

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31762
Docket No. MW-30720
96-3-92-3-503**

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
(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 (load concrete ties onto flat cars) at the Clifton Forge Yard, Clifton Forge, Virginia, on March 23, 1991 [System File C-TC-6364/12(91-734) COS].**
- (2) The Agreement was further violated when the Carrier failed to discuss the matter with the General Chairman 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 Foreman R. L. Tucker, Equipment Operator G. Broughman and Trackman D. R. Nicely, J. F. Lacks and E. M. Oyler shall each be allowed ten hours pay at their respective straight-time rates.”**

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.

On March 23, 1991, a contractor loaded concrete cross-ties onto flat cars at the Clifton Forge Yard, Clifton Forge, Virginia. The crew worked between 7:00 A.M. and completed their tasks around 5:00 P.M. As a result of the Carrier's contracting out of supposed bargaining unit work, the Organization filed a claim on April 12, 1991.

The Carrier's declination was dated May 28, 1991 and suggested that the work of loading concrete cross-ties needed to be done in a timely manner and required the use of special tie loading equipment that was only available through the contractor.

The Organization responded that the Carrier failed to give the proper contracting notification and failed to meet and confer prior to contracting out the work. The Organization also suggested that the Carrier possessed sufficient equipment to perform the tasks and, if not, the necessary equipment could have been leased.

The Organization first contends, in support of its claim, that the claim should be allowed since the Carrier failed to give the proper subcontracting notification. Furthermore, the Carrier failed to meet and confer as required by the October 24, 1957 Memorandum of Agreement and by the December 11, 1981 side letter between Charles I. Hopkins, Chairman of the National Railway Labor Conference and O. M. Berge, then President of the Brotherhood of Maintenance of Way Employees.

In response, the Carrier argues that the work in question was outside of the scope of the Agreement. Moreover, even if it was not, the Organization received adequate notice of the pendency of the Carrier's tie renewal program.

Based upon the evidence as presented, we find that the Agreement was violated when the Carrier failed to adequately notify the General Chairman in advance of contracting the loading of the concrete ties on March 23, 1991.

We find the work of loading concrete ties to arguably be within the jurisdiction of the Scope Rule. Also, the type of machinery used by the Carrier's contractor arguably is covered by the Rule and the fact remains that the Carrier's employees have performed this type of work between November 1989 and January 1990. Moreover, the Third Division has held that the loading of concrete cross-ties is maintenance of way Scope Rule work (*Third Division Award 29823*). Finally, even if the Carrier is correct that the work is outside the scope of the Agreement, the work is closely enough aligned to require the Carrier to give notice to the General Chairman and to meet and confer prior to performing what is arguably Scope Rule work.

Consequently, since we have determined that a violation occurred, we must next determine the appropriate remedy. We note for the record that this is not the first time that this particular Carrier failed to comply with the prenotification requirement. (*See Third Division Awards 24399, 26436, 26791, and 28486*).

Given the previous past violations of this Carrier and this Division's findings that contracting out violations may qualify for penalty payments without proof of actual damages if the Organization can establish repeated violations, which it has done here, we will sustain this claim as presented.

AWARD

Claim sustained.

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 24th day of October 1996.