

SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 40

Case No. 40

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

CSX Transportation, Inc. (Former Seaboard System Railroad)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Brason Construction Company) to perform Maintenance of Way work (build tracks and construct turnouts) in the vicinity of Mile Post SG-306 beginning June 5, 1995 and continuing [System File CJS-95-156/12(95-1119) SSY].

2. As a consequence of the violation referred to in Part (1) above, the Claimants* listed below shall each be compensated at their respective time and one-half rates for an equal proportionate share of the total number on man-hours expended by the outside forces in the performance of the work in question beginning June 5, 1995 and continuing.

*C. H. Jordan
J. E. Jones
W. D. Bunn
E. Wallace
R. W. Mabe
O. L. Hailey
L. Morman
L. T. Woolard
L. L. Stroman, Jr.
D. L. Batton
L. Wall
R. Plum
T. Thomas, Jr.

W. H. Bannerman
C. E. Sturdivant
W. L. Sturdivant
J. R. Braddock
F. L. Hinton
J. Bell
S. Melvin, III
A. D. Williams
F. E. Thompson
A. C. Powell
R. E. Mabe
W. H. Dunston
E. C. Jennette

FINDINGS:

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

1. That the Carrier and the Employees involved in this dispute are, respectively, Carrier and Employees 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 special circumstances of the present dispute indicate that Rule 2 contains the pivotal provision concerning the propriety of the Carrier's action. The record substantiates that the Carrier provided the Organization with the requisite advance notice of the disputed work, that the parties conferred about the disputed work, and that the parties failed to reach an understanding setting forth the conditions under which the work will be performed.

In reviewing a Rule 2 dispute in which the parties had conferred without reaching an understanding, the Third Division in Award 26220 (Marx, Referee) reasoned that:

the Board perceives that the parties failed to agree as to whether the work should be contracted or performed by Carrier employees or a combination of both. The requirement of Rule 2 is not that strong, however. Is "reach an understanding setting forth the conditions under which the work will be performed" the same as requiring Organization approval or consent to any contracting of construction work? The Board finds that it is not, relying on the preceding phrase, which states "under certain circumstances, contracting, [sic] of such work may be necessary."

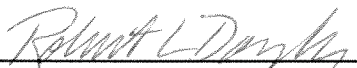
As a result, the failure of the parties to reach an understanding in the present case does not mean that the Carrier violated the Agreement. Instead, Rule 2 requires a further inquiry to determine whether the Carrier met the limited exceptions that enable outside forces to perform such work.

The record indicates that the Carrier repeatedly asserted that the Carrier lacked sufficient manpower and available equipment to perform the disputed work. To fulfill the elements of Rule 2, however, the Carrier must prove that certain work requires special skills not possessed by the employees. The Carrier provided sufficient evidence that all of the employees were fully working. The Organization failed to rebut this evidence. As a

result, the Carrier perforce lacked the employees with special skills to perform the disputed work. Furthermore, the Carrier provided un rebutted evidence that the Carrier lacked the necessary equipment to perform the disputed work. Under these precise circumstances and in the absence of sufficient evidence to the contrary, the Organization failed to prove that the Carrier had violated Rule 2 of the Agreement. Any other provisions of the Agreement relied on by the Organization lack persuasiveness in the context of the present dispute.

AWARD:

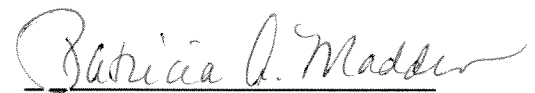
The Claim is denied in accordance with the Opinion of the Board.



Robert L. Douglas
Chairman and Neutral Member



Donald D. Bartholomay
Employee Member



Patricia A. Madden
Carrier Member

Dated: October 6, 1999