

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 Chief Engineering Officer and the General Chairman as required by Rule 2, it assigned or otherwise permitted outside forces to construct trackage on the Palmetto Subdivision in the vicinity of the AZA-881 Mile Post beginning in September 1985 [System File SF5T34-85-83/12-2-(86-70) I].

(2) Because of the aforesaid violation, each employe assigned to Section Force 5T34 at Rock Port, Florida shall be allowed pay at their respective pro-rata rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

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.

This subcontracting dispute, initiated by the Organization on behalf of Claimants regularly assigned to Section Force 5T34 at Rock Port, Florida, centers on work performed by R.W. Summers, Inc., in the construction of a new side track on the right-of-way in the vicinity of AZA-881 Mile Post on the Palmetto Subdivision beginning in September 1985. The new track is approximately 3,500 feet long and is connected to the main line by a turnout which was constructed by the Carrier's Track Subdepartment forces. The Organization contends that the work performed by the outside contractor is work belonging to employees in the Track Subdepartment pursuant to the Agreement, and that Carrier failed to give the requisite advance notice prior to engaging the services of the contractor.

Carrier maintains that the track in question serves Tampa Park of Commerce, Inc., a development company which owns the tract of land adjacent to Carrier's land and which is being developed for industrial purposes. Carrier further contends that the track in question was constructed by the developer entirely at its expense and that Carrier had no involvement with R.W. Summers, Inc., other than to approve the track once it was completed. Therefore, since the work did not belong to the Carrier and was not available to its employees, Carrier insists that no violation of the Agreement occurred.

We do not concur with Carrier's position. After a thorough review of the precedent Awards cited, the Board is of the view that they speak directly to the issue, and control the disposition of this case. In Third Division Awards 26212 (see the comprehensive discussion therein) and 28045, we held that where Carrier retained significant control or the right of approval over the manner in which the track was to be constructed, operated or maintained, the Agreement was violated when no advance notice of the work was given and the work was within the Scope of the Agreement. It is precisely that situation which is now before us, as we read the indenture agreement dated October 29, 1984, between Carrier and Tampa Park of Commerce, Inc., as well as the applicable Rules cited by the Organization.

Accordingly, it is our ruling that the Agreement was violated. With reference to the monetary penalty requested, however, Claimants apparently were fully employed and suffered no loss of earnings. Item 2 of the Statement of Claim therefore is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deves - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.