Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36018
Docket No. MW-34195
02-3-97-3-679

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 an outside concern (Progress Rail Company) to cut bolts off splice bars, pick up and load plates, anchors, splice bars and rail from Mile Post 97.5 and Mile Post 75.5 between South Bend, Indiana and Kingsbury, Indiana beginning on March 4, 1996 and continuing through April 18, 1995 (Carrier File 8365-1-541).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman of its intent to contract out said work in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Machine Operators G. L. Reid, E. F. Gaines, L. M. Kneuppel and S. Brown shall each be allowed an equal proportionate share of the total number of man-hours expended by the contractor's forces at their respective straight time and time and one-half rates of pay."

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.

This claim was progressed on the property in the following manner:

The original claim dated April 29, 1996, protested the Carrier's use of outside forces to perform the disputed work at the locations set forth in the claim.

By letter dated May 15, 1996, the Carrier denied the claim on the ground that "[t]he sale of track material 'as is, where is' does not constitute contracting as contended by the organization."

By letter dated May 27, 1996, the Organization appealed the denial contending that, historically, covered employees have performed the work; the " . . . assertion that the rail was sold to Progress Rail is irrelevant"; and " . . . the same rail that is allegedly sold to Progress Rail is being reused on the Mt. Clements Subdivision."

By letter dated June 24, 1996, the Carrier denied the appeal stating "[r]ail and other track material as stated in this claim from M.P. 97.5 to 75.5 was sold to Progress Rail with an F.O.B. of 'As is, Where is'"; and "[t]he sale of track material removes it from the jurisdiction of the railroad and contract agreements."

By letter dated July 21, 1996, the Organization further appealed on the same basic grounds set forth in its May 27, 1996 letter.

By letter dated September 18, 1996, the Carrier denied the further appeal stating that "[t]he sale of track material 'As Is Where Is' does not constitute contracting"; and "[t]here is a past practice and documentation relative to other than GTW BMWE employees removing abandoned trackage that has been sold, i.e., on the Cass City Subdivision, Dearoad Yard, westward main track on the Chicago Division from M.P.

5 to M.P. 7, eastward main track from M.P. 129 to M.P. 149 and Elsdon Yard were removed by other than BMWE employees between 1989 and 1995."

Conference was held on October 3, 1996, without resolution.

By letter dated March 19, 1997, the Organization again stated that "the rail allegedly sold to Progress Rail was reused by the Carrier on the Mt. Clements Subdivision . . . [and t]his makes the Carrier's 'As Is-Where Is' argument null and void."

By letter dated July 18, 1997, the Organization wrote the Carrier, stating, in relevant part:

> ". . . Since it is rather apparent that the Carrier is using the alleged sale as is where is defense as a subterfuge to deny this claim, I am now requesting that the Carrier provide the Organization with the alleged sales contract that it is hiding behind. Absent such a document, it is readily apparent that the Carrier simply contracted for services.
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> The Carrier further asserted that there is a past practice of other than maintenance of way employes removing abandoned trackage that documentation to support such an assertion, it can only be considered as such. However, and without conceding that the incidents occurred, it must be assumed that those transactions were true sales as stipulated by the Carrier and not contracts for services which is the case here."

By letter dated August 28, 1997, the Organization progressed the dispute to the Board.

The Carrier is correct that its Agreement obligations concerning contracting out are not applicable when the material is sold to an outside concern on an "as is, where is" basis. See e.g. Third Division Award 32857 and Awards cited therein:

> "Based on what is before us, we are satisfied that the Carrier entered into an arrangement whereby TIFP removed the ties on an 'as is, where is'

basis. As such, no violation of the Agreement has been shown. See Third Division Award 30637:

> The ties were sold on an 'as is, where is' basis. Accordingly, the removal by the outside concern did not violate the Agreement since the ties were no longer owned by the Carrier.

See also, Third Division Awards, 30080, 30224, 30231, 30901, 31716 and Awards cited therein."

Further, see Third Division Awards 31522 and 30946 with the same result for "abandoned" trackage.

Throughout the handling of the dispute on the property, the Carrier asserted that the material was sold to Progress Rail, "as is, where is." That position is an affirmative defense by the Carrier which places a burden of proof for that defense on the Carrier. The narrow question here is whether the Carrier has met that burden? We find that it has.

The initial assertion concerning the nature of the arrangement with Progress Rail came from the Carrier's Production Engineer in the Carrier's May 15, 1996 letter declining the claim. While it would have been much more definitive for the Carrier to meet its burden of proof had it produced some type of documentation corroborating the nature of the arrangement with Progress Rail, the Carrier, in effect, relied upon what amounts to a statement from the Production Engineer that the arrangement with Progress Rail for the disputed material was on an "as is, where is" basis. The Carrier's offering was sufficient to shift the burden back to the Organization to refute or rebut the Carrier's proof on its asserted affirmative defense.

As the matter was further progressed on the property, the Organization generally disputed the Carrier's assertion concerning the nature of the arrangement with Progress Rail. However, beyond assertions (e.g., characterizing the Carrier's position as "null and void" or stating, without more, that the rail was reused by the Carrier elsewhere on the system), nothing <u>factual</u> was presented by the Organization to refute the Carrier's affirmative defense that the arrangement with Progress Rail was on an "as is, where is" basis.

But remember, the Carrier's position is an affirmative defense. And here, although perhaps thin, that proof supporting the Carrier's affirmative defense was present. Given the Carrier's offered proof, it became the Organization's task to offer evidence to rebut that affirmative defense. The Organization did not do so.

The Organization could have easily put the Carrier to its proof by early on demanding production of the sales documents with Progress Rail. Had the Organization done so, and had the Carrier failed to produce the relevant documentation, the Organization would have prevailed. See e.g., Third Division Awards 28229, 28430 (where lease agreements were requested by the Organization and not produced or were produced late leading to the adverse inference that the lease arrangement did not support a carrier's affirmative defense). Compare Third Division Award 35978 (where the produced sales documentation for an "as is, where is" affirmative defense was found inadequate because it covered a transaction four years before the disputed work was performed).

In this case there was a demand by the Organization for documentation concerning the nature of the arrangement with Progress Rail - a demand that was not met by the Carrier. In its Submission, the Organization argues that there should be a negative inference drawn from the Carrier's failure to provide the requested documentation (". . . [T]he Carrier failed to respond to the Organization's challenge. The Carrier's failure can only be construed as its tacit admission of the correctness of the Organization's claim."). We disagree.

It was not until July 18, 1997 - over nine months after the claim was conferenced - that the Organization, for the first time, demanded to see documentation concerning the transaction with Progress Rail. By then, it was too late. By the time the Organization made its demand, the claims handling procedure was, in effect, over. The purpose of the claims handling procedures developed by the parties in this industry is to allow the parties the ability to present, evaluate and discuss the evidence - ultimately with a goal of resolution of the dispute. That process is not furthered by what amounts to a belated request for documentation after the procedures are completed and then progressing the matter to the Board. In effect, given the belated request for documentation, the Organization's position is one of "gotcha." That is not what this process is about. Under the circumstances, we are unwilling to draw the requested negative inference that the Carrier's failure to provide documentation concerning the transaction with Progress

Rail should be considered as evidence that the transaction did not exist on an "as is, where is" basis as the Carrier stated throughout the claims handling procedure.

Based on the above, the claim shall be denied.

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 21st day of May, 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 36018, DOCKET MW-34195
(Referee Benn)

A dissent is required because the findings of the Majority were not based on the record as it was developed on the property.

First, the Majority held that the Carrier had satisfied its burden to prove its affirmative defense in this case. The affirmative defense was that the Carrier had sold the track material at issue here to the contractor on an "as is where is" basis. Although the Organization did not initially ask the Carrier for proof of the sale early in the handling of this dispute, we did so as evidenced by the General Chairman's July 18, 1997 letter of appeal (Carrier's Exhibit 9). The record is devoid of evidence that the Carrier presented the alleged sales agreement. Inexplicably, it was the Majority, not the Carrier, that took the Organization to task by asserting that the General Chairman should have asked for the sales agreement earlier in the handling of this dispute on the property. As it has been consistently held by innumerable awards of the National Railroad Adjustment Board (NRAB), the record remains open until a notice of intent is filed with the appropriate Board. The record in this case was still open on July 18, 1997 when the request for proof was made by the General Chairman. The Carrier made no objection to the timing of the request, but simply acknowledged that the request was made. The time limits for filing the case at the NRAB did not expire for another forty (40) days after the General Chairman requested the Carrier to prove its affirmative defense. The Carrier never complained that it was put in an undesirable position, wherein it could not meet the Organization's demand for proof. Therefore, the Majority's assertion of "gotcha" was nothing more than a figment of its imagination. What is unforgivable here is that the Majority assumed the role of the protector of the Carrier's position, a role the Carrier neglected to assume itself.

Second, the Majority declared that "by the time the Organization made its demand, the claims handling procedure was, in effect, over." is nonsense. Notwithstanding the fact that the Carrier never raised this issue, it is palpably in error. The extended claims handing procedure outlined within the Agreement and the Railway Labor Act (RLA) are designed for the parties to fully flesh out the issue in an attempt to adjust the dispute during the handling on the property. If the General Chairman's request for proof came early or late in the handling should be of no concern of the Board. The record in this case is completely barren of any objection from the Carrier as to the timing of the request for documentation. The request for proof was made on July 18, 1997, which provided the Carrier plenty of time to respond. The Carrier simply ignored the request. If the Carrier had sold the material "as is where is" it would have been a simple matter to produce the document during the remaining forty (40) days of handling before the notice of intent was filed with the Board. It did not do so and an adverse inference should have been applied to the Carrier's position in this case.

In effect, what has happened here is that the Majority has acted as an agent of the Carrier and developed a denial award based on its own brand of industrial justice. The issues upon which the Majority arrived at its decision to deny this case were never raised by the Carrier during the handling of this dispute on the property. Award 36018 is palpably erroneous and I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member