

SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 79

Case No. 79

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

CSX Transportation, Inc. (formerly the Chesapeake and Ohio Railway Company)

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 mainline track in connection with the Barrett Parkway Project beginning November 11, 1995 through January 8, 1996 and continuing [System File 12(1)(96)/12(96-425) LNR].
2. The Agreement was further violated when the Carrier failed to notify the General Chairman of its intent to contract out the "work in accordance with Article IV of the May 17, 1968 National Agreement.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman W. K. Whitwam, P. C. Gipson, Tamper Operator E. t. Green and Track Repairmen C. M. Fults, D. L. Fults, M. C. Ward, D. E. Green, J. Hartsfield, W. T. Howard, W. D. Spencer, L. R. Timbs, C. E. Rowe, C. A. Henley and R. S. Swafford shall each be allowed an equal proportionate share of the total number of man-hours expended by the outside forces at their respective rates of pay.

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and the Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as amended; and
2. That the Board has jurisdiction over this dispute.

OPINION OF THE BOARD:

Rule 1 (Scope) specifies:

These Rules cover the hours of service, wages and working conditions for all employees of the Maintenance of Way and Structures Department as listed by Subdepartments in Rule 5 - Seniority Groups and Ranks, and other employees who may subsequently be employed in said Department, represented by Brotherhood of Maintenance of Way Employees.

This Agreement shall not apply to:
Supervisory forces above the rank of foremen,
clerical employees and Signal and
Communication Department employees.

Rule 2 (Contracting) provides:

This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except 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 by or available to the Carrier. In such instances, the Chief Engineering Officer and General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that under certain circumstances, contracting of such work may be necessary. 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. In such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures

Department work with Company forces.

The minutes of the meeting on May 5, 1994 of the State Properties Commission of the State of Georgia, chaired by then Governor Miller, reflect that the State of Georgia approved the following action:

Request by Cobb County to be granted a revocable license to cross Western & Atlantic Railroad right of way at the Barrett Parkway Extension The County intends to build a railroad bridge over the Parkway, rather than the at-grade current crossing.

Cobb County and the Carrier subsequently executed a contract, dated October 25, 1994, that included the "construction of an underpass of CSX Main track and necessary detour track to facilitate its installation" Cobb County paid for the project by reimbursing the Carrier.

A contractor built the detour track on the government property beginning on or about November 11, 1995. The Organization submits that this portion of the project lasted until January 1, 1996 whereas the Carrier contends that the project took 20 work days to complete. Certain Carrier employees represented by the Organization connected the detour track to the Carrier's mainline on or about January 1, 1996.

The Carrier claimed to have sent a notice of intent, dated October 13, 1995, to the Organization about the plan to have a contractor perform the disputed work of constructing the detour track. The Organization denied receiving the notice of intent. In any event, no conference occurred between the parties concerning the disputed work.

The Third Division has considered this type of situation in Award No. 31234 by indicating:

This Board has consistently held that where work is not performed at Carrier's instigation, nor under its control, is not performed at its expense or exclusively for its benefit, the contracting is not a violation of the Scope Rule of the Agreement. . . . In reviewing the record in this case, the Board agrees with Carrier that its agreement with the State does not constitute contracting out work as that concept is contemplated within the meaning of the Scope Rule. . . .

Having found that Carrier did not contract

out the work in issue under the terms of the Agreement, it follows that it was not under any obligation to provide the General Chairman with notice under Article IV of the May 17, 1968 National Agreement.

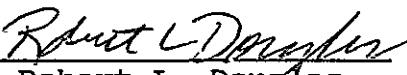
This approach is substantially similar to the analysis of the Third Division in Award No. 24078 (January 5, 1983) and the cases cited therein.

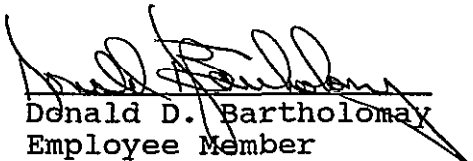
In the present case, the Carrier did not initiate the disputed construction project, did not ultimately pay for the disputed construction project, and did not obtain a direct benefit from the disputed construction. Instead, the disputed construction project benefitted Cobb County by enabling Cobb County to undertake the Barrett Parkway Extension. The disputed construction project of detour track merely provided Cobb County with a means to accommodate the interim needs of the Carrier so that Cobb County could effectuate the primary construction project, namely, the Barrett Parkway Extension.

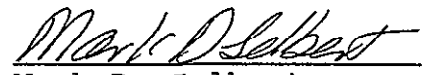
Although the Carrier necessarily participated with Cobb County in safeguarding the Carrier's interim operational interests, this relatively limited involvement did not rise to the level of control that triggers the scope provision of the collective bargaining agreement pursuant to the arbitral precedent contained in the present record. In addition, the record demonstrates and the parties did not dispute that members of the bargaining unit performed the scope-covered work of connecting the main line to the detour tracks at the appropriate time. Under all of these precise circumstances, the Carrier therefore did not have an affirmative contractual obligation to provide advance notice to the Organization.

AWARD:

The Claim is denied in accordance with the Opinion of the Board.


Robert L. Douglas
Chairman and Neutral Member


Donald D. Bartholomay
Employee Member


Mark D. Selbert
Carrier Member

Dated: Nov. 2, 2000