

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35762
Docket No. MW-33734
01-3-97-3-192**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (forming and pouring concrete pads) along the Engine Pit Track at Frankford Junction, Philadelphia, Pennsylvania on August 28, 1995 and continuing (System Docket MW-4153).**
- (2) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (installing ties, changing bolts and joint bars and cutting weeds) on the Engine Pit Track at Frankford Junction, Philadelphia, Pennsylvania on August 28, 1995 and continuing (System Docket MW-4154).**
- (3) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out the work referred to in Parts (1) and (2) above.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Messrs. W. W. Trexler, G. A. Golden, J. L. Royer, M. D. Tallarida and E. W. Volbrig shall each be allowed eight (8) hours' pay at their respective rates of pay for each day the outside forces performed the work described in Part (1) above beginning August 28, 1995 and continuing until the violation ceased.**

- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Messrs. K. A. Wunderlich, D. A. Sabo, M. J. McCarthy, W. A. Cropper, G. F. Warren and C. E. Miller shall each be allowed eight (8) hours' pay at their respective rates of pay for each day the outside forces performed the work described in Part (2) above beginning August 28, 1995 and continuing until the violation ceased."

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 record in this case indicates the Carrier had leased .74 acres and 390 feet of track at Frankfort Junction to Tanner Industries. The lessee apparently performed or contracted with a third party to have it perform certain work that the Organization argues was reserved to employees under the scope of the Agreement. There is no indication that any of this work was performed on property not subject to the leasehold, or was performed for the benefit of the Carrier.

The Organization objects to the Carrier's citation of the lease, arguing it was not furnished with a copy of the lease. The record shows, however, that the Organization was permitted to examine the lease in the Carrier's office. We do not agree that the Carrier was obligated to give the Organization a copy of the lease, as long as it had the opportunity to inspect it to determine the limits of the leasehold and other items that might be relevant to the Organization's objective of enforcement of the Agreement. In Third Division Award 29515, involving these parties, the Board held:

“This is a contracting out case which turns on the issue of whether or not the tracks on which the work was performed by the contractor was under the control of Carrier or leased to another enterprise at the time that the disputed work was performed. Carrier, from the outset, maintained that the track was leased, and while it refused to furnish the Organization with a copy of the lease because of confidentiality considerations it did make a copy available for inspection by the Organization. The Organization did not avail itself of the inspection opportunity.

The failure of the Organization to take advantage of the opportunity to inspect the lease flaws its argument that the trackage on which the contractor worked was under the control of Carrier. Accordingly, in these circumstances the Board must accept Carrier’s position as correct.”

Based upon the facts of record, the Board does not find that the Agreement was 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 24th day of October, 2001.