

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34993
Docket No. MW-31046
00-3-92-3-788**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside concern (Amtrac Construction) to perform track rehabilitation work on River Line Track Nos. 1, 2, 3 and 4 at Conway, Pennsylvania beginning April 8, 1991 and continuing (System Docket MW-2134).**
- (2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with proper advance written notice of its intention to contract out said work and discuss the matter in good faith as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. A. Pharr, M. Spickerman, T. Townsend, M. Uhring, D. Burkett, T. Armstrong, H. Mullen, G. Pachuta, G. Lowmiller, W. M. Burton, R. Marshall, III, and A. B. Rooney shall each be compensated eight (8) hours' pay per day at their respective straight time rates, compensated for all overtime and receive credits for benefits for each day and month worked by outside forces.”**

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.

This case involves a claim by the Organization that the Carrier, on April 8, 1991 and continuing, violated the Scope and Seniority Classes Rules of the Agreement when it allowed General Materials Terminals, Inc. ("GMT") to hire an outside firm, Amtrac Railroad Contractors ("Amtrac"), to perform track rehabilitation work on trackage lying within a parcel of land leased by the Carrier to GMT.¹ There is no dispute that the routine track maintenance and repair work performed by Amtrac is work that would fall within the Scope of the Agreement if performed by the Carrier. The sole issue is whether the work properly was assigned by the Carrier's lessee to Amtrac, or whether it should have been performed by the Carrier's Maintenance of Way employees. As in previous cases, our decision turns on the nature of the lease and who maintains actual control over the rehabilitation of the trackage.

According to the Organization, the Carrier should have used its own employees to perform the disputed track rehabilitation work because, under the terms of the Carrier's lease with GMT, the trackage at all relevant times remained in the Carrier's full control and the maintenance work in question was for the Carrier's immediate and ultimate benefit.

The Organization insists that the Carrier knew about the deteriorated condition of the track, refused to dedicate the necessary manpower to its repair, and attempted

¹The demised premises consists of 4.5 acres together with 4,500 lineal feet of track in Carrier's Conway Yard, a barge to rail bulk material transfer point in Conway, Pennsylvania.

instead to remove the work from the Scope of Agreement through the device of the lease. Thus, the Organization argues, the lease was little more than a thinly veiled attempt to circumvent the Agreement, and to shift the cost of repair work to the lessee without sacrificing any actual control of the premises covered by the lease. This violated the Agreement. Therefore, it asks that the claim be sustained.

Further, according to the Organization, the Carrier violated the advance notice provisions of the Scope Rule when it failed to identify the work and provide to the General Chairman, at least 15 days in advance of the transaction, the reasons for contracting out the work. The Organization maintains that the Carrier, before it finalizes a transaction contracting work to outside forces, must make a good faith attempt to resolve the dispute with the Organization. The Organization asserts that the advance notice requirement is a prerequisite to the contracting out of work, and absent compliance, an outside firm may not perform the work. The essence of this Rule, the Organization argues, is that it affords employees the opportunity to persuade the Carrier to assign them the disputed work. A violation of the notice provision, the Organization insists, obligates the Carrier to pay the claim as presented.²

The Carrier, on the other hand, asserts that under the express terms of the lease, it ceded control over track maintenance and repair work to GMT, thereby removing the work from the coverage of the Agreement. The Carrier disputes the Organization's claim that the Carrier's use of the property has relevance to this dispute. The Carrier insists that it is merely a customer of GMT's leased facility and does not exercise any dominion over GMT's operations.

The Carrier argues that this dispute is governed by decisions of the Third Division and other Boards which hold that work performed by a lessee for its own business purposes is not the lessor's work. According to the Carrier, the fact it may derive an indirect benefit from the disputed subcontract does not alter the analysis. Under cited decisions, the Carrier asserts, the fact a lessor's consent may be required

²The Organization also maintains that its claim must be granted because the Carrier allegedly failed to provide the Organization with an unredacted copy of the subject lease. According to the Organization, the Carrier, having failed to produce the lease, cannot rebut an inference that its transaction with GMT was not an arm's length deal. The Carrier, in response, references correspondence between the parties indicating that the Organization had a full and fair opportunity to examine - and re-examine - the lease. Given this factual dispute, we reject this as a basis for sustaining the claim.

before work on the demised property may commence, or that the lessor may benefit from the work at the expiration of the lease, all is irrelevant. What counts, the Carrier maintains, is whether lessee exercises dominion and control over the property for its own benefit, or whether control of the operations legally remains vested in the Carrier.

Under these precedents, the Carrier insists, there has been no violation. It argues that the track repair was initiated and paid for by GMT for its own business purposes and benefit. The Carrier maintains that the track rehabilitation work was GMT work over which the Carrier had no control. Accordingly, it was not subject to the provisions of the Agreement between the Carrier and the Organization, and the claim must be denied.

On the basis of the record evidence, the Board finds that the Carrier violated the Scope and Seniority Classes Rules of the Agreement when it permitted an outside contractor to perform work reserved by the Agreement to employees in the Carrier's Maintenance of Way Department without first complying with the Agreement's Notice requirements.

The Board has ruled in numerous past Awards that work which is not within the Carrier's direction or control and not at its expense or for its benefit may be contracted out without violation of the Scope Rule. See Third Division Award 21283.³ With respect to property which is under lease, the Board has identified factors for determining when work is under the Carrier's control, and therefore subject to the Scope Rule, and when it may be deemed to lie outside the operation and maintenance of the Carrier, and therefore not within the Scope of the Agreement. In Third Division Award 4783, the Board explained:

"We think the mere fact of ownership of property by the Carrier is not sufficient ground for claim by the Organization of application of contract rights thereon. The common business of the Carrier and Organization

³The governing principle, broadly stated by the Board, is that:

"[W]here the disputed work is not performed at the Carrier's instigation, not under its control, not performed at its expense and not exclusively for its benefit, the work may be contracted out without a violation of the Scope rule."

Third Division Awards 26103. See also Third Division Awards 20644, 20280, 20156 and 19957.

is railroad operation, and it is to that business and the property employed in that business alone, that their Agreements apply. Where property is so used no lease or other device should exclude the operation of the Agreement thereon, and where a Carrier owns property used not in the operation or maintenance of its railroad, but for other and separate purposes, such property is outside the purview of the Agreement.”

In Third Division Award 14641, the Board elaborated on this principle, observing that where there is “a lease of property for the use of lessee and not for the railroad, maintenance work done by lessee in fulfillment of its obligation is not within the scope of the Agreement.” Indeed, as the Board explains, the Scope Rule cannot extend to work that does not belong to the Carrier; it applies only to that work the Carrier has the power to offer. Third Division Award 13056. However, work which belongs to those employees for whose benefit the Agreement was made may not be assigned to employees outside the Agreement without complying with advance notice requirements. See Third Division Award 26212.

Our review of the evidence, in particular the lease between the Carrier and GMT, convinces us that the rehabilitated trackage remained at all times part of the Carrier’s railroad operation and subject to maintenance by the Carrier. Paragraph 6.1 of the Lease expressly permits the Carrier to “operate a railroad and related transportation services on or adjacent to the [demised] Premises.” Further, under the terms of the Lease, existing tracks are deemed “Reserved Facilities” which the Carrier “reserves the right and easement to operate, maintain, repair, replace, reconstruct, augment or relocate,” and GMT’s Lease “is subject to and subordinate” to those reserved rights.

Further, with respect to rail operations, paragraph 30(b) of the Lease provides:

“Lessor, without penalty, shall have the right at any time to re-spot the cars of Lessee and at all times to move other cars and engines over the Track in connection with its railroad business, and use of the Track by Lessee shall be subject to the rules and regulations prescribed from time to time in the tariffs and rulebook of Lessor, and other applicable regulations.”

Under paragraph 30(c), moreover, GMT is responsible for making such modifications in the track and in the leased facilities as may be necessary to meet changes in the Carrier's operating requirements. Further, while GMT must "perform all necessary maintenance and repair to the demised Track," the Lease further stipulates that it must obtain the Carrier's "prior approval" for "a complete set of plans of the final improvements and changes to be made to and on the Premises as well as any subsequent changes thereto." In the absence of such "final approval," the Lease terminates.

These provisions signify to the Board that during the term of the Lease, control of railroad operations legally remained vested in the Carrier and that maintenance of the trackage stayed within its dominion and control. Accordingly, the Carrier was required under the Scope Rule to give the Organization advance notice of the contracting transaction here at issue. Its failure to do so constituted a violation of the Agreement.⁴

This case is distinguishable from Third Division Award 21283, cited by the Carrier, which involved a Scope dispute between the Brotherhood of Railroad Signalmen and Conrail predecessor Penn Central Transportation Company. The Signalmen asserted a Scope violation after employees of the Louisville and Nashville Railroad Company ("L&N"), which had leased several miles of track from Penn Central for the purpose of moving coal from a mine to L&N's main line track, performed work on the property. Noting that "L&N enjoys sole right to the use and enjoyment of the leased track," the Board found that Penn Central "relinquished dominion and control to L&N for the term of the lease." So, too, in Award 15 of Public

⁴In contrast, we have held that the scope provision of the Agreement is not violated:

"(1) Where the work, while perhaps within control of Carrier, is totally unrelated to railroad operations.

(2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.

(3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work."

Law Board No. 4768, involving a dispute between the Organization and Burlington Northern, the Board denied the claimed Scope violation because it was "clear that the lessee here has taken control of the facility and its trackage for its own business purposes, which is to lease and service locomotives for the Carrier and for other carriers." A key factor in the Board's evaluation of the claim was the fact "the facility [was] no longer part of the Carrier's operation."

In contrast, here, the Carrier retained control over the premises covered by the Lease, as well as dominion over any improvements or changes made to the trackage. Under the express terms of Paragraph 61 of the Lease, GMT's operations must, at all time, remain subordinate to the Carrier's rights to operate, maintain, or repair the Premises, or even to lease it to a third party. Thus, we believe this case more closely should follow Third Division Award 26212, wherein the subject lease applied to "the construction maintenance and operating of industrial track," and significant control over the manner in which the track is to be constructed maintained and operated is reserved to the Carrier and the operation of the track is certainly intimately connected with the Carrier's railroad operation.

The Board found that "by leasing the property for the express purpose of construction of the track an attempt [was] made to do by indirection that which cannot be directly done," and concluded that the Carrier violated the Agreement when it failed to give the Organization advance notice of the Lease. Award 26212. The Board further noted its repeated holding that the Organization need not establish exclusivity with respect to the disputed work when the question is one of whether the Carrier gave the Organization advance notice of the Lease.⁵

In the instant case, it is undisputed that no advance notice was given, and the Board, therefore, finds that the Carrier violated the Agreement when it permitted an outside contractor to perform work reserved by the Agreement to employees in the Carrier's Maintenance of Way Department.

Accordingly, the claim is granted for April 8, 1991 and continuing. Eligible Claimants shall be compensated eight hours' pay for each claim day at their respective

⁵With respect to such advance notice, the Third Division observed in Award 28312 that "failure to provide the required notice obviated any opportunity by the Organization to have the work done by the Carrier forces."

straight time rates, and further shall be compensated for all lost overtime and shall receive credits for benefits for all hours worked on track rehabilitation by employees of Amtrac on April 8, 1991 and continuing.

The Carrier argues, however, that the Claimants who were unavailable for work are not entitled to compensation. We agree that employees who were working, were furloughed or otherwise were not available to perform the disputed work beginning on April 8, 1991 and continuing, shall not be entitled to compensation.

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 20th day of September, 2000.