Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29581
Docket No. MW-28845
93-3-89-3-245

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 new roadbed and track structures at the CSX Industrial Park in Charlotte, North Carolina beginning in mid December, 1987 (System File KM-88-13/12(88-543) SSY).

(2) The claim*, as presented by General Chairman J. D. Knight on February 10, 1988 to Division Manager J. A. Drake, shall be allowed as presented because said claim was not disallowed by Division Manager Drake in accordance with Rule 40, Section 1(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Maintenance of Way employes V. M. Thompson, W. B. Currie, H. A. Talley, J. M. Butler, K. R. Morgan, D. L. Roberts and L. W. Greenlee shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the total number of straight time and overtime man-hours consumed by the outside contractor performing the work referred to in Part (1) above."

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 employe 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 dispute in this claim involves work that was performed in mid December 1987, at the Charlotte Industrial Park in Charlotte, North Carolina, by Midway Construction Company, an outside contractor.

On February 10, 1988, the Organization filed a claim on behalf of the furloughed Claimants alleging that the Carrier violated Rule 2 when it hired an outside contractor to construct a new roadbed and track structures at the CSX Industrial Park. The Organization contended that track construction and track maintenance work involved in this dispute has traditionally and historically been performed by the Carrier's Track Subdepartment of which the Claimants hold established seniority.

The Carrier denied the claim on the grounds that the work that was performed was not performed on Carrier property, but on property that was leased by the Carrier to Bulk Distribution Centers, Inc., a separate company that is not subject to the Agreement between the Carrier and the Organization. The Carrier further stated that it did not contract any work, but that it was contracted by Bulk Distribution at its own expense on property that it leased from the Carrier. Therefore, the Carrier denied the claim.

This Board has reviewed the record and we find that the subcontracting agreement at issue did not involve the Carrier, but rather the Carrier's lessee and another company. Therefore, Rule 2 does not apply, and the claim must be denied ab initio because no valid claim existed.

Rule 2 states the following:

"This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not

possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth conditions under which the work will be performed.

It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that under certain circumstances, contracting of such work may be necessary. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed. In such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces."

The subcontracting Rule is set up for the purpose of making sure that the Carrier will not subcontract the Organization's work without conferring with the Organization and hopefully reaching an understanding regarding the conditions of the subcontracting work. However, Rule 2 sets up restrictions on subcontracting that would be performed on behalf of the Carrier, not another company. The record in this case reflects that the Carrier had leased the property at issue to Bulk Distribution Centers, Inc., and Bulk contracted with Midway Construction to have the work performed. Rule 2 simply does not cover subcontracting agreements between two parties that do not include the Carrier.

The Organization argues that the claim should be sustained because the Carrier did not respond to the claim within the required 60 days. The record reveals that the claim was filed on February 10, 1988, and the Carrier did not issue its response until April 22, 1988. It is obvious that more than 60 days transpired and under normal conditions the Organization's argument might hold some weight. However, this claim was not valid ab initio since the Carrier cannot be responsible for occurrences on property that it leases to others, and therefore, the Organization's timeliness argument must fail. See Third Division Awards 4783 and 9602 as well as 20230.

For all the above reasons, this Board finds that the claim must be denied.

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 9th day of March 1993.