Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32702
Docket No. MW-31873
98-3-94-3-200

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

(CSX Transportation, Inc. (former Baltimore and
(Ohio Railroad Company)
PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM:

"Welder P. L. Whittington, ID# 206126 and Welder Helper P. M. Edmonds, ID# 521131 for 23 hours pay each at their respective straight time rate for claim period March 20 and 21, 1993, account Amtrak Welders performed welding at Camden Station, allegedly violating fifteen (15) rules of the former B&O Agreement, Book No. 3. (Organization files B-TC-8385 and B-TC-8386, Carrier files 12 (93-944) and 12 (93-945)."

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.

The consolidated claims in this case allege that on two dates in March 1993, the Carrier improperly contracted welding work at the site of Camden Station.

In Public Law Board No. 3561, Award 1765 rendered December 1, 1993, a claim concerning improper track removal by a contractor was denied because that record revealed that the Carrier once owned the property in issue in this case but, prior to 1990, sold that property to the State of Maryland for construction of the Camden Yard baseball stadium. According to that Board, the Carrier ". . . no longer owned the property and had no obligation to use Carrier employes on the track removal project."

The claims in this case arose in March 1993 - long after the sale of the property. At first blush, Public Law Board No. 3561, Award 1765 thus appears to resolve the matter requiring a denial of the claim.

But according to the Organization, during the handling of this claim, the Division Engineer stated that after construction of the stadium was completed, the State of Maryland turned over maintenance of the formerly owned property to the Carrier. During the handling on the property, the Organization repeatedly informed the Carrier of the specifics of that conversation:

> ". . . During discussion of these claims Division Engineer Martin Ramsey stated that the State of Maryland owns from Warner Street down to the stadium but admitted that CSX maintains it. He stated that once construction was completed on this project, the maintenance was turned over to CSX Railway by the |S|tate of Maryland."

The statement attributed to Division Engineer Ramsey was never denied or refuted by the Carrier on the property.

The Organization then made several requests for copies of any maintenance agreements. In response, the Director Employee Relations stated:

> ". . . Your request for some phantom maintenance agreement is merely an attempt on your part to belabor this matter. It is apparent that the facts in this case are being ignored. Your contention that Carrier's failure to provide a copy of maintenance agreement will serve as proof that CSXT was performing maintenance at the time this claim was filed. Furnishing a maintenance agreement would be relatively simple if we knew what maintenance agreement you are referring to."

With respect to the performance of maintenance work, the Director Employee Relations further stated:

> ". . . [M]aintenance of that portion of track made subject of this claim is not work which accrues to MofW employees, although MofW employees have been utilized to perform work on this portion of track in the past. Such participation is no different than work sometimes performed on private sidings and switches where work does not accrue to MofW employees but is performed by them."

In its Submission to the Board, the Carrier further states:

> "The Carrier admits that its employees do perform work on this trackage on an intermittent basis; however, this fact is not controlling. The significant fact is who controls the property. In this case it is the State of Maryland. Just because the State, on occasion, solicits CSXT to perform some track repairs and such work is done by BMWE employees, does not place such work under the scope of the Agreement between CSXT and the BMWE. On the contrary, the CSXT employees are as much 'contractors' as the personnel the Organization complains of in this claim."

We can only decide these cases based on the record developed by the parties on the property. What we have before us in this case is a record showing that on two specific dates welding work was performed by a contractor on property formerly owned by the Carrier but sold to the State of Maryland; the Carrier's admission that it is called upon by the State of Maryland to perform maintenance work on that property; a statement attributed to the Division Engineer that "once construction was completed on this project, the maintenance was turned over to CSX Railway by the [S]tate of Maryland"; a request by the Organization for production of any such maintenance agreement; and a response by the Carrier that "[f]urnishing a maintenance agreement would be relatively simple if we knew what maintenance agreement you are referring to."

Two showings - or the lack thereof - are critical in this case. First, the statement attributed to the Division Engineer ("once construction was completed on this project,

the maintenance was turned over to CSX Railway by the [S]tate of Maryland") was not denied or refuted by the Carrier on the property. If that the statement was not made, we would expect the Carrier to have strongly denied that the statement was made or submit a statement from the Division Engineer denying the same. The Carrier did not do so. Second, after the Organization made a request for a copy of any maintenance agreement between the State of Maryland and the Carrier, rather than denying the existence of such an agreement, the Carrier avoided response to the request by replying "Furnishing a maintenance agreement would be relatively simple if we knew what maintenance agreement you are referring to." One would expect that if no such agreement were in effect for the dates in question that the Carrier would have simply stated that fact rather than making a response requiring the Organization to be more specific.

The Organization's prima facie showing is made by the demonstration that the Carrier does perform maintenance work on the formerly owned property; the Division Engineer made the statement that "once construction was completed on this project, the maintenance was turned over to CSX Railway by the [S]tate of Maryland"; the Carrier avoided response to the Organization's request for a copy of any maintenance agreement; and on the dates in question, a contractor performed welding work on that property. The burden at that point shifted to the Carrier to deny or refute the statement attributed to the Division Engineer and to deny or assert that no maintenance agreement was in effect between the State of Maryland and the Carrier. In this case, the Carrier did neither. The Organization's prima facie case has not been rebutted.

The Carrier's reliance on Public Law Board No. 3561, Award 1765 does not change the result. As earlier discussed, that Award addressed the lack of a requirement to use covered employees on property the Carrier sold to the State of Maryland. This case concerns the Carrier's obligations to use its employees where the State has engaged the Carrier to perform maintenance work on that formerly owned property.

Our decision in this case is limited to the facts developed on the property in this case. Under the circumstances, and as the record was developed, we find that on the two dates specified in the claim the Carrier was performing maintenance on the formerly owned property and was obligated to use its employees. We have no choice but to enter a sustaining Award.

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 19th day of August 1998.