

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30975
Docket No. MW-30063
95-3-91-3-476

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 System Railroad)

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

- (1) The Carrier violated the Agreement when, without a conference being held between the Chief Engineering Officer and the General Chairman, as required by Rule 2, it assigned or otherwise permitted outside forces [six (6) employees of American Railroad Construction Company] to perform the maintenance work of dismantling and constructing 830 linear feet of trackage at or near Mile Post ANB 862.5 on the Manchester Subdivision of the Atlanta Division beginning March 26, 1990 up to and including April 5, 1990 [System File 90-57/12(90-647) SSY].
- (2) As a consequence of the aforesaid violation, Foreman E.L. Thompson and Trackmen C. Patton, Jr., G.P. Hollmon, B.L. Reeves, E.T. Howell and A.T. Ray 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 man-hours (480) and overtime man-hours (60) expended by the outside forces performing the work outlined 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.

There is essentially no dispute as to the facts of this case. As part of its "Proctor Creek" project, the Metropolitan Atlanta Rapid Transit Authority ("MARTA") constructed a tunnel under Carrier's right-of-way. MARTA's project necessitated the relocation of Carrier's main line trackage at or near MP ANB 862.5 to accommodate tunnel construction. Thus, 830 feet of new track was constructed for Carrier adjacent to the existing main line trackage.

MARTA contracted American Railroad Industries, Inc., whose forces installed the 830 feet of new track. Once this new track was completed, Carrier forces performed the work of cutting off the existing main line track and connecting the new track to the existing main line alignment at the north and south ends. American Railroad Industries, Inc. employees then dismantled the "cut out" trackage after the newly constructed track was connected to the existing main line alignment by Carrier's forces.

On May 25, 1990, the Organization filed a claim for six employees for the work performed by employees of American Railroad Industries, Inc., between March 26 up to and including April 5, 1990.

Carrier denied the claim maintaining that:

"The work that was allegedly done by an outside party as indicated in your claim, was done under the direction of MARTA. However, MARTA constructed the track adjacent to the mainline which was NOT connected to any active or live track. Once this track was finished, CSX's forces physically cut the track and connected the new track to the existing alignment. All of this work was done by CSX employees including surfacing. After the old track alignment was cut out of the live track, the outside party disassembled the track. As you can see, the Agreement was not violated in any shape, form, or fashion. This claim is declined."

The Organization similarly appealed the claim asserting:

"In Mr. Delong's letter he readily admits that the Contractor did indeed perform the maintenance work made subject of our claim.

Rule 2 of the effective Agreement is quite clear and states,

'This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject of this Agreement except that 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 or available to the Carrier. 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.'

With regard to the above quoted Rule, Carrier forces, the Claimants, were available to perform this work. They possessed the necessary skills and had the proper equipment available to perform this subject work. Even if they had not, the Carrier failed in its mandated obligation to confer with the General Chairman."

Parties to the dispute met in conference without wavering from respective positions taken in correspondence previously exchanged on the property. Therefore, the dispute has been placed before the Board for resolution.

The Organization made out a prima facie case that outside forces performed work to which its members were entitled. Carrier asserted, but did not prove that the entire project "belonged" to MARTA, and that the Carrier had "no control" over the use of outside forces. It was incumbent upon the Carrier to submit probative evidence supporting its assertion that the work of constructing 830 feet of new main line track and dismantling the old main line track was "performed under the total authority and for the sole benefit of MARTA." We are persuaded that the construction of the new track was instigated by MARTA and that Carrier had no control over its subcontracting; but the Carrier has not carried its burden of proof regarding the dismantling of the old main line on its own property. Aside from bare assertions, there is no probative evidence on the record to justify Carrier's failure to use its own forces to dismantle the old main line. At

a minimum, Carrier was clearly obligated to confer with the General Chairman prior to contracting out said work. To that extent, therefore, this claim must be sustained. This Board shall retain jurisdiction over the question of appropriate damages should the Parties be unable to agree upon the time spent by the subcontractor in dismantling and removing the old track.

AWARD

Claim sustained in accordance with the Findings.

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.