

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Atlanta and West Point Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without a conference having been held between the General Superintendent-Chief Engineer and the General Chairman as required by Rule 2, it assigned and/or permitted outside forces to perform track repair work on Track Nos. 19, 20, 21, 22, 23 and 25 in Harrisonville Yard at Augusta, Georgia beginning January 13, 1986 [System File 37-AWP-GA-86-12/12-2(86-251)].

(2) Because of the aforesaid violation, the claimants named below who hold seniority in the Track Subdepartment and who are assigned to Section Forces 5F41 and 5F42 shall each be allowed pay at their respective rates for an equal proportionate share of the eight thousand four hundred (8400) man-hours expended by the outside forces in performing the work referred to in Part (1) hereof.

Claimants - Section Force 5F41 - Augusta, Ga.

Ted Holts, Jr.	Id. 196159 Foreman
R. L. Grissom	Id. 196180 Foreman
W. J. Jennings	Id. 196182 Trackman
B. C. Gilbert	Id. 175059 Trackman
C. Miller, Jr.	Id. 177794 Trackman

Claimants - Section Force 5F42 - Camak, Ga.

R. C. Smith	Id. 196190 Foreman
W. Hannah	Id. 196151 Trackman
R. Moss	Id. 196176 Trackman
B. W. Branyan	Id. 196174 Trackman
W. Cummings, Jr.	Id. 196208 Trackman"

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 employees 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 waived right of appearance at hearing thereon.

The dispute in this matter centers around the allegations that the Carrier used an outside contractor, Midway Construction Company, to perform track repair work on Track Numbers 19, 20, 21, 22, 23 and 25 located in Harrisonville Yard, Augusta, Georgia, without proper notification to the Organization as required by Rule 2. The Carrier responds asserting that as a result of new track construction and additions made at Harrisonville Yard allowing the Carrier to move its switching and mechanical operations, the tracks referred to by the Organization became obsolete and plans were made to abandon those tracks which led to a Lease Agreement between the Carrier and Archer Daniels Midland on October 14, 1985, whereby ADM took over the tracks. According to the Carrier, ADM controlled the tracks under the Lease and the work in dispute in this matter was contracted by ADM and not the Carrier.

In denying the Claim, the Carrier stated by letter dated May 8, 1986, that "since the industry [ADM] has sole control of the tracks and since the tracks are not now included in the Railroad's control, the Railroad cannot give the work to its employees." In its letter of June 11, 1986, the Organization took the position that notwithstanding the existence of the Lease with ADM, "the Carrier retained ownership and continues to benefit from the use of these tracks and, therefore, it is our position that all maintenance work thereon is reserved by Agreement Rules to Carrier Maintenance of Way Employees." In its declination of January 20, 1987, the Carrier described its investigation which "included a copy of Division Manager G. M. McNeill's May 8, 1986 response to your claim, as well as a copy of the lease agreement referred to by Mr. McNeill." By letter dated July 28, 1987, the Organization made the following request:

"In your letter of declination dated January 20, 1987, you refer to the lease agreement between the Carrier and the Archer Daniels Midland Company. When this claim was discussed in claims conference on August 12, 1986, that lease agreement was mentioned, however, we were not furnished a copy.

By way of this letter I am respectfully requesting that you furnish me with a copy of that lease agreement as soon as possible."

Notwithstanding the Organization's request for production of the Lease and further notwithstanding the fact that in denying the Claim the Carrier relied solely upon the terms of the Lease, a copy of the Lease was not produced on the property. However, a copy of the Lease was attached to the Carrier's Submission in this matter.

In Third Division Award 28229, the Carrier therein failed to give notice to the Organization concerning the contracting out of track maintenance work and in defense of the Claim relied upon the terms of a Lease Agreement that it did not previously produce to the Organization as requested. In sustaining the Claim, this Board held:

"Third Division Awards 20895 and 19623 are controlling. The Carrier's defense to the Claim was to rely upon the terms of the lease between it and Amtrak. However, although requested by the Organization, the Carrier failed to produce a copy of that lease. Under Awards 20895 and 19623, having failed to produce the lease in support of its defense, the Carrier's position cannot prevail."

This case is indistinguishable from Award 28229 and the Awards cited therein. In this case, as in Award 28229, after the Organization specifically made the request for production of the Lease and after having failed to produce the Lease upon which it relied, the Carrier cannot now rely upon the terms of that Lease as a defense to the Claim.

The fact that the Carrier attached the Lease to its Submission does not change the result. Submitting the Lease in such a fashion is a request for this Board to consider new material not handled on the property. It is well established that we are unable to now consider that material. See Award 20895, supra:

"It is noted that Carrier with its rebuttal argument before this Board submitted a copy of a lease agreement with the Elevator Company dated April 13, 1973. Such evidence cannot be considered since it is well established doctrine that new evidence which was not presented during the handling of the dispute on the property may not be considered by this Board."


Therefore, in light of the existing authority, we shall sustain the Claim. As a remedy, compensation shall be paid for wages in the amount of hours worked by the contractor during the relevant period. Such a remedy has been fashioned in similar cases. See Awards 28229, 20895, 19623, supra.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dexter - Executive Secretary

Dated at Chicago, Illinois, this 21st day of June 1990.