

The Third Division consisted of the regular members and in addition Referee Elliott Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.
(Formerly The Chesapeake and Ohio Railway Company)

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

(1) The Carrier violated the Agreement when, without a letter of notice or discussion as required by the October 24, 1957 Letter of Agreement, it assigned outside forces to remove the tool houses at KV Cabin (Kenova, West Virginia), Mile Post 513.6 (Cattlesburg, Kentucky) and Cliffside Cabin (Cattlesburg, Kentucky) beginning February 9, 1987 [System File C-TC-3735/12-83 (87-486)].

(2) As a consequence of the aforesaid violations, furloughed B&B Mechanics K. D. Brown, W. P. Steele, J. Slone, M. Dial, H. Cobb, S. Waggoner, P. Burns and J. C. Comer shall each be allowed pay at their respective rates for an equal proportionate share of the one hundred ninety-two (192) man-hours expended by the outside forces in performing the work referred to in Part (1) above."

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.

This dispute centers around the Carrier's assignment of outside forces to demolish and remove three (3) tool houses from its property beginning February 9, 1987. As a consequence, the Organization filed the instant Claim alleging that Carrier violated the Agreement when it permitted contractor's employees rather than B&B forces of its own to perform the disputed demolition and removal work.

Carrier contended that it sold the buildings in question on the condition that the buyers demolish and remove the structures from the Carrier's property. Carrier argues that once the structures were sold, they no longer belonged to the railroad and there is nothing in the Agreement which would give the Claimant's the contractual right to perform the work in question.

The Organization stated throughout the handling of this Claim, without denial, that the type of work involved in this dispute was embraced within its Agreement and had historically been performed by its forces. In fact, we note that this Board in Third Division Award 27112 has recently agreed that the Agreement reserves demolition work of the character involved here to the Carrier's forces. The real crux of this case, in our view, centers on the fact that Carrier defended largely on the assertion that the structures had been sold. We note that the Organization requested in its correspondence during the handling of this dispute on the property that some written evidence of the sale be furnished to clarify the issue in dispute. The Organization argues that Carrier did not furnish any evidence in support of its assertion, and that the failure to produce such written evidence was fatal to its defense. We agree.

Given the posture of the case, we can only conclude that while the Carrier asserted that the structures had been sold, no probative evidence to sustain that allegation was ever introduced. Once the Organization established, as a prima facie matter, a violation of the Agreement, the burden shifted to the Carrier to support its assertion that it lacked control over the structures because it no longer had ownership of them. Absent such evidence, we must find that the work should have been assigned to the furloughed employees, as the Organization claims.


As a final matter, it is noted that the Organization raised the issue of notice, or lack thereof, for the first time in its Statement of Claim before this Board. Since that assertion was never raised prior hereto, based on our review of the record, the Board is precluded from considering the matter ab initio on appeal. We therefore sustain the Claim based on our determination that the Agreement was violated when outside forces removed the structures in question, but make no findings as to whether the lack of notice violated the Agreement.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1991.