

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30971
Docket No. MW-29611
95-3-90-3-589

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Seaboard Coastline Railroad Company)

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

- (1) The Carrier violated the Agreement when, without conferring and reaching an understanding with the General Chairman as required by Rule 2, it assigned outside forces (Tampa International Forest Products, Inc.) to perform maintenance work (loading cross ties) between Mile Posts 271.8 and 295.0 on the Hamlet Subdivision on the Florence Division from August 7, 1989, through August 15, 1989. [System File 89-51/12(90-10) SSY].
- (2) As a consequence of the aforesaid violation, Maintenance of Way General Subdepartment Group A employees D. J. Webster and R. Drew shall each be allowed pay at their respective straight time rates for an equal proportionate share of ninety-six (96) straight time hours the contractor's employees worked on August 7, 8, 9, 10, 14 and 15, 1989, and pay at their respective time and one-half rates for an equal proportionate share of the twenty-four (24) overtime hours the contractor's employees worked on August 11, 14 and 15, 1989."

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.

In early 1989, Carrier entered into a contract with Tampa International Forest Products (TIFP) in which it was agreed that TIFP would purchase Carrier's used crossties. Beginning August 7, 1989, two TIFP employees each worked a total of eight hours on August 7, 8, 9, 10, and 11, 1989, and (12) hours on August 14 and 15, 1989, on the Hamlet Subdivision, loading ties with heavy equipment.

On October 3, 1989, the General Chairman submitted a claim asserting that the contractor employees had performed maintenance work which was "clearly embrace[d] within the Scope of the Agreement," and was work which had "traditionally and historically been assigned to employees who hold seniority in the Maintenance of Way General Subdepartment, Group A." The General Chairman further asserted that Carrier failed to meet and confer with the Organization prior to contracting out the subject work, as provided for by Rule 2 of the Agreement.

The Division Manager denied the claim stating:

"I have determined that the crossties you alluded to were property of Tampa International Forest Products and they were removing them from CSX's right of way. the aforesaid ties were donated to Tampa International; therefore, I do not find Carrier to be in violation of the Agreement. I must therefore, respectfully deny your claim."

On January 20, 1990, the General Chairman replied to Carrier's denial submitting:

"If these crossties were in fact donated, as Mr. Drake asserts, I am confident that the Carrier will have no problem providing such documentation as necessary to back up such a position.

In light of the fact that there is no such supportive documentation provided by Mr. Drake in his declination, the Organization's position remains unchanged in that the Carrier did violate the Agreement, that this claim is fully supported by Agreement Rules, and this claim must be allowed as presented."

In subsequent correspondence, Carrier stated:

"Florence Division Manager J. A. Drake advised you in a letter dated December 1, 1989, that Tampa International Forest Products merely removed cross ties which they had purchased from the Carrier. TIFP's removal of its property from Carrier's right of way constitutes no violation of any Agreement rule and you have not shown otherwise. You are incorrect in your contention that a contractor was used by the Carrier to retrieve the cross ties in question.

You were in this office on February 27, 1990, and at that time you were given the opportunity to peruse a copy of a contract with Tampa International Forest Products, Inc. whereby they would remove used cross ties from the property. Hopefully that document satisfied your concerns as set forth in your claim."

However, on October 19, 1990, the General Chairman asserted:

"I sincerely appreciate the opportunity on February 27, 1990, while in Mr. Allred's office, to review the contract between CSXT, Inc. and Tampa International Forest Products, Inc., for the removal of crossties from the Carrier's right-of-way. Even though I had the opportunity to briefly view these documents, I was unable to ascertain at the time whether any contract violation did in fact occur as we have contended while handling this dispute on the property."

It should be noted that Carrier did not at any time during the handling of this dispute on the property provide the Organization with a copy of the contract it allegedly had made with TIFP. Had Carrier provided that document to the Board with its Submission, it would have been de novo evidence.

Carrier's primary argument, on the property, was that the crossties had been purchased by or donated to TIFP on an "as is where is" basis. That is an affirmative defense and Carrier has the burden of proving, by at least a preponderance of record evidence, all material elements of its "as is where is" defense. Moreover, when faced with a colorable claim of the disputed work, Carrier must provide such evidence to the Organization on the property. In this case, Carrier failed to fulfil its obligation in both respects. Carrier apparently allowed the General Chairman to take a peek at the purported contract with TIFP, but when the General Chairman challenged the efficacy of that contract, Carrier

refused to provide a copy. Belated assertions of "confidentiality" are of no comfort to Carrier in this situation. Carrier cannot have it both ways, if it asserts an "as is where is" defense, it must provide the Organization and this Board with sufficient information to support that assertion. Based upon the failure of proof on the as is where is defense, the claim must be sustained.

In addition to the affirmative defense, Carrier did assert that there was no cited Agreement Rule expressly reserving the disputed work to the Organization, but it also did not challenge the Organization's contention that MofW forces traditionally and historically performed this work. Nor did Carrier dispute on the property that it failed to provide requisite advance written notice. Under the circumstances, there can be no question that Carrier violated Rule 2 in this case.

Finally, Carrier failed to address the issue of damages during handling on the property. It has long been held that the Board is restricted to evidence presented on the property. Carrier's belated attempt to argue the issue of damages in its Submission to this Board comes too late to be considered. Based upon all of the foregoing, this claim is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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