Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28938
Docket No. MW-28269
91-3-88-3-35

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 Employes
(
(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 to otherwise permitted outside forces to surface the lead track approach to the boat slips at the West end of Ludington Yard at Ludington, Michigan on November 24, 25 and 26, 1986 [System File C-TC-3343/12-APPF(87-160)].

(2) As a consequence of the aforesaid violation, furloughed Foreman J. Shinsky, Class A Machine Operators R. Dahringer, D. Jacobi, Jr., Trackmen T. Darascheld, K. Cracraft and S. Rotzien shall each be allowed pay for twenty-one and one-half (21.5) hours at their respective straight time rates."

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 track work. A companion Claim deals with the raising of the apron hinge.

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 Acts 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. In addition, since the trackage from the Slip was connected to Carrier's yard, it remained under Carrier's control and continued to be very much a part of the railroad operation.

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 raise the track, 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. 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 neglience. C&O shall not be responsible for dregding 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. Thus, no notice was necessary.

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.