NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 31526
Docket No. MW-30743
96-3-92-3-539

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
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier contracted out to Central Jersey Contracting roadbed maintenance work (cleaning of debris) at Jersey City, New Jersey, beginning January 24, 1991 and continuing (System Docket MW-1973).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed employes K. Weierbach, W. Pavlick, W. Wentz and T. Newton shall each be allowed S.U.B. and vacation eligibility credits for 1991 to be used in 1992 for each day the contractor's forces performed work during the claim period and Claimants shall each be allowed eight (8) hours' pay at their respective straight time rate of pay beginning January 24, 1991 and continuing until the contractor's forces are off Carrier property."

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 waived right of appearance at hearing thereon.

When originally filed, the Organization's claim contended that the Carrier "contracted out roadbed maintenance work (Cleaning of debris) on the Philadelphia Division starting from January 24, 1991 ...." as well as the failure of the Carrier to "timely notify the General Chairman of its intention to contract out this work fifteen (15) days in advance of the contracting transaction." Make whole relief was sought on behalf of the four named furloughed Claimants.

In its initial response, the Carrier asserted that "Labor clearance was obtained." The Organization then demanded production of any notice to the Organization from the Carrier of the Carrier's intention to contract out the work and any "Labor clearance" given by the Organization.

The Carrier next responded that the work in question was not exclusive to the employees and that the Carrier "does not possess the equipment necessary for work of this size."

In subsequent correspondence, the Carrier asserted the following:

> "Contrary to your allegations, the work in dispute is not `roadbed maintenance work.' The removal of 2,100 cubic yards of dirt and approximately six (6) concrete footers 36' x 22' each can hardly be construed as normal roadbed maintenance, nor is it work normally performed by BMWE personnel. Rather this was demolition and excavation work, which does not come under the Scope of your Agreement.

Moreover, this work was part of the larger National Docks project. Thus, even if this could be considered BMWE work, and we maintain it was not, there would be no violation as numerous awards of the National Railroad Adjustment board and its substitute tribunals have held that Carrier is not required to piecemeal projects of this nature."

While the Organization is correct that the Carrier's position appeared to change during the different levels of handling the claim, nevertheless, in the end the ultimate burden is on the Organization to establish the necessary factual elements supporting its claim. Here, the Organization has not done so.

From the evidence in this record as developed on the property, this Board cannot definitively determine whether, as initially alleged by the Organization, the contracted work was simple "roadbed maintenance work (Cleaning of debris)" which was contracted out without prior notice (which would entitle the Organization to a sustaining award—see e.g., Third Division Award 31449), or whether the work was of the type characterized by the Carrier as "demolition and excavation work ... part of the larger National Docks Project" which the Carrier need not "piecemeal" (which would result in a denying award—see e.g., Third Division Award 29187).

Because the Organization's burden has not been met, we must therefore deny the claim.

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 25th day of July 1996.

LABOR MEMBER'S DISSENT
TO
AWARD 31526, DOCKET MW-30743
(Referee Benn)

The Majority exceeded its jurisdiction and obviously erred in denying this claim, alleging that the Organization failed to meet its burden of proof. Therefore, this award is palpably erroneous and should not be considered as precedent.

The Majority outlined the progression of this claim on the property and noted that:

1. The Organization alleged that the Carrier contracted out the cleaning of debris from the right of way and failed to issue notice thereof.

2. The Carrier alleged that it issued notice and obtained "labor clearance".

3. The Organization requested proof of notice and "labor clearance".

4. The Carrier changed its defense and alleged that the work was not exclusively reserved to the Employes and that it did not have the necessary equipment to perform the work, without ever presenting evidence to its first defense.

5. Later the Carrier alleged that the work was demolition work which is not reserved to the Employes.

6. Finally, the Carrier alleged that the work was part of the National Docks Project and therefore it was not obligated to "piecemeal" the work.

7. Thereafter, the Board comments on the Carrier's vacillating defenses at different levels of handling in this case.

The overriding problem with the Majority's position in this case is the fact that at the first level of handling, it alleged that it issued notice and received labor clearance to contract out the work. Thereafter, the General Chairman asked for proof thereof which the Carrier never provided during the handling of this case on the property. Instead, the Majority held that inasmuch as the Organization could not hit moving targets, which the Carrier's multiple and ever changing defenses were, it somehow failed to meet its burden of proof in this case.

This Member always thought that a party raising an affirmative defense in response to a prima facie case was responsible for providing proof thereof when challenged. Apparently, the Majority believes that all the Carrier has to do is present an ever changing defense, without supporting evidence, in order to defeat an otherwise proper claim. The problem may have been remedied if the Carrier had produced evidence that it had issued notice and received "labor clearance" as it initially alleged. But instead of doing that, it merely changed the color of its defense by raising one unsupported affirmative defense after another. In the past, this Organization has been chided by this Board for taking a scatter-gun approach to claim handling. However, in order to hit a moving target, at times one needs a scatter-gun. Years ago this Board has

held that such a weapon is not proper when progressing disputes before this Board. We believe that the Carrier should be held to the same standards as is the Organization, which was clearly not done in this case.

The fact remains in this case that the Carrier's initial defense was challenged by the Organization and it failed to meet its affirmative defense. Therefore, I am compelled to dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member