Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37677
Docket No. MW-36664
06-3-01-3-213

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Sanders Brothers Inc.) to perform Maintenance of Way work (place ties, rail and gravel in siding construction) at Columbia Gardens, British Columbia beginning on November 22, 1997 through December 7, 1997 instead of Messrs. G. E. Bray and K. L. Fellows (System File S-P-623-O/MWB 98-04-15AN BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. E. Bray and K. L. Fellows shall now be compensated for an equal and proportionate share of the three hundred sixty (360) man-hours' expended by the outside forces in the performance of the aforesaid work at their respective straight time 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.

Claimants G. E. Bray and K. L. Fellows have established and hold seniority as Sectionmen within the Track Sub-Department in the Maintenance of Way and Structures Department. The Claimants were furloughed at the time during which the instant case took place.

On November 7, 1997, the Carrier and International Railroad Systems ("IRR") entered into an "agreement for the sale of certain assets, rights and obligations." Paragraph 10(b) of this Sale Agreement conveyed an easement from the Carrier to IRR. This easement is located between the endpoint mileposts of the rail line that was sold to IRR as part of the November 7, 1997 Sale Agreement, and also within 50 feet of either side of the centerline of the tracks that comprise the rail line. The easement expressly provided IRR the exclusive right to operate rail service over the rail line, "*including the right to maintain, reconstruct or relocate* the rail lines and to construct and maintain connecting sidings or industry tracks on the rail corridor."

In order to allow IRR to begin work on this new sidetrack pending the final sale date, the parties entered into a lease on May 17, 1997, transferring effective control of the track to IRR. On November 17, 1997, IRR hired an outside contractor (Sanders Brothers Inc.) to perform the construction of the sidetrack, which lasted from November 22, 1997 through December 7, 1997. Final approval and consummation of the Sale Agreement occurred on January 18, 1998. It appears to be uncontested that three employees of Sanders Brothers Inc. were permitted to use the Carrier's roadway machines and equipment to perform the subject track

construction work to completion. The work consisted of laying out ties and placing of rail and rock ballast for siding. Sanders Brothers Inc. consumed 360 man-hours to complete the subject work. The completion of the subtrack is the subject matter of this dispute.

On January 5, 1998, the Organization filed its claim alleging that the Carrier violated the Agreement by assigning a contractor to finish a siding at Columbia Gardens, British Columbia. The Organization takes the position that the Carrier did not give the General Chairman advance written notice of its plans to assign such work to outside forces as required by the Note to Rule 55. Thus, the Organization was deprived of the opportunity to engage in a good faith discussion with the Carrier to reach an understanding concerning the Carrier's desire to contract out the work. In addition, the Organization claims that the Carrier did not produce a copy of the lease on the property in order to allow the Organization to review the Carrier's position. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work. Such work is properly reserved to the Organization.

According to the Organization, the Carrier's Maintenance of Way employees were fully qualified and capable of performing the designated work. The work performed by Sanders Brothers Inc. is within the jurisdiction of the Organization and, therefore, the Claimants should have performed such work. Because the Claimants were denied the right to perform the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the relevant work was within the sole control of IRR and as such, IRR had the right to contract out said work. Further, the Carrier contends that because the work was within the control of the IRR, the Carrier had no obligation to issue a notice to the Organization of its intent to contract out the work. According to the Carrier, established arbitral precedent ". . . firmly establishes that the Carrier is not required to provide the Organization notice of work performed for the ultimate benefit of a third party" (Carrier's Ex Parte Submission at 8-9).

As to the question of notice, there is no evidence that the Carrier provided the Organization with a copy of the lease on the property, although there is evidence that the Carrier attached a copy of that lease to its Submission to the Board. Based

on this determination, the claim will be sustained because the Carrier failed to provide a copy of the lease to the Organization as requested on the property.

In Third Division Award 37047, Arbitrator Benn addressed this exact issue:

> "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:
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> > '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...
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> > * * *
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> > On that limited basis – the failure to produce the . . . agreement as requested – the claim will therefore be sustained. Had the Carrier produced the . . . 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 progressed to the Board.'"

It may be true that the terms of the Lease Agreement were sufficient for the Board to conclude that the Carrier's position would be ultimately sustained. However, as the lease was not produced, 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. As noted above, when an organization makes a request on the property for a lease, the carrier is obligated to produce, on the property, a copy of the lease to the Organization. Failure to do so requires that the claim be sustained.

As a remedy, due to lost work opportunities, the Claimants shall be made whole for the actual number of hours of contractor-performed work, at the Claimants' respective rates of pay. While the Organization claimed that the actual number of hours expended by the contractor totaled 360, this could not be definitively verified from the record. Once the number of actual hours expended by the Contractor is verified, the Claimants shall be made whole for the actual number of hours expended.

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 30th day of January 2006.