

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36014
Docket No. MW-33120
02-3-96-3-544

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 or otherwise allowed outside forces (Weirton Steel) to perform Maintenance of Way work (repair track damaged by a derailment) in Weirton, West Virginia on October 4 and 5, 1994 (System Docket MW-3764).
2. As a consequence of the aforesaid violation, Messrs. H. Hoberek, K. Miller, D. McGraw, J. Maldonado, Jr., L. Nonemaker, D. Goddard, M. Hamilton, J. Hamilton, H. O’Hara, R. Carroll and B. Rodgers shall each be allowed thirty-two (32) hours’ pay at their respective time and one-half rates and receive proper credit for benefit and vacation purposes.”

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.

Employees of Weirton Steel caused a derailment damaging the Carrier's track. Accepting responsibility for the damage, Weirton had its employees perform repairs to the Carrier's track. The Carrier asserts that it did not give prior permission to Weirton to make those repairs and did not have prior knowledge of those repairs.

Third Division Award 29509 sustained a claim in a similar dispute between the parties:

"Claimants are seeking four days pay each, account employees of a mining concern making repairs on tracks servicing the mine. . . . Carrier argues that it had no knowledge that employees of the mining company undertook the repairs and that it did not authorize the work. . . .

This record leaves little doubt that the work completed by the employees of the mining company on the dates in the Claim was work which would normally have been performed by Claimants. Carrier is not privileged to have strangers to the Agreement, in this case non-employees, enter upon its tracks and perform required repairs and then seek to be excused from payment of resulting claims on the basis that the work was unauthorized and/or that it was unaware that it was being completed. Such conduct would erode a basic premise that such work is reserved to employees within the Craft and could effectively nullify Agreement viability. In situations where Carrier is desirous of having outsiders perform repairs on its tracks it must resort to the procedures agreed upon for contracting out such work. A failure to do so cannot be excused on the basis that it was unauthorized and unknown."

That Award is not palpably in error and shall govern this dispute.

With respect to the remedy, the Claimants lost potential work/overtime opportunities due to the performance of the work by Weirton's employees. The Claimants shall be made whole at the appropriate contract rate for those lost opportunities. There is a dispute concerning the number of hours the Claimants should be entitled to receive under this Award. The Claimants shall only be compensated for the number of hours Weirton's employees took to perform the work on the Carrier's

tracks. The Claimants' entitlement to overtime, if any, shall be based on their particular work records for the pay period in which that work was performed and the specific Agreement language governing overtime. The matter is remanded to the parties to determine those amounts. The Claimants shall be compensated accordingly.

AWARD

Claim sustained in accordance with the Findings.

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 May, 2002.