Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31084
Docket No. MW-30857
95-3-92-3-694

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Chesapeake
( and Ohio Railway Company)

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 and Structures Department work (operating a shoulder cleaner, a ballast regulator and a double broom) between Mile Post 80 near Scottsville, Virginia and Mile Post 146 near Lynchburg, Virginia from April 15 through May 13, 1991 [System File C-TC-7481/12(91-886) COS].

(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 said work as required by the October 24, 1957 Letter of Agreement (Appendix 'B').

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Equipment Operators D. Brown, B. S. Whanger, and G. A. Broughman shall each be allowed one hundred twenty-eight (128) hours' pay [eight (8) hours' pay for each day worked by the outside forces] at the Class A Operator's rate and an additional sixteen (16) days towards their 1991 vacation qualifying time."

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 waived right of appearance at hearing thereon.

Claimants are employed by the Carrier as Machine Operators and on the date in question were allegedly on furlough.

During mid-April and the beginning of May 1991, the Carrier established Gang 6G18 to assist an outside contractor (Kershaw) with the Carrier's ballast cleaning program. The work involved operating a shoulder ballast cleaner, a ballast regulator, and a double broom behind the ballast regulator. The contractor's employees operated the machines needed to perform the work. The Organization took exception to the use of an outside contractor and filed a claim on behalf of the Claimants.

The Organization contended that this work has customarily and traditionally been performed by the Carrier's employees. It argued that the Claimants were on furlough at the time of the disputed work and available for the work. It further argued that if the Carrier did not have the equipment needed to perform said work, the Carrier could have rented the equipment and called the Claimants back into service to operate the machines that they were employed to operate.

The Carrier denied the claim explaining that Gang 6G18 was established by bulletin to work with the contractor's equipment in performing the work in question and further contending that it did not have the required equipment available to do the work.

This Board reviewed the record and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it assigned outside forces to operate a ballast cleaner, a ballast regulator and a double broom during the time that Carrier employees were on furlough. The record reveals that the Carrier went through a major ballast cleaning program in 1991 and it simply did not have sufficient equipment to perform the work. The Organization acknowledged that the Carrier does not own a ballast cleaner and merely states that the Carrier should have rented one and allowed Carrier forces to operate it.

Although Rule 83 requires that maintenance work that has customarily been performed by employees will not be let out to contract under most instances, the Carrier is not precluded from letting a contract out for the purpose of performing maintenance work which requires equipment which it does not have. The Carrier presented evidence that it did not have sufficient available equipment to perform the disputed work in a timely fashion.

With respect to the Organization's contention that the Carrier failed to give the General Chairman advance **written** notice of its intent to contract out the disputed work, our review of the October 24, 1957 Letter of Agreement (Appendix B) reveals no such obligation. Rather, the Letter of Agreement memorialized the intentions of the parties to discuss the contracting out of certain types of work, but not the type of work involved herein because special equipment was necessary. In any event, none of the cited Agreement provisions contains a penalty clause supporting payment to the Claimants.

It is fundamental that the Organization bears the burden of proof in cases of this kind. Since the Organization has not met that burden, 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 1st day of September 1995.