Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37047
Docket No. MW-36018
04-3-00-3-121

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces [Jacobs Trucking (J-Star) and S. E. Johnson] to perform Maintenance of Way work (track construction and related work) at Stanley Yard in Toledo, Ohio beginning on April 23, 1997 and continuing until June 6, 1997 (System Docket MW-5443).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the work described in Part (1) above and when it refused to meet with the General Chairman as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. E. Canas, J. Bressler, E. Berg, M. J. Daly, G. L. Clifton, D. P. Kopp, R. K. Nelson, D. A. Snider, R. P. Kline, G. Rodriquez, M. W. Jenkins, J. H. Jockett, J. T. Ogdahl, J. P. Pesartic, J. E. Hopkins, J. A. Mitchell, G. N. Windisch, J. P. Gillen, H. Chase, E. J. Zimmerman, M. W. Sapp, A. L. Herrera, M. Grames, R. I. Tate, J. L. Dazley, E. T. Wood, R. E. Headrick, J. W. Palmer, P. R. Molina and C. Fonesca shall now be compensated an equal and proportionate share of all straight time and overtime hours expended by the

outside forces in the performance of said work at their respective straight time rates of pay and at their respective 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.

The claim asserts that the Carrier violated its notice and conference obligations under the Agreement when, without prior notice to the Organization, it contracted out work involving grading a roadbed, laying track material and assembling switches and track panels at Stanley Yard in Toledo, Ohio, during the period of April 23 through June 6, 1997. As developed on the property, the record shows that the Carrier defended against the claim by asserting that the property in question had been leased to J-Star in 1996 and the Carrier therefore had no control over the leased property or the contracting out of the work. See the Carrier's letters of July 18, 1997, January 19 and May 24, 1999.

In its letter of February 8, 1999, the Organization requested that the Carrier provide it with a copy of the lease with J-Star (". . . at this time we are requesting a copy of the lease agreement for our review"). On the property, and after the Organization made that request, the Carrier did not provide the Organization with a copy of that lease. Rather than providing the Organization with a copy of the lease, the Carrier responded in its May 24, 1999 letter that ". . . the property in question where the work allegedly was performed was leased by the Carrier to J-Star." Further, according to the Carrier in that letter, "[i]nasmuch as the work was not performed at the request of or for the benefit of the Carrier, no violation of the

BMWE Scope occurred when the holder of the lease arranged for certain work to be performed in the leasehold area." In its June 2, 1999 letter, the Organization reminded the Carrier that it had refused to provide the Organization with a copy of the lease with J-Star. Notwithstanding that reminder, on the property, the Carrier still did not provide the Organization with a copy of the lease as requested.

Although it did not provide the Organization with a copy of the lease on the property, the Carrier attached a copy of that lease to its Submission to the Board.

The claim will be sustained because the Carrier failed to provide a copy of the lease to the Organization as requested on the property. See Third Division Award 36959 where, like here, although requested by the Organization, the Carrier refused to produce a copy of a lease on the property; argued that it did not control the leased property as a result of the lease arrangement so as to be bound by the contracting out provisions of the Agreement for work performed by a contractor; but then attached a copy of the lease to its Submission to the Board:

> "In cases addressing this precise issue, it has been held that the failure of a carrier to produce a lease agreement as requested by the organization during the handling of a claim on the property requires a sustaining of the claim and the production of that Agreement when the dispute advances to the Board is too late. See First Division Award 25973:
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> > The Carrier cannot rely upon an Agreement as a defense to a claim and decline to produce a requested copy of that agreement. See Third Division Award 28430 involving the failure of a carrier to produce on the property a lease Agreement it contended supported its position (and quoting Third Division Award 28229):
> >
> > > 'Third Division Awards 20895 and 19623 are controlling. The Carrier's defense to the Claim was to rely upon the terms of the lease between it an[d] Amtrak. However, although requested by the Organization, the Carrier failed to produce a copy of that lease. Under Awards 20895 and 19623, having

failed to produce the lease in support of its defense, the Carrier's position cannot prevail.

* * *

The fact that the Carrier attached the Lease to its Submission does not change the result. Submitting the Lease in such a fashion is a request for this Board to consider new material not handled on the property. It is well established that we are unable to now consider that material. See Award 20895, supra:

> It is noted that Carrier with its rebuttal argument before this Board submitted a copy of a lease agreement with the Elevator Company dated April 13, 1973. Such evidence cannot be considered since it is well established doctrine that new evidence which was not presented during the handling of the dispute on the property may not be considered by this Board.'

On that limited basis - the failure to produce the trackage rights agreement as requested - the claim will therefore be sustained. Had the Carrier produced the trackage rights Agreement as requested, perhaps the Organization would have been persuaded as to the validity of the Carrier's position and this dispute would not have been progressed to the Board.

* * *

Because the Carrier did not produce the agreement between it and NYRTA on the property as requested by the Organization, it cannot rely upon that Agreement as a claim defense that it did not control the work and was therefore not obligated to follow the procedures for subcontracting scope covered work. We shall therefore sustain the claim for the hours it took the contractor to dismantle track and handle track material. The fact that the Claimants may have been

working when the work was performed by the contractor does not change the result. The Claimants lost work opportunities and must be compensated for that loss."

It may be that the terms of the lease in dispute were sufficient for the Board to conclude that the Carrier did not retain enough control over the leased property for it to be responsible for contracting of work at the behest of the lessee. See Third Division Award 37048 and cases cited ("In these kinds of contracting out disputes, the issue is the extent of control retained by the Carrier over the leased property"). See also, Third Division Award 30947 ("The track upon which the contractor performed the work was under the control of the East Jersey Railroad pursuant to the terms of its lease with the Carrier. The lease made the East Jersey Railroad responsible for maintenance of the track. The Carrier did not hire the contractor to perform the work. The work in dispute was therefore outside the scope of the Agreement").

But we cannot undertake an analysis of the terms of the lease in this case to determine the extent of control retained by the Carrier over the leased property. The above cited Awards concerning the failure of a carrier to produce a copy of a requested lease on the property make it clear that if the Carrier defends against a contracting out claim on the basis that a lease arrangement divested it of control over the leased property and the Organization requests a copy of the lease on the property, the Carrier is obligated to produce a copy of that lease to the Organization on the property and not to the Board in the first instance and failure to do so requires that the claim be sustained.

The Carrier's argument as described in its July 18, 1997 letter that the Organization was ". . . made aware that the property in question had been leased by J-Star in 1996" does not change the result. Prior knowledge of the general fact that the property had been leased does not equate with knowledge of the terms of the lease concerning the extent of control retained by the Carrier over the leased property.

As a remedy, and because of the lost work opportunities, the Claimants shall be made whole at their respective rates of pay for the number of hours that the contractor performed the work.

AWARD

Claim sustained.

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 22nd day of June 2004.