

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32866
Docket No. MW-31887
98-3-94-3-212

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 Seaboard System
(Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned or otherwise allowed outside forces (B. R. Moore Construction Company) to construct a run-around track between Mile Posts SG 550.5 and SG 550.8 on the Abbeville Subdivision of the Atlanta Division beginning March 16 and continuing up to and including April 9, 1992 (System File 92-98/12(92-784) SSY).**
- (2) The Carrier also violated Rule 2 when it failed to confer with the General Chairman and reach an understanding prior to contracting out the work in question.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants listed below, who all hold seniority in the Track and Welding Subdepartments, Group A, on the Atlanta-Waycross Seniority District and are regularly assigned to work in the vicinity, shall each be compensated at the applicable straight time and overtime rates of pay for an equal proportionate share of the eight hundred seventy-nine and one-half (879.5) man-hours expended by the outside forces in the performance of the subject work.**

**E. L. Thompson
J. Roland, Jr.**

**K. J. Turner
S. A. Hopper**

D. W. Thompson
L. Byers
H. S. Gathright, Jr.
C. Heard

E. A. White
J. D. Singelton
R. M. Chaney"

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.

In its claim, the Organization asserts that the Carrier contracted scope covered work involving the construction of a runaround track without holding a conference as required by Rule 2 ("... In such [contracting] instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed").

In a May 29, 1992 letter, the Carrier states that "... the majority of the work that was done by the contractor took place off of CSX right-of-way, therefore, it had to be contracted since CSX forces could not be used to do work off the property." The Carrier further states in that letter that "[a]pproval was given by Employee Relations to proceed with the project in a telephone conversation between our Project Engineer Rick Boehle and Employee Relations Manager Rick Hiel and the BMW." Further, according to the Carrier, "[a]ll employees listed in said claim were working. ..."

In its letter of July 30, 1992, the Organization states that it "... has no knowledge of such telephone conversation ... nor were we, to our knowledge, made party to same."

A memo from Project Engineer W. R. Boehle attached to the Carrier's letter of September 29, 1993 states:

"Grading work began today for construction of temp. run around track. Per agmnt. dated 10/19/91 - grading, drainage, and sub ballast to be performed by Gwinnett County, Grading work is extensive (40' cuts & fills) and the majority takes place off of CSX R/W. A CSX flagman/inspector has been assigned to the project.

Construction of temp. runaround track to begin 1/1/92±. Because CSX will not have available manpower and because majority of work takes place off of CSX R/W, it will be necessary to contract construction of 2,000'± of track. Shifting 400' of track at each end to tie in temp. track and furnishing materials to the project will be done by CSX forces. Construction of bridge by County to take 1 year±

Attached is pertinent correspondence. Please advise."

Attached to that memo is a contract request. In the "Reason for Contracting," Project Engineer Boehle states "Manpower not available account of '92 production season."

This claim will be sustained.

First, the threshold question is whether the Carrier controlled the work and track in question. According to the Carrier's September 29, 1993 letter "... the majority of the work done was off CSX property ... [and t]herefore CSX employees would have no claim to any work performed that was off CSX property." In terms of proof, lack of control as asserted by the Carrier is an affirmative defense to be demonstrated by the Carrier. The Carrier has not met that burden.

The record shows the Carrier sufficiently controlled the work and track to engage a contractor to perform the construction of the runaround track. Further, in its May 29, 1992 letter, the Carrier states that "... the majority of the work that was done by the contractor took place off of CSX right-of-way. . . ." [emphasis added]. That statement leads to the conclusion that an undisclosed amount of the work performed by the contractor was not "off of CSX right-of-way" which could otherwise have been

performed by covered employees. But more important, the record shows that the Carrier's stated "Reason for Contracting" in the contract request attached to Project Engineer Boehle's memo was not because of any lack of control of the work by the Carrier, but because of "Manpower not available." Nothing in the contract request form from Boehle refers to lack of control as a reason for contracting the work. The lack of "available manpower" also appears as a reason for the contracting in Project Engineer Boehle's memo ("Because CSX will not have available manpower . . . it will be necessary to contract construction of 2,000'± of track"). We therefore find an insufficient showing by the Carrier that it lacked control of the work or track in question. Rather, it appears that the reason for contracting the work was driven in large part by manpower concerns and not lack of control of the work or track by the Carrier.

Second, Rule 2 requires a conference between the Organization and the Carrier in cases where such construction work is going to be contracted. The Organization met its prima facie burden to show no conference was held when it alleged that the contracting occurred without the required conference. That assertion shifted the burden to the Carrier to demonstrate some facts to refute the Organization's position that no conference was held. All the Carrier presented in response was a vague assertion that the parties conferred. No facts or details were presented to support the Carrier's position that there was a conference. After the Carrier took the position that there was a conference, the Organization again denied that assertion.

When the Carrier contended that a conference was held, it was incumbent upon the Carrier to make some demonstration of probative facts to support that assertion. That was not done. There is nothing in the record on the property from those Carrier officials involved in the alleged conference to sufficiently show that such a conference was held or, at a minimum, to raise a dispute of facts on that question. This is not a case where the record leads to the conclusion that the facts are in dispute on this issue. This is a case where the Carrier did not meet its shifted burden in sufficient degree to demonstrate that the facts are in dispute. We therefore find that the contracting occurred without a conference as required by Rule 2. That Rule has been violated.

Third, with respect to the remedy, the fact that Claimants were working during the time the contractor performed the work does not deprive them of a remedy. The Carrier's actions resulted in a loss of work opportunities for the covered employees. Had the Carrier engaged in the conference as required, the parties may well have been

able to agree upon a method whereby covered employees could have performed the work. See Third Division Award 32699:

“... [T]he fact that Claimants were working during the time covered by the claim does not deprive them of a remedy in this case. As a result of the Carrier's demonstrated violation, Claimants lost work opportunities and shall be made whole.”

The matter is now remanded to the parties to jointly determine the number of hours worked by the contractor on the project where it performed work covered by the Agreement. Claimants shall be compensated accordingly.

AWARD

Claim sustained in accordance with the Findings.

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 21st day of October 1998.