

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (formerly The Chesapeake
(and Ohio Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without notifying the General Chairman in advance as contemplated by the October 24, 1957 Letter of Agreement, it assigned or otherwise permitted outside forces to raise the boat slip at Ludington, Michigan beginning November 20, 1986 [System File C-TC-3342/12-APPE(87-159)].

(2) As a consequence of the aforesaid violation, furloughed B&B Carpenters J. C. Woods, D. Swanson and D. Nowak shall each be allowed one hundred twenty (120) hours of pay at the carpenter's rate and they shall each be credited with an additional fifteen (15) days for vacation qualifying purposes."

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.

The essential background facts are not in dispute. Some three years prior to the time this dispute arose, Carrier owned and operated a ferry service which transported automobiles, passengers and rail cars from an embarkation point contiguous with its Ludington, Michigan yard facility to various points on the Wisconsin side of Lake Michigan. In July 1983, Carrier entered into a lease/sale Agreement with a consortium of three corporations unrelated to Carrier. The Agreement provided for outright sale of Carrier's three ferry boats and a six year lease, with an option to purchase, for the ferry service

and use of certain docking facilities and appurtenant trackage. The provisions of the lease/sale Agreement and their meaning form the core of this dispute.

By November 1986 the lease/sale arrangement had been operative for more than three years. During this time, however, the water level in Lake Michigan had been gradually rising due to natural processes. Continued operation of the ferry service required that the "apron hinge" of the docking facility be raised to compensate for the rising water level. In turn, the appurtenant trackage also had to be raised. This Claim deals with the apron hinge work. A companion Claim deals with the raising of the track.

The Organization position is that the Carrier remained responsible under the lease to maintain Boat Slip No. 2 and appurtenant trackage in a serviceable condition except for Act of God, Force Majeure or unforeseen events that severely damage or destroy the facilities. Since there was no such damage or destruction, Carrier was obligated to make repairs using its own forces.

Carrier's position is that its obligation under the lease was limited to repairs caused by fair wear and tear and its own negligence. The rising water level does not fit under either criteria. The lease obligated the ferry operator to make the hinge repair, and the ferry operator did so. This was not work by or for the benefit of the railroad. Moreover, the work was not under Carrier's control and the contract was between the ferry operator and the contractor. The pertinent provisions of the lease stated:

"C&O, for the six (6) Year Period, will maintain in serviceable condition and allow M-WT Co. exclusive use of Slip No. 2 and appurtenant tracks and apron, auto ramp and passenger platform and gangplank (hereinafter Slip No. 2) for this AGREEMENT's purposes, and C&O will provide docking space for the car ferries at Slip Nos. 2-1/2 and 3-1/2, provided C&O only shall make repairs to Slip No. 2 and docking space necessitated by fair wear and tear or its own negligence. C&O shall not be responsible for dredging Slip No. 2 or the docking spaces nor shall C&O be responsible for repairs to Slip No. 2 or docking facilities or for providing docking space in the event an Act of God, Force Majeure or unforeseen event not caused by C&O destroys or severely damages Slip No. 2 or docking spaces."

(Underlining supplied by the Board)

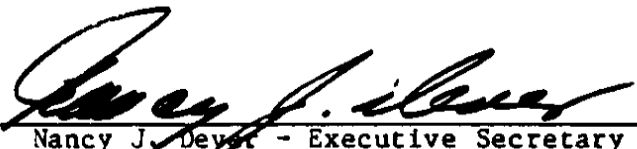
Previous Awards of this Board form the well-established principle that Carrier cannot be responsible for repairs and construction on property it leases to other parties where, as here, the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and the work is performed at the expense of the other party. As such, no notice was required.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

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