Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35774
Docket No. MW-34408
01-3-97-3-920

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (*Brotherhood of Maintenance of Way Employes*
(
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Progressive Rail Company) to cut bolts off of splice bars, load plates, anchors, splice bars and rail behind the Steel Gang between Mile Post 148 and Mile Post 152.7 on the Main Line from April 22 through May 5, 1996 (Carrier's File 8365-1-553).

(2) The Agreement was violated when the Carrier assigned outside forces (Progressive Rail Company) to cut bolts off of splice bars, load plates, anchors, splice bars and rail behind the Steel Gang between Mile Post 10 and Mile Post 15, and between Mile Post 31 and Mile Post 36 on the Mt. Clements Subdivision from May 13 through June 3, 1996 (Carrier's File 8365-1-554).

(3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the work in accordance with Article IV of the May 17, 1968 National Agreement.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Crane Operator B. L. Beckman, R. Womack, Welder A. Koselke and Welder Helper J. Perez shall each receive ten (10) hours of pay at their respective straight time rates for each date the contractor worked from April 22 through May 5, 1996.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Crane Operator R. Bragg, M. Wilson, Welder A. Koselke and Welder Helper J. Perez shall each receive ten (10) hours of pay at their respective straight time rates for each date the contractor worked from May 13 through June 3, 1996."

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.

The work in dispute is sufficiently described in the Statement of Claim and will not be repeated. The Organization asserted that its members have always performed the kind of work involved and it also asserted, in its October 12, 1996 appeals on the property, that contractors have never been used to do the type of work. Close examination of the record herein reveals that the Carrier never refuted either of these assertions. At most, the Carrier claimed the existence of a past practice, in its December 9 and 10, 1996 replies, whereby outsiders had been used to remove abandoned trackage that had been sold.

But the Carrier never asserted, in any manner whatsoever on this record, that the work in dispute here was done on abandoned trackage. Quite to the contrary, the Organization repeatedly asserted that the track was in service and used by the Carrier's trains. Indeed, the Organization also asserted that M of W employees served as pilots to obtain track and time permits and to protect the contractor's forces from train movements. These assertions also stand unrefuted by the Carrier on this record.

The Carrier's sole defense to the claims is that the contractor was merely removing materials that had been sold to it on an "As Is Where Is" basis. Accordingly, the Carrier's position is that the transaction was not a contracting issue. As a result, the Carrier took no exception to the Organization's contention that no notice was served. In the Carrier's view, the notice provisions did not apply.

The Board has denied claims where a genuine "As Is Where Is" sale has been established by the evidence. We have also denied claims where allegations of scope coverage claimed under a general Scope Rule have been rebutted by a proven past practice showing regular and predominant performance of disputed work by non-agreement personnel. Both of these kinds of contentions, however, are affirmative defenses. As such, it is the Carrier's burden to establish, with probative evidence, all of the requisite elements of the defense. Mere assertions do not suffice when, as here, the affirmative defense contentions are challenged.

The Organization said, in writing, that it did not concede that the past practice incidents alleged by the Carrier had occurred. This triggered the Carrier's obligation to produce evidence of such alleged practice. The Carrier failed to do so.

The Organization also contended the Carrier's "As Is Where Is" sale was a subterfuge to deny the claims. Accordingly, it requested a copy of the sales contract. This request was made in the Organization's September 9, 1997 letter. The record on the property stayed open for the Carrier's response for nearly three months thereafter until December 8, 1997, when the Organization served its Notice of Intent to file an ex parte submission. The Carrier never responded to the Organization's request.

Although the Board has upheld successfully proven "As Is Where Is" sales, it has also rejected the purported affirmative defense when carriers have refused or failed to provide documentation to establish the legitimacy of the defense when properly requested by the affected organization.

Because the instant record establishes neither a legitimate "As Is Where Is" sale nor a past practice that rebuts scope coverage, we are compelled to find that the Carrier violated the Agreement when it contracted the work in the manner it did. We must also find that the Carrier violated the written notice requirements.

Given the foregoing findings of violation, we must sustain the claims. Because no good faith discussions were held regarding the use of Carrier forces, we reject the Carrier's full employment defense. Had such good faith discussion taken place, there is no reason to believe that a way could not have been found to use Carrier forces.

Because the Carrier asserted certain unavailability of one or more of the Claimants, we remand this matter to the parties to determine how many hours should be paid to each Claimant. We otherwise sustain the claims.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of October, 2001.