

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31755
Docket No. MW-30697
96-3-92-3-455**

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (Former
(Baltimore and Ohio 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 (WOCAP Construction Company) to perform track cribbing in the Cumberland Yard (No. 36 Track, Tabbie Track, Ready Track and Outbound Track) Cumberland, Maryland, on September 20, 21, 24, 25, 26, 27, 28, October 1, 2, 3, 4 and 5, 1990 [System File B-TC-7445/12(91-576) BOR].**
- (2) The Agreement was further violated when Carrier failed to give the General Chairman advance written notice of its intent to contract out the work.**
- (3) As a consequence of the violations referred to in Part (1) and/or Part (2) above, Foreman J. Alkire shall receive pay for ninety-six (96) hours at his respective straight-time rate of pay."**

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 Claimant is assigned as a Foreman in the Track Subdepartment. On the claim dates in question he was fully employed by the Carrier. The Carrier states that the Division Engineer has already compensated R. L. Whisner for the contractual violations enumerated in this claim. Therefore, the Carrier argues, it should not be required to pay twice for the same contractual violation.

The Organization, on the other hand, contends that the Carrier's alleged payment to Whisner was never argued on the property, nor has the Carrier stated the basis for its decision to allegedly pay Whisner. In short, the Organization argues that there is no basis on the record to indicate that any employee has been properly compensated for the Carrier's admitted contract violation in this instance.

The Carrier also argues that despite its admission of a contract violation in this matter, that the Claimant was fully employed on all claim dates and therefore, was not damaged by the Carrier's admitted contract violation.

The Organization rebuts by arguing that the Third Division has established that "fully employed" claimants are entitled to damages based upon the Carrier's violations of the Scope Rule by impermissibly contracting out work. The Organization, in its argument correctly states the policy of this Division that "fully employed" claimants can be, in certain circumstances, compensated when the Carrier impermissibly contracts out Scope Rule work.

The damage doctrine penalizing carriers for impermissibly contracting out scope rule work was developed to maintain the integrity of the scope rules when an organization can demonstrate that a particular carrier is a repeated violator. In other words, the doctrine has an equitable base. This means also, that given the equitable underpinnings of the penalty doctrine, that the Carrier should not be required to pay twice for the same claim violation.

Consequently, we will sustain this claim based upon the Carrier's admissions that it violated the Agreement on the claim dates, but only to the extent that it can be established that no other employee was compensated for the Carrier's admitted contracting out violations.

Consequently, we will remand this matter to the property for the parties to determine whether Whisner was actually paid by the Carrier for violating the parties' contracting out provisions on the dates claimed. However, if Whisner was not compensated for the claim dates, we shall order that the Claimant be compensated in accordance with Paragraph (3) of the Statement of Claim.

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) 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 24th day of October 1996.