for March 7, 1997, the date the work in dispute was performed.**

**In its July 2, 1997 response to the Carrier's denial, the Organization contended that:**

**"Once again the Carrier is trying to hide their total disregard for the working Agreement by using an emergency argument which is totally irrelevant in this case since the location of the violation was not affected by the flood.**

Enclosed you will find copies of signed statements of witnesses along with a copy of a picture of the work location that without question shows that there was absolutely no mud, rocks or trees that needed to be removed to restore train traffic at the location of this violation and clearly there was no emergency condition.

\* \* \*

This was an obvious loss of work opportunity for the claimants.

Even if this had been an emergency, which in this case it was obviously not, there are several equipment rental companies such as Danelle, Padgent and Carlisle where the Carrier could have rented the above mentioned equipment and assigned the operation thereof to the Claimants.”

As noted above, the Organization disputed the Carrier’s emergency defense and maintained that the furloughed Claimants should have been recalled to perform the work. In support of that allegation, the Organization submitted a photograph of the “work location” in dispute, in addition to signed statements from employees each of whom alleged that there was “absolutely no mud, rocks or trees that needed to be removed to restore train traffic at the location of the violation.”

In its final response, the Carrier asserted that the statements and photographs enclosed in the Organization’s correspondence were of “no probative value,” and there was “no correlation” between the pictures and the location where the work at issue had been performed. The Carrier further noted that there was no “ownership identification” of the machinery shown in the photo, nor was there confirmation that the photo was taken on the date or at the location specified in the claim.

A review of the record evidence supports the Carrier’s position. Although the Organization asserts that there was no “emergency” damage to the area in which Midway Construction performed work, the undated photograph and employee statements are unsubstantiated and, therefore, of no probative value. During handling on the property, the Carrier questioned the veracity of both the photo and the statements, e.g., dates and exact locations. Nevertheless, the Organization failed to produce said documentation.

Conversely, the reports that the Carrier provided from the Operations Center were both date and location specific. Those reports, in conjunction with the evidence presented on this record, indicate that the severe flooding on the LCL Subdivision created true emergency conditions. Clearly, the work that Midway Construction performed was not planned in advance, nor was there enough time to recall the furloughed Claimants in a timely manner. Therefore, the claim must be denied.

**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 April, 2001.**