

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

(CSX Transportation, Inc. (formerly The Seaboard Coast Line
Railroad Company)
PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

"(1) The Agreement was violated when beginning sometime in February 1989, Bulk Distribution Services, Inc. contracted with an outside party to reconstruct trackage at Howell Yard, Atlanta, Georgia without conferring (sic) with the General Chairman. [Carrier's file 12 (898-541), Organization's file ATL/WAY-89-18].

(2) As a consequence of the aforesaid violation, K. J. Turner, John Rowland, Jr., R. M. Chaney, Jr., C. E. Clements, M. Alexander, Jr., C. Heard, D. W. Thompson, A. G. Hale, C. Daniels and G. E. Alexander be allowed an equal proportionate share of an unspecified number of man hours consumed by Midway Construction Company in performing work for Bulk Distribution Services, Inc."

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 employees 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 Organization alleges that some time in February 1989, Carrier permitted an outside contractor, Midway Construction Company, to perform reconstruction and overall track maintenance and/or repair work at the Howell Yard in Atlanta, Georgia. Work was done on the runaround track, depot 1, 2, 3, and piggyback tracks 1 and 2. The Organization points out that the work of constructing, dismantling, maintaining, and/or repairing tracks on Carrier's right-of-way and/or property is reserved to Track Subdepartment employees under Rules 1, 3, 4, and 5 of the parties' Agreement. It notes that Carrier violated Rule 2 by its failure to notify the General Chairman and allow the "Chief Engineering Officer and the General Chairman [to]...confer and reach an understanding setting forth the conditions under which the work will be performed."

Carrier counters that the work in question was done by Midway forces at the request of Bulk Distribution Services, Inc., a separate corporate entity that leased the property from the Carrier. The Carrier argues that Bulk Distribution contracted out the work at its own expense and for its own benefit; that Bulk Distribution is not subject to the applicable Agreement; and that the Carrier cannot be found in violation of the Agreement when it does not have the right to control the work in question. In support of its position, the Carrier provided a copy of a Land Lease between itself and Bulk Distribution, dated February 15, 1988.

A review of this document reveals the following statement:

"WITNESSETH: That, for and in consideration of the rents hereinafter agreed to be paid by Lessee, and of the covenants and agreements to be kept and performed by Lessee, Lessor hereby demises and leases unto Lessee certain vacant and/or unimproved land, owned by Lessor, referred to hereinafter as 'the premises,' located at Howells Yard, Atlanta, GA, as shown on Lessor's Exhibit, attached hereto and hereby made a part hereof, said premises, exclusive of track and the strip of land or right-of-way adjacent to and beneath same leased simultaneously herewith to Lessee under the Track Lease, to include roadways, crossings, utilities, drainage, lighting, truck scales, and where practical, fencing, on which premises Lessee, by separate agreement with Lessor, will arrange for construction of certain improvements to operate a bulk intermodal distribution terminal to be served by Lessor...."

The Carrier's argument that it did not control the work would have been more persuasive had it introduced into the record a copy of the Track Lease cited in the above-referenced document. Without its inclusion, this Board has no way of knowing whether the Carrier retained or did not retain control of the track and right-of-way on the property.

We note that in Third Division Award 28819, a case involving the same issue and the same parties (including Bulk Distribution Centers, Inc.) at Howell Mill Yard, the Board concluded that:

"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."

That case is not directly on point with the instant dispute in that the parties, at that time (in August 1987, a year prior to the signing of the current Land Lease) were operating under a short-term, interim license (pending formal lease negotiations), which clearly stated that the licensee would be responsible for all expenses in conjunction with the work in question (track removal, switch work, reconstruction, and overall maintenance):

"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."

As noted previously, this Board has no way of knowing if these terms were ultimately incorporated into a formal Track Lease.

Given Carrier's affirmative responsibility to provide support for its contention that it did not have the right to control the work in question (and its failure to do so), this claim must be sustained. Given that Claimants were fully employed at the time, no compensation will be awarded.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1992.