

SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 8  
Case No. 8

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees  
  
and

CSX Transportation, Inc. (formerly 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 (Ashland Fab.) to perform Bridge and Structures Group work (paint the holding tanks, pipes, cat walks, handrails and dikes) at Peach Creek, West Virginia on June 10, 11, 12 July 1 and 13, 1994 [System File C-TC-5837/12(94-771) COS].
2. The Agreement was violated when the Carrier assigned outside forces to perform Bridge and Structures Group work (paint the inside of the CSX Bunk House) at Danville, West Virginia on June 24, 25, July 2 and 8, 1994 (System File C-TC-5838/12(94-772)].
3. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out the work referred to in Parts (1) and (2) above, 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').
4. As a consequence of the violations referred to in Parts (1) and/or (3) above, Messrs. A. Adkins, C. Lambert and C. Rakes shall each be compensated, at their respective rates of pay, for an equal proportionate share of the two hundred thirty-one (231) man-hours expended by the outside forces in the performance of the work in question.

5. As a consequence of the violations referred to in Parts (2) and/or (3) above, Messrs. A. Adkins, C. Lambert C. Rakes and C. Hanshew shall each be compensated, at their respective rates of pay, for an equal proportionate share of the eighty-eight (88) man-hours expended by the outside forces in the performance of the work in question.

#### FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and the Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as amended;; and

2. That the Board has jurisdiction over this dispute.

#### OPINION OF THE BOARD:

These distinct disputes involve the performance of certain painting work by contractors that allegedly caused bargaining unit members to lose work opportunities within the exclusive scope of their classifications.

With respect to the claims arising as a result of the use of outside forces to perform certain painting at Peach Creek, West Virginia, the record indicates that the Bridge and Building Subdepartment forces maintain water supply facilities and also perform painting work on the property. Rule 83 restricts the Carrier's use of outside forces provided that the Carrier's employees have performed the relevant work in the past and are available to perform such work at the relevant time. The Carrier improperly failed to use members of the bargaining unit to perform the disputed work because such qualified employees had performed painting work in the past and were available to perform such work at the relevant time. As the dispute involves employees of the Carrier versus outside forces, the exclusivity issue advanced by the Carrier lacks relevance to the present dispute because the lack of exclusivity argument raised by the Carrier concerns the performance of the disputed work by other employees of the Carrier rather than outside forces. Thus the present dispute materially differs from the dispute between different groups of employees on the property as occurred in the Third Division Award, Number 25090 (Dennis, Ref.). Furthermore, the Letter Agreement between the parties on December 11, 1981 established that the Carrier had an affirmative obligation to make a good faith effort to avoid the use of outside forces. As discussed below, the failure of the Carrier to provide advance notice to the Organization about the possible use of outside forces undermined the Carrier's ability to make the required good faith effort to avoid the use of outside forces.

In addition, the record indicates that the Carrier must provide advance notice to the Organization of an intent to use outside forces. Such advance notice provides an opportunity for the parties to engage in good faith discussions to address their respective concerns.

The Organization proved that the Carrier failed to provide the appropriate advance notice to the Organization about the painting at Peach Creek. The agreement between the parties that mandates such advance notice relates to a critical aspect of the relationship between the parties by creating an opportunity for the parties to address their needs in a structured context as a means to avoid problems without resorting to the grievance procedure. The Third Division, in Award Number 19899 (Sickles, Ref.), provided useful analysis of the appropriate remedy for a violation of the advance notice requirement:

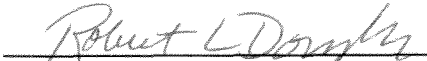
We favor the rationale of the Fourth Circuit . . . . [T]he Board holds that a claim for damages may be sustained for a violation of Article IV of the 1968 National Agreement even though employees in question were fully employed at all relevant times. This result does not compel Carrier to agree to anything or to do anything other than what it previously agreed to i.e. give notice and bargain in good faith. While it is urged by Carrier that damages may be speculative, it is Carrier itself, by its failure to comply with its agreement, who places the matter in that posture - not the employees.

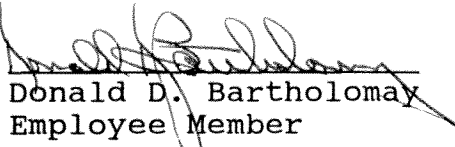
In the present case record reflects that the outside forces expended 231 hours of work performing the relevant painting and that such activities precluded the appropriate members of the bargaining unit from having an opportunity to perform such work. As a result, the employees covered by the grievance shall receive an equal proportionate share of the 231 hours at their respective rates of pay.


With respect to the claims arising as a result of the use of outside forces to perform certain painting at Danville, West Virginia, the record indicates that an outside company managed the bunk house facility. Under these circumstances and in the context of the specific facts set forth in the record concerning interior walls that became water damaged, the management company had a right to have the outside forces perform the routine maintenance at the bunk house. Such routine maintenance included the type of painting that led to the instant dispute. As a consequence, the Carrier did not act improperly by permitting such painting to occur and by failing to provide any advance notice to the Organization about the painting. The record fails to contain sufficient credible evidence to negate the right of the management company to perform such routine painting.

AWARD:

The Claim is sustained in accordance with the Opinion of the Board.

  
Robert L. Douglas  
Chairman and Neutral Member

  
Donald D. Bartholomay  
Employee Member

  
Patricia A. Madden  
Carrier Member

Dated: 12/3/98