

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30965
Docket No. MW-30003
95-3-91-3-402

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees)
(
(CSX Transportation, Inc. (former
(Western Maryland Railway Company)

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

- (1) The Carrier violated the Agreement beginning October 15, 1989 when it assigned outside forces (Brock Contractors) to perform the Maintenance of Way track rehabilitation work of replacing crossties, rails, joint bars, aligning track and clearing debris from between tracks at Maryland Junction in Ridgely, West Virginia [Carrier's File 12(90-16) WMR].
- (2) The Carrier further violated the Agreement when it failed to provide advance written notice of its intention to contract out the track maintenance work described in Part (1) hereof.
- (3) As a consequence of the violations in Parts (1) and/or (2) above, Foreman E. E. Shockey, Machine Operator M. L. Lowery, Vehicle Operator T. R. Davis and Trackmen R. L. Brode and H. Westlow shall each be paid eight (8) hours at their respective rates for each workday beginning October 15, 1989 and thereafter while the outside forces continue to perform the work described 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 employee or employees involved in this dispute are respectively carrier and employee 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.

By lease made effective October 15, 1989, the Carrier leased certain premises at Maryland Junction, Mineral County, West Virginia, to Brock Steel Company.

Under Section 5.3 of the lease, the rented property was taken by Brock Steel in an "as is" condition. Section 5.1 of the lease obligated Brock Steel to "...not make, or permit to be made, any building, structure, improvements or alterations on or to the Premises without the prior written approval and consent of..." the Carrier. Section 5.8 of the lease provided that the Carrier "...shall in no manner be obligated to reimburse [Brock Steel] for all or any part of any expenditures made by [Brock Steel] during its occupancy of the Premises...for any repairs, replacements, renovations, remodeling or any other work on or about the Premises."

This claim asserts that commencing October 15, 1989, outside forces improperly performed track rehabilitation on the leased property without prior notice from the Carrier to the Organization.

The specific evidence as developed on the property shows that Brock Steel is a scrap dealer who purchases rolling stock from the Carrier. Brock Steel leased the premises from the Carrier in order to have space to cut up scrap cars for further disposition of the scrap.

The Carrier is not prohibited from leasing its property. In this case, that is what the Carrier did. Our review of the lease agreement shows it to be an arm's length transaction between the Carrier and Brock Steel.

From what was developed on the property, the work performed by Brock Steel was done in furtherance of that company's business under the confines of its authority pursuant to the lease and was not performed as part of normal railroad operations by the Carrier. As the facts were developed on the property, the Organization has not demonstrated that the lease arrangement was a subterfuge engaged in by Brock Steel and the Carrier to avoid the consequences of the Organization's Agreement with the Carrier.

The fact that the lease provided at Section 5.1 that any improvements and alterations on the premises could not be

accomplished by Brock Steel without the approval and consent of the Carrier does not change the result. Those general kinds of provisions are typical in lease agreements and are merely for the purpose of assuring that a lessee does not engage in conduct so as to materially alter the condition of the leased property which is still owned by the lessor. But, the burden here is not for the Organization to show that Brock had to first obtain the Carrier's approval and consent for improvements and alterations. The burden here is for the Organization to demonstrate that the lease arrangement was a sham so as to permit the Carrier to avoid having to comply with the terms of the Agreement between the Organization and the Carrier. That burden has not been met.

The Organization's argument that the lease did not contemplate track repairs, but was only for the lease of land and a building, is not persuasive. The lease is for specified "parcels of land" designated as "'the Premises.'" Section 5.1 permitted Brock Steel to make "...improvements or alterations on or to the Premises" From what we can discern from the evidence developed on the property, the work performed by Brock Steel was on track on "'the Premises'" and the work therefore fell within the ambit of Section 5.1 of the lease.

Finally, the fact that the Carrier and Brock Steel amended Section 2.1 of the lease to require Brock Steel to pay certain rents as of November 1, 1989 rather than as of the October 15, 1989 effective date is insufficient to meet the Organization's burden in this case. That temporary relief on the payment of rents (particularly at the commencement of a lease) does not, by itself, change the effective date of the lease (October 15, 1989). Given the complexity of negotiations for the renting of commercial property, it is not atypical to find in commercial leases a "free rent" provision for a limited period of time.

Without more, we must deny the claim.

AWARD

Claim denied.

Form 1
Page 4

Award No. 30965
Docket No. MW-30003
95-3-91-3-402

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.