

SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 83
Case No. 83

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

CSX Transportation, Inc. (Former Chesapeake & 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 (Downey Construction) to perform Maintenance of Way and Structures Department work in connection with the removal of old crossties from the river bank and loading same into gondola cars in the Clifton Forge Yard beginning April 24, 1995 and continuing [System File **C-TC-6053) /12(95-0911274) COS**].

2. As a consequence of the aforesaid violation, **Trackmen** C. Stewart, D. Stinespring, W. **McKnight**, C. Waldren and L. Holloway shall each be allowed eight (8) hours' pay at the trackman's straight time rate and three (3) hours' pay at the trackman's time and one-half rate for each day worked by the outside forces beginning April 24, 1995 and continuing until the violation ceases. The number of days compensated shall be counted towards Claimants' vacation and retirement benefits.

FINDINGS:

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

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

2. That the Board has jurisdiction over this dispute.

OPINION OF THE BOARD:

The record indicates that the Waste Management Regional Office of the Department of Environmental Quality of the Commonwealth of Virginia conducted an investigation of certain property of the Carrier on January 13, 1994. The investigation occurred as a result of a complaint about the use of the Carrier's property. The investigation found, in pertinent part, that:

the property is being used to improperly dispose of solid waste including items such as: white goods, shingles, scrap metal, gutter material, water heaters, and railroad ties. In addition, hundreds of railroad ties have been dumped over the bank on the Jackson River.

The Department considers this site to be an unpermitted solid waste disposal facility as per Part IV of the Virginia Solid Waste Management Regulations (VSWMR), VR 672-220-10. All wastes disposed of on site must be removed and properly disposed of at a solid waste management facility holding a permit from **the Director** of the Department of Environmental Quality, or the site must be closed in accordance with Part IV of the VSWMR (VR 672-20-10).

The penalties [sic] for operating an unpermitted solid waste facility can be severe. In addition to requiring removal of the waste material or site closure in accordance with the regulations, state law authorizes civil penalties of up to \$25,000 each day for each violation (Virginia Code **§10.1-1455**).

It is undisputed that outside forces performed the disputed removal and disposal of railroad ties that rolled down the Carrier's embankment into the Jackson River between the Hump Yard Bridge and the Selma Yard Bridge at Clifton Forge, Virginia.

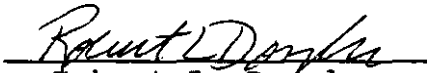
The record contains credible evidence that special government regulatory requirements existed for the disposal of the referenced railroad ties, which constituted industrial waste. As a result, the disputed work of removing the industrial waste--in the context of a state government environmental investigation, a finding that the Carrier had a responsibility for creating an

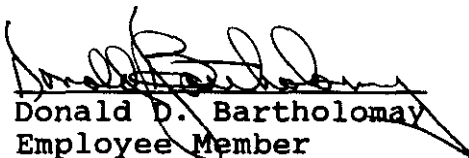
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"unpermitted solid waste disposal facility," and the possible imposition of daily fines of \$25,000 --fails to fall within the scope of the customary and traditional maintenance work performed by the members of the bargaining unit. In the absence of any credible evidence that the members of the bargaining unit had performed such specific environmental cleanup work in the past during the **pendency** of a formal government environmental investigation, the Organization failed to meet its burden of proof under the precise circumstances of the present case.

AWARD:

The Claim is denied.


Robert L. Douglas
Chairman and Neutral Member


Donald D. Bartholomay
Employee Member


Mark D. Selbert
Carrier Member

Dated: 5/14/01