BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the appeal of CSX TRANSPORTATION, Inc.	)	
	)	Docket No. MSBCA 1771
Under Mass Transit Administration Commuter Rail Passenger Service Agreement	)	

January 3, 1995

Interpretation of Contracts-Objective
Following the objective law of contract interpretation, the Board found that MTA is not required to indemnify CSXT under the MARC commuter rail agreement for damages sustained by a third-party contractor performing track maintenance work not directly related to "contract service" under the agreement.

Appearance for Appellant: Stephen B. Caplis
Whiteford, Taylor & Preston, L.L.S.
Baltimore, MD

Appearance for Respondent: William A. Kahn
Assistant Attorney General
Baltimore, MD

Opinion by Board Member Steel

This matter comes before the Board on cross-motions for summary disposition. The parties are agreed that the underlying material facts are not in dispute and that this appeal is therefore ripe for summary disposition.

Findings of Fact

1. Appellant timely appeals the denial of its claims for indemnification under the captioned agreement.

2. In 1979, the Baltimore & Ohio Railroad Company ("B&O"), predecessor in interest to Appellant, and the State Railroad Administration, predecessor in interest to Respondent Mass Transit Administration ("MTA") entered into leasing and operating agreements which superseded in October 1990 by a Commuter Rail Passenger Service Agreement (the "Contract") between the parties.

3. Under the Contract, CSXT operates weekday commuter passenger rail service known as Maryland Rail Commuter ("MARC") between Baltimore and Washington, DC, and between Washington, DC and

Martinsburg, West Virginia on tracks and using station facilities owned by CSXT, CSXT and Mass Transit Administration rolling stock, CSXT employees, and CSXT maintenance facilities.

4. CSXT's primary obligations under the Contract are summarized in Article I, §1(a):

> Section 1. SERVICE OBLIGATION
>
> (a) CSXT will provide regularly scheduled daily commuter rail service on weekdays (Monday through Friday) on its Capitol Subdivision line between Baltimore, Maryland and Washington D.C., its Metropolitan and Cumberland Subdivision lines between Martinsburg, West Virginia and Washington, D.C. in accordance with Section 2 of this Agreement. This train operation, plus the maintenance of equipment, access of and use of facilities, ticket sales, and other activities required to support the operation of the train service as provided in this Article I, shall be called the "Contract Service." CSXT will make available its rail facilities on the above state lines to provide the Contract Service. CSXT will operate the Contract Service in a safe and efficient manner with use of appropriate facilities and staff for management, train operations and maintenance. Train consists will be as mutually agreed upon.

5. Under Contract Section 10(a)--Facilities Access and Usage, MTA pays CSXT a fixed sum per month for the basic Contract Service train sets and an additional fixed fee per month for each train set added. Payment of these monthly rates allows MTA usage of CSXT track and track facilities. There are no additional charges for track access or maintenance anywhere else in the contract.

6. Under Contract Section 9(b) MTA agrees to indemnify CSXT from loss as follows:

> 9(b) Indemnification by Administration.
> (1) The Administration agrees to indemnify, save harmless, and defend CSXT from any and all casualty losses, claims, suits, damages or liability of every kind arising out of the Contract Service under this agreement...

7. In order to protect against accidents occasioned by the presence on the track of work crews and equipment, CSXT has established rules including the following:

> 701. On-track equipment operators must be examined and qualified on the Operating Rules or they must be working under the immediate

(on-the-job) supervision of a person who has been examined and qualified on these rules.

702. When other that CSX on-track equipment is being operated on CSX track, a qualified employee must accompany and direct such equipment. He shall position himself to observe and give instruction to the OTE operator and he will be responsible for obtaining authorities and complying with the operating Rules.

703. The OTE operator must be familiar with the method of train operation and the physical characteristics of the territory over which the on-track equipment is being operated, or on which work is to be performed.

8. Rule 704 governs on-track equipment movement and short-term track movements. For example, a main track, signalled track or siding must not be occupied or fouled without written authority of the train dispatcher. The track foreman is required to request authority from the dispatcher to occupy the tracks, including the specific location, the limits and time of occupancy. After authority for presence on the track is received, the track must be cleared within the authorized time, and the track foreman must report that the track is clear.

9. On or about November 4, 1992. CSXT contracted with Melvin Benhoff Sons, Inc. ("Benhoff") to remove and replace four at-grade public road crossings over CSXT Baltimore-Washington track. The four crossings, including a crossing at Hanover Road, were remote from the nearest stations. Benhoff's work was part of general track rehabilitation to benefit all traffic, both passenger and freight. MTA was not notified of

the work to be performed, or asked to contribute to the expenses arising therefrom.

10. In the instant case, On December 18, 1992, although a CSXT supervising employee (foreman) was present as Benhoff commenced work with a backhoe on track at the Hanover Street crossing, apparently the central train dispatcher was not informed of Benhoff's presence and work plans pursuant to Rule 704. Thus, there was no notice to any train engineers or any notice to the dispatcher so that he might alert any oncoming trains of the obstruction on the track.

11. At 9:10 a.m. on that date MARC train Number 244 en route to Baltimore rounded a bend in the track just before the Hanover Street crossing. Although there is some dispute as to the warnings given by the CSXT foreman to the Benhoff backhoe operator, there was insufficient time to remove the backhoe or for the train to slow sufficiently to avoid a collision.

12. The parties have stipulated that there was no negligence in the operation of the MARC train. The backhoe was "totalled", generating a claim by Benhoff for $40,420.25. Without conceding liability, CSXT settled with Benhoff in the amount of $23,350[1], which amount is now sought from MTA under the indemnity agreement cited in Finding of Fact No. 6 above.

13. This claim for indemnification was raised at the agency level. The procurement officer denied the claim, and the Appellant appealed to this Board. Cross-motions for Summary Disposition were filed, and hearing on the motions held on November 16, 1994.

Decision

In order to decide the cross motions for summary disposition, the seminal question for the Board to determine is whether the accident in question arose out of "Contract Service". Appellant argues that the accident did arise out of "Contract Service" and

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[1]Without approving settlement, MTA has agreed that this settlement amount is fair and reasonable.

that therefore, under ¶9(b) of the Contract it is entitled to indemnification.

MTA agrees that for the ¶9(b)indemnification provisions to apply, the accident must have arisen "out of Contract Service", but argues that the accident did not "arise out of Contract Service." Respondent further argues that if it is determined that the claim did "arise out of Contract Service," under the particular facts of the instant claim, MTA is barred from indemnifying CSXT by Section 5-305 of the Maryland Courts and Judicial Proceedings Article which prohibits indemnification of a party for its own negligence in the context of certain construction activity.[2] As succinctly stated by the Procurement Officer in his decision on Appellant's claim at page 13,

> CSXT's claim with respect to the Benhoff collision boils down to this: CSXT seeks to be indemnified for its own negligence in transacting its own affairs. This the Contract does not allow. First the Contract calls for indemnification of CSXT only for its negligence in the conduct of MTA's affairs. Second, the public policy of the State would preclude indemnification in these circumstances.

MTA claims that the "track maintenance activities" at issue during the Benhoff construction were not "Contract Service" but "general business activity" of CSXT. While this activity may be

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[2] Section 5-305. Certain construction industry indemnity agreements prohibited.

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. This section does not affect the validity of any insurance contract, workers' compensation, or any other agreement issued by an insurer.

necessary as a prerequisite to CSXT's ability to perform its obligations under the contract, i.e., to make its rail facilities "available", it primarily supports CSXT's responsibilities in its other lines of work, for example, freight movement. CSXT argues that the fact that this work benefits services to entities not a party to this contract is simply an extraneous result of the proper performance of this contract.

The Board finds that the activity in question (grade crossing repair) represented a necessary and recurring maintenance activity required of CSXT notwithstanding the existence of the instant commuter rail Contract. This activity would have been required to have been performed by CSXT to maintain its operations had it never entered into the commuter rail Contract with MTA.[3] While it may be argued that there is an incidental benefit to the commuter rail activity, since the activity may only occur on tracks that are maintained in good order, the fact of such attenuated relationship does not bring the activity within the definition of contract service set forth in the Contract.

The mere fact that a MARC train was innocently and fortuitously involved in the incident does not bring the incident within the ambit of the definition of "contract service" under the Contract. Further, the construction work was not sufficiently significant to the performance of the provision of the Contract Service to require indemnification.

Contract Service is not defined specifically. The Contract speaks directly only of stations, ticket sales, equipment and track. Grade crossings are not mentioned. While the Contract refers to station upgrades (§§10(b) and 11(a)) the Contract is silent on track maintenance and upgrades. While "upgrade" might involve an issue of the safety of the commuter rail service

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[3]In response to the Board's questioning, counsel for CSXT stated his belief that approximately 15-20% of the traffic over CSXT rail lines in the Baltimore/Washington/Frederick corridors involved the MARC commuter service which is the subject of the instant contract.

provided for in this Contract, there is no evidence that the specific upgrade in this case was related to anything other than normal CSXT maintenance which would have occurred whether the Contract was in place or not.

We understand that by entering into this Contract the State has agreed to indemnify a private party for its own negligence with taxpayer dollars. It is not illegal for the State so to indemnify the private party where there is a clear nexus between the service provided by the private party and the incidence in which its negligence causes damage to a third party. Under the facts of the case at bar, while there is the most minimal nexus in that no train can operate if the tracks fall apart, we find that this upgrade was not intended to benefit the Contract Service as such.

Maryland follows the objective law of contracts. General Motors Acceptance Corp. v. Daniels, 303 Md. 254 (1985). The Court in Daniels stated:

> A court construing an agreement under this test must first determine from the language from the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated.

Id. at pp. 261-262. It stretches the meaning of the words of §1(a) of the Contract beyond all reasonable bounds to find that those words were meant to include as an activity encompassed under Contract Service any occurrence involving a MARC train.

When read objectively and for the ordinary meaning conveyed by the words used, we find that the activity encompassed by the upgrade undertaken at the request of CSXT by Benhoff could not reasonably by understood to constitute Contract Service. Thus the State's liability does not arise, and the Board need not consider MTA's alternate defense that the incident arises out of a construction contract wherein §5-305 would be applicable.

We believe that our determination herein is reinforced by a review of two recent federal decisions involving Maryland railway contracts. In Brown v. Baltimore & Ohio Railroad, 805 F.2d 1133, (4th Cir. 1986) the Court found that there was a nexus between the

contract work and the incident giving rise to the seeking of indemnification and affirmed the U.S. District Court judgment for the B&O on its contractual indemnification claim. In that case, Brown, a B&O brakeman, brought suit for injuries suffered when his train struck an earth moving machine placed on the track by unknown vandals. The earth moving machine had been stored near the tracks because it was being used by a third party to install a sewer pipeline crossing pursuant to an easement contract between Baltimore County and B&O. Baltimore County had agreed to indemnify the Railroad for any liability sustained by the railroad on account of injury or damage connected with inter alia, the "installation . . . of [the described sewer crossing], regardless of whether such . . . injury . . .[was] caused by the negligence of the [B&O] or otherwise". Id. at 1139. The Court found, in effect, that Brown and the railroad were innocent parties, and upheld the indemnification agreement.

In Helm v. Western Maryland Ry. Co., 838 F.2d 729 (4th Cir. 1988), by contrast, Carroll County and Western Maryland Railway Company entered into an agreement to allow the county to work on the railroad's right of way to improve drainage and install a box culvert. The railroad also agreed to do construction work for the County at the right of way by removing railroad track and line poles. The Railway's employee Helm was injured when the utility pole he was working on pursuant to the contract broke. The lower court found that the Railroad was engaged in construction work pursuant to (although not required by) the contract when the injury occurred. Id., p. 732.

The Fourth Circuit distinguished these facts from those in Brown and said, at p. 732, "in Brown the railroad was not engaged in any construction work pursuant to the contract." The Court concluded,

> Thus, only in [Helms] is it necessary to apply Maryland's expressed public policy against requiring indemnification for one's own negligence in performing construction related work contracted for by the indemnitor.

In Brown, the indemnitee railroad had no role in the construction activities giving rise to the incident. The railroad had simply granted an easement, and was not "in a position to control performance" of the construction contract. Therefore no indemnity provision could attach.

In Helms, work was being performed directly by the railroad ostensibly to benefit the County (although the Court found there was a material dispute because the County claimed that since the work was erroneously being performed outside of the "work area" there was no benefit to the County) and the indemnity provision might arguably be held to apply. The Court found that the County could have been held to indemnify the Railroad but for the fact that the sole negligence of the Railroad was at issue so as to trigger application of §5-305. See Helms, supra, p. 731, fn. 1.

In the instant appeal, as in Brown and as opposed to Helms, the work being performed was outside the scope of the Contract with the State, provided no direct benefit to the State, and was performed without its knowledge. Therefore, the indemnification provision in §9(b) of the Contract does not apply and the question of §5-305 applicability is not reached.

Based on the foregoing the motion of the Respondent for summary disposition is granted, the motion of the Appellant for summary disposition is denied and the appeal is denied. Wherefore, it is ORDERED this 3rd day of January, 1995, that the appeal is denied.

Dated: 1/3/95

Candida Steel
Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1771, appeal of CSX Transportation, Inc. under Mass Transit Administration Commuter Rail Passenger Service Agreement.

Dated: 1/3/95

Mary F. Priscilla
Recorder