Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38206
Docket No. MW-37999
07-3-03-3-436

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 utilized outside forces to construct track on its property between Cicero Avenue and Pulaski Avenue, south of the New Tail Track from May 6 through September 20, 2002 (System File BRC-6787T).

(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 Claimants (all BMWE employes on the Belt Railway Company) shall each be compensated at their respective rates of pay for an equal proportionate share of the nine thousand eight hundred thirty-two (9,832) man-hours expended by the outside forces in the performance of the aforesaid work from May 6 through September 20, 2002."

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.

On April 15, 2002, the Carrier sent the Organization the following e-mail notification:

> "Sorry for the late notification, but I would also like to talk this afternoon about a project scheduled to begin early next month. We have entered into a long term lease (through 2022) with CSX Intermodal for about 12 acres of land east of Cicero Bridge, on the south side of our property, on which CSXI intends to construct a Staging Yard. It is intended to house about six tracks of 4000-5000 foot length and will feed their Bedford Park Intermodal Facility.
>
> BRC serves a couple of industries within this acreage, and we will retain the right to operate over and maintain, inspect & repair the industry turnouts therein.
>
> Given the long term of the lease arrangement, and BRC's lack of control over the construction, I was unsure as to whether notice would be required. However, I think it better that we discuss it. Thanks."

The above referenced claim was initially filed on June 10, 2002. The claim stated in pertinent part:

> "This claim is being filed in behalf of all members of the Brotherhood of Maintenance of Way Employes employed on the Belt Railway Company of Chicago, due to the Carrier's violation of Rule 4 and Agreement dated August 24, 1998. Contractors are

being utilized to construct a Staging Yard between Cicero Avenue and Pulaski Avenue, south of the New Tail Track.

. . . Track construction is work belonging to and historically performed by the Brotherhood of Maintenance of Way Employees.

. . . Rule 4 states in part: 'In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.' The Carrier has furnished no such notice involving the construction of a Staging Yard between Cicero and Pulaski Avenues.

The Agreement of August 24, 1998 states in part: 'It is understood before any additional contractors or foreign railroad gangs are to be utilized or any other work not identified or contemplated can be performed, an additional letter of understanding detailing the work will be required.'

There has been no Letter of Understanding allowing contractors to perform the above-mentioned work. This is work reserved for and historically performed by the Brotherhood of Maintenance of Way Employes.

It is the claim of the Brotherhood that each member of the Brotherhood of Maintenance of Way Employes employed on the BRC be compensated, an equal and proportionate share, of all hours worked by the contractors until they are removed from Carrier's property. . . ."

The Carrier responded to the claim on August 6, 2002. In its letter of denial, it contended that there was no advance notice because the "property or area in question was leased per Agreement dated March 13, 2002 with CSXI." The Carrier added, "since this work is being done on long-term leased property, I see no valid

claim as to outside contractors (not under BRC control or contract) performing listed work."

The Organization appealed the Carrier's denial by letter of September 24, 2002. It contended that because the Carrier owned the land, retained the right to use the tracks on the land once CSXI had built them, would profit from the leasing transaction with CSXI, and then would take possession of all tracks and appurtenances on the leased land once the lease expired, the Carrier was bound to administer the land – leased or not – in accordance with the BRC/BMWE Agreement. The Organization also contended that the "obvious purpose was to avoid [the Carrier's] obligation" under the Parties' Agreement and that the same result could have been obtained by building the new track with BMWE-represented forces and then leasing the property to CSXI.

The Organization's appeal was denied by letter of November 19, 2002. The Carrier reiterated its position that there was no violation of Rule 4. Further, it addressed the Organization's allegations that it had control of the land, leased or not, and should have used Carrier forces and equipment to perform the construction work. Specifically, the Carrier stated:

> ". . . The Belt Railway Company of Chicago had no right to perform this work. The land was leased and under the exclusive control of CSXI. Without prejudice to the Carrier's argument that BMWE forces had no right to the work, the Carrier had neither the forces nor the machinery to perform this project."

The Carrier also characterized the Organization's allegation that the lease was simply a vehicle for avoiding its responsibilities under the BRC/BMWE Agreement as "absolutely untrue."

The claim was subsequently progressed according to the relevant contractual provisions of the Agreement, including conference on the property on February 6, 2003.

This is certainly not a case of first impression. The matter of one Carrier leasing property – with or without retention of control of that property – to another

Carrier or non-rail third party has been considered in numerous Awards on this and other Boards, with varying results, depending upon the circumstances and the ultimate effect of the leasing arrangements upon the primary Carrier's operations and "bottom line." (See, for example, Third Division Awards 32941 and 26212; Public Law Board No. 4768, Award 1).

As noted above, the Carrier notified the Organization on April 15, 2002 that it had signed a lease with CSXI to allow the latter to construct a Staging Yard. There is no indication that such notice was simply a confirmation of a "fait accompli" as the Organization alleged in its correspondence on the property. Rather, although the lease had been signed, there is no indication that the work on the property had begun. On the contrary, the notification specifically states that the project at issue "is scheduled to begin early next month."

In correspondence with the Carrier on February 6, 2003, the Organization contended that an e-mail notification was not sufficient notification under the meaning of Rule 4. However, in its response, the Carrier asserted without contradiction that, while some divisions of the Carrier might serve such notice by mail, the General Counsel/Director of Human Resources had, on several occasions in the past, notified the Organization regarding contracting out via e-mail, faxes and telephone calls, without protest from the Organization as to method of notification.

With respect to the portion of the claim regarding whether the work at issue should have been performed by Carrier employees, that matter is essentially moot. The Organization offered no evidence other than assertions that the Carrier was performing the construction. On the contrary, all construction seems to have been carried out under the direction of CSXI. The only remaining BRC work on that property appears to be with regard to operating over and maintaining, inspecting and repairing industry turnouts for the "couple of" BRC customers within the acreage. That work would normally continue to be encompassed by the BRC/BMWE Agreement provisions. The Organization's reliance on the fact that both BRC and CSXI benefit financially from the leasing arrangement – the basis upon which any leasing arrangement presumably is undertaken – that fact alone is insufficient to prove continued control of the property under lease by the Lessor rather than by the Lessee. (See, Third Division Awards 37165, 36936, and 36017).

In light of the foregoing, the Board has no choice but to deny the claim in its entirety.

AWARD

Claim denied.

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 18th day of May 2007.