

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28819
Docket No. MW-28588
91-3-88-3-429

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister 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, without a conference having been held between the General Chairman and the Chief Engineering Officer as required by Rule 2, it assigned and/or permitted outside forces to perform track removal, switch work, reconstruction and overall maintenance in Howell Mill Yard at Atlanta, Georgia beginning August 11, 1987 (System File HMY-87-88/12(87-1187)).

(2) Because of the aforesaid violation, each of the Claimants named below* shall be allowed pay at his respective pro rata rate of pay for the number of man-hours consumed to his exclusion by the outside contractor beginning August 11, 1987 and continuing until such time as the violation is corrected.

<u>Name</u>	<u>ID NO.</u>	<u>Position</u>
E. L. Thompson	160252	Foreman
C. Heard	172983	Machine Operator Class 3
C. Daniels	165990	Trackman
E. T. Howell	163222	Crankhand
D. Moon	165989	Trackman
K. J. Turner	149721	Foreman
S. A. Hopper		Trackman
M. Alexander	171805	Trackman
D. W. Thompson	168322	Trackman
T. V. Farmer	164415	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 employe or employes involved in this dispute are respectively carrier and employes 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.

Beginning August 11, 1987, certain work, which the Organization avers is reserved to it under the Agreement, was performed by a contractor at Howell Mill Yard in Atlanta, Georgia. The Carrier asserts this yard is leased to Bulk Distribution Centers, Inc., a wholly owned and separate corporate entity. The Carrier states this work was performed by the contractor for and at the request of Bulk Distribution Centers, Inc., and not the Carrier.

In support of its position, the Carrier furnished the Organization with a copy of a short term (interim) license, under which Bulk Distribution Centers, Inc., received a license, pending formal lease negotiations, entitling it to use of the yard. Pertinent to this dispute is Item 3 of that license, which reads as follows:

"Licensee shall not make, erect or perform construction on the Premises without prior written consent of CSXT. Any partitions, structures or other equipment necessary in connection with the use of the track or space by Licensee will be provided by and at the sole expense of Licensee. Upon vacating said Premises, Licensee will remove said partitions, structures and equipment in a manner satisfactory to CSXT."

We do not agree with the Organization's suggestion that the Carrier required prior written consent as a means to ensure work was done in accordance with the Agreement. This would conflict with the second sentence of the provisions, which requires the licensee to perform all such work at its own expense. Provisions requiring a landlord's prior consent to construction are not uncommon in leases, and are often designed to protect adjacent property or the landlord's future enjoyment of the land. Such a provision does not, in and of itself, place the work within the Carrier's direction or control.


Whether the property was leased or licensed to the third party is a legal distinction which has no bearing on this dispute. By the terms of the license, the Carrier ceded dominion and control over the disputed work, which removed the work from the coverage of the Agreement. See Third Division Awards 21283 and 23575. The work was not performed at the Carrier's instigation or expense, nor was it for the Carrier's benefit. Therefore, there has been no violation of the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.