

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36176  
Docket No. MW-35739  
02-3-99-3-715**

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

**PARTIES TO DISPUTE:** ( **(Brotherhood of Maintenance of Way Employes**  
( **CSX Transportation, Inc. (former Clinchfield**  
( **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 (D&E Contractors) to dismantle and rebuild track between Mile Posts 107.8 and 108 in the vicinity of Gray, Tennessee beginning June 8, 1998 through June 26, 1998 [Carrier’s File 12 (98-1466) CLR].**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 48 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants H. C. Hampton, T. L. Peterson, R. A. Gates, S. E. Adkins, J. B. Rogers, C. Edwards, R. E. White and B. R. Garland shall now each be compensated for one hundred twenty (120) hours’ pay at their applicable rates 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.

By letter dated July 23, 1998 the Organization alleged that the Carrier had contracted out scope protected work in violation of the Agreement. It maintained that the contractor utilized the same equipment that the Claimants utilized and performed work, such as spacing cross ties, placing tie plates, laying rail, tamping and other work to dismantle and rebuild mainline track. As the work was historically and customarily performed by the employees, its contracting out was a clear Scope Rule violation. As the work was performed on Carrier property without required notice to the Organization, the Claimants suffered a clear loss of work.

The burden of proof clearly lies with the Organization. New issues raised for the first time in its Submission and not presented on the property were not considered by the Board. In this claim, the Carrier notified the Organization that all the work herein disputed was performed by the State of Tennessee. The on-property record substantially proves that the construction was at the direction and control of the State which was building a new underpass. The Carrier clearly asserted that all the work was contracted out by the State of Tennessee and for the benefit of the State, with no gain or loss in terms of trackage by the Carrier. Most importantly, the Board notes that the Carrier not only denied any contract between itself and D&E Contractors, but in its December 15, 1998 declination stated:

“Attached is a copy of a letter from the State of Tennessee to CSXT, proving that the work was contracted by the State. A copy of the contract will be made available for your inspection during conference, if you so

desire. All of the work involved was contracted out by the State for the benefit of the State.”

The Board must find that the Organization failed to meet its burden of proof. We find no evidence presented, nor refutation by the Organization to overcome the Carrier's position. The Board has long held that the Carrier is not liable for work performed on its property over which it can be shown that it has no direct control and for which it is not contracting out to evade its Agreement. Because there is no showing by the Organization that the Carrier did the contracting out, or was involved therein to evade its responsibilities, the burden has not been met. Because the Carrier has shown it did not initiate or control the disputed work, it had no notification responsibilities. This is consistent with Awards on this point (Third Division Award Nos. 35634, 33936, 33210, 32354, 32319, 32316, 32308, 32274, 31926, 31663, 31234, 26816, 24078, 23422, 19957, 17002, 15491 and 13857 among numerous others).

**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 20th day of August 2002.