

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32941
Docket No. MW-32178
98-3-94-3-613**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Belt Railway Company of Chicago**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to construct a track along the north side of Carrier's south thoroughfare and northeasterly of Carrier's east leg of the Central Avenue Wye Track in the Clearing Yard, Bedford Park, Illinois from January 15, 1993 through February 6, 1993 (System File BRC-6016T/100-MofW).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance notice in writing of its intention to contract out the work in question in accordance with Rule 4.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the nine (9) senior furloughed Track Subdepartment employees shall each be compensated one hundred sixty (160) hours' pay [eight (8) hours per day, six (6) days per week], at their applicable rates of pay, for the loss of work opportunity suffered when the work was performed by the outside forces."**

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 were given due notice of hearing thereon.

This dispute involves the construction of a new tail track at a location within Carrier's Clearing Yard on the claim dates without prior notice to the Organization. Carrier is a switching railroad, and directly adjacent to part of its Bedford Park yard is a CSX Intermodal (CSXI) facility that was serviced by one of Carrier's existing tail tracks up until the time of the events in question.

There is no dispute that CSXI experienced an increase in business leading to the expansion of its facility in 1992 and a desire to obtain improved rail access to it. Because Carrier could not give CSXI exclusive use of its existing tail track without compromising its own operation, Carrier and CSXI entered into a series of lease and easement agreements leading to the construction of the new tail track being protested herein. Because an understanding of these agreements is important to the resolution of the "control" issue being raised in this case, their pertinent provisions will be set forth herein.

On October 10, 1992 Carrier leased a section of its premises adjacent to its existing tail track to CSXI for the purpose of installing a new roadbed, track and turnouts. The lease was for one year, or until the track construction was complete, whichever was shorter, at a rental of \$10.00. In this lease, Carrier granted CSXI permission to construct the new track at its own risk and expense.

On the same date, Carrier granted CSXI a 30 year easement in and around the new tail track. The easement agreement indicates that it is in the parties' best interest for CSXI to construct a new tail track on Carrier property for the permanent and exclusive use of Carrier so that Carrier can give the existing track to CSXI. It notes that after the new tail track construction is complete, Carrier will use it for its own operation and is responsible for all aspects of its maintenance. The easement agreement

also provides that at its expiration, CSXI will sell to Carrier any and all property interest it has in the improvements on the easement property for \$100.00.

On December 31, 1992, Carrier and CSXI entered into two lease agreements. First, Carrier leased to CSXI the existing tail track for its exclusive use for a period of 30 years from the completion of the new tail track, at a fee of \$8000.00/year, specifying that CSXI would be responsible for all maintenance associated with such track. Second, CSXI leased to Carrier the new tail track for a period of 30 years from its completion for a fee of \$1.00/year, indicating that Carrier would be responsible for all maintenance thereon. Additionally, this lease provides that CSXI will sell any property interest it has in the new tail track to Carrier at the expiration of the lease for \$100.00.

The on-property handling of the claim reflects the Organization's contention that the work in issue was scope-covered, and could not be contracted out without prior written notice. The Organization asserted that the lease and easement agreements were merely a device used by Carrier to abrogate its obligation to assign the work in accordance with the Agreement, and noted that the short term lease was for the sole purpose of construction of the new track, that the project remained under the control of Carrier, was related to its operations and that it derived an economic benefit from it. The Organization also stated that Carrier provided material from its stockpiles for the construction project. It relies upon Third Division Awards 23928, 26212, 27576, 28312, 30977; Second Division Award 11562; Public Law Board No. 2203, Award 21, in arguing that Claimants should have been assigned to perform this work.

Carrier denied the claim based upon its contention that because the work was performed on leased property, it was not covered by the scope provisions of the Agreement. Its correspondence reveals that it only provided 600 ties to complete the project in a timely fashion, and was reimbursed by CSXI for them. Carrier explained that it only gets a wheelage fee for moves over the main line, and that it was CSXI that received the primary benefit from the construction of the new track. Carrier asserted in its claim denial letters that the increased volume of CSXI traffic would have created unacceptable blockages to Carrier's yard operations without this additional track. It rests its argument on its lack of control, and the fact that the work was performed "for the ultimate benefit of others, [and] is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party," citing Third Division Award 26212. Carrier relies upon Third Division Awards 29577 and 31234 for the proposition that where property is leased for the purpose of

constructing a lead track to the lessee's business to provide it a tie in to Carrier's track for shipment of its goods, Carrier is not responsible for the contracting out of the construction of such track, nor is notice required.

In this case there is no dispute that track construction work of the type performed herein is scope-covered work historically performed by employees. Further, it is undisputed that no notice was served under Rule 4 concerning this work. What is in dispute is whether Carrier retained sufficient control over the leased property, or benefitted from the construction of the new track, to hold it responsible for the subcontracting.

Both parties agree to the application of the rationale of Third Division Awards 26212 and 28312 herein, especially with respect to the following listed criteria for holding Carrier not liable for contracting out:

- "(1) Where the work, while perhaps within control of Carrier, is totally unrelated to railroad operations.
- (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.
- (3) Where Carrier has no control over the work for reasons unrelated to having contracted out the work."

Carrier argues that this case falls squarely within the second and third criteria. It notes that it had no need or desire to build a new tail track because it already had an existing track, and that CSXI derived the exclusive benefit of an increase in its business and the speed of handling its freight. Carrier also relies upon the fact that the property was leased and CSXI contracted out the project at its own expense. The Organization states that Carrier's direct economic benefit came from its acquiring a new tail track and realizing the increase in freight volume associated with additional trackage.

A careful review of the record convinces the Board that this claim should be sustained. While we agree with the basic proposition that work which is not performed at Carrier's instigation, under its control, at its expense or for its benefit, does not come within the confines of the Scope of the Agreement or its notice provisions (see Third

Division Award 31234) we find that the particular facts of this case do not support such a conclusion.

Primary focus must be given to the nature of the relationship created by the various lease and easement agreements between Carrier and CSXI, and the intent of such arrangement. These documents establish that Carrier, in reality, retained control over the property upon which the new construction was performed as well as its added value. The lease was only granted to CSXI for the period of construction, in this case around four months, and, upon completion of the new track, Carrier was leased back its exclusive use for 30 years at a nominal fee of \$1.00/year. Further, the arrangement provided for CSXI to sell back to Carrier any property interest in that land (including the trackage and improvements) at the expiration of the lease for a minimal fee. While CSXI did get the exclusive use of the existing track for a 30 year period in exchange, it paid \$8000.00/year for that right. Additionally, the benefit derived by CSXI was the use of the old track which was not located on the leased property upon which it performed the construction in issue. Therefore, it cannot be said that Carrier gave up control over the leased premises or derived no benefit from the construction of a new track thereon. CSXI did not retain any control over the new track; Carrier did.

It may well be that Carrier would not have constructed a supplemental track to service CSXI on its own without CSXI funding the construction in exchange for exclusive use of the old track for a 30 year period. There is no showing that this could not have been accomplished by Carrier performing the new construction (or contracting it out with notice) and entering into a long-term leasing agreement with CSXI which would have funded the project and provided for future maintenance of such track. However, on the facts of this case, the Board cannot conclude that Carrier's scheme was for the ultimate benefit of CSXI alone and was not for the purpose of avoiding its obligations to assign the construction work to its employees under the Agreement.

We adopt the following finding of the Board in Third Division Award 26212, as applicable in this case:

"... The very instrument by which the property was leased to Coastal includes the parties' Agreement 'with respect to the construction, maintenance and operation of industrial track.' This constitutes an agreement by Carrier to have track built by the Lessee and is fairly within the Notice requirement of the Agreement as well as the December 11, 1981

letter. Further, significant control over the manner in which the track is to be constructed, maintained and operated is reserved to Carrier and the operation of the track is certainly intimately connected with Carrier's railroad operation. Had Carrier directly let the work in question to Byler clearly the Agreement and notice requirements would apply. It seems equally clear that by leasing the property for the express purpose of construction of the track an attempt is made to do by indirection that which cannot be directly done. We conclude that the Agreement was violated when no advance notice of the Lease was given."

Because this claim seeks compensation for furloughed employees, no issue arises as to the loss of work opportunity involved in the construction of the new track. Nor did Carrier dispute the number of hours sought in its correspondence on the property. Accordingly, the claim will be 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 23rd day of November 1998.