Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32227
Docket No. MW-31323
97-3-93-3-254

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (David Steel's Roofing Company) to shingle the Depot at Bridgeport, Alabama, on September 4, 5, 6, 9, 10, 11 and 12, 1991 [System File 9 (70) (91)/ 12 (91-1613) LNR].

(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 Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Bridge and Building Subdepartment employes J. H. Roberts, C. V. Arnold, L. L. Woodlee, K. W. Steel and T. Smith shall each be allowed ten (10) hours' pay, at their respective rates of pay, for September 4, 5, 6, 9, 11, and 12, 1991 and four hours' pay, at their respective rates of pay, for September 10, 1991."

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 Organization asserts that on September 4, 5, 6, 9, 10, 11 and 12, 1991 the Carrier assigned or otherwise allowed outside forces (David Steel's Roofing Company) to shingle the roof of the Depot at Bridgeport, Alabama. Five employees of the outside contractor, who hold no seniority in the Maintenance of Way and Structures Department, each worked a total of 64 man-hours utilizing common ordinary carpenter tools in the performance of the building (roofing) maintenance in question.

Claimants J. H. Roberts, C. V. Arnold, L. L. Woodlee, K. W. Steel and T. Smith established and hold seniority in the B&B Subdepartment. At the time the incident involved here occurred, they were regularly assigned to positions within the B&B Subdepartment.

The Organization asserts that the performance of building maintenance/repair work, such as the placement of shingles on the roof of the Depot at Bridgeport, Alabama, is customarily and traditionally performed by the Carrier's Maintenance of Way B&B forces and is contractually reserved to them by the Agreement. The Organization further asserts that Claimants were qualified, willing and available to perform all work involved in this dispute during regular workdays, during rest days or on daily overtime, and would have expeditiously done so had the Carrier assigned them to do so.

The Carrier does not contest the Organization's allegations that the disputed work was done by employees of an outside contractor. Rather, the Carrier urges this Board to find that the work was removed from coverage of the Agreement because the Carrier previously had ceded dominion and control of the work to the Bridgeport Historical Society.

The Carrier thus raises an affirmative defense, asserting that the subject property was leased, and subsequently sold to the Bridgeport Area Historic Association (BAHA)

and that the lease and sale both occurred before the disputed work was done on the subject property. The Carrier contends that: (1) this work was not at the behest of the Carrier, (2) it was not paid for by the Carrier, (3) the Carrier is only aware of such work in compliance with the provisions of the Lease Agreement, (4) the work was contracted by the Lessee, BAHA, which is not signatory to the Agreement provisions cited by the Organization, and (5) numerous Awards have supported the distinction between Lessor/Lessee roles when a Carrier cedes dominion and control over disputed work, which removes the work from the coverage of the Agreement. The Carrier urges the Board to decline this claim in its entirety.

Relevant provisions of the controlling Agreement contain the following Rules:

"RULE 1. SCOPE

Subject to the exceptions in Rule 2, the rules contained herein shall govern the hours of service, working conditions, and rates of pay for all employes in any and all subdepartments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employes, and such employes shall perform all work in the maintenance of way and structures department.

* * *

RULE 3. SUBDEPARTMENTS

The employes covered herein shall be grouped in subdepartments, namely:

3(a) Track Subdepartment.
3(b) Bridge and Building Subdepartment

* * *

RULE 41. BRIDGE AND BUILDING WORK

41(a) All work which is done by Company forces in the construction, maintenance, repair, or dismantling of bridges, buildings, tunnels, wharves, docks, water tanks, turntables, platforms, walks, and

other structures, built of brick, tile, concrete, wood, or steel, the painting of bridges, buildings, docks, platforms, walks, turntables, tanks and other structures, hand rails in buildings and on bridges, and the erection and maintenance of signs attached to buildings or other structures, shall be performed by employes of the bridge and building subdepartment.

* * *

Rule 41(f) When bridge and building subdepartment employes are used to do brick work, plastering, slate or tile roofing, tinner's work, or concrete finishing, they shall be paid on the basis of a differential of 22 cents per hour above carpenter pro rata rate for all time so engaged." [Emphasis added.]

There are numerous decisions of the Board which hold that the Maintenance of Way Agreement extends only to property which is subject to the Carrier's domain and control. See, e.g., Second Division Award 3630. However, the Carrier has the burden of producing evidence in support of its affirmative defense, and such production of evidence must be accomplished during the handling of the dispute on the property.

A review of the correspondence of record reveals that the Carrier raised the affirmative defense early in the dispute, but failed to timely produce substantiating proof during the handling of the dispute on the property. The General Chairman submitted the claim to the Division Engineer on September 25, 1991. In his response dated October 8, 1991 the Division Engineer stated:

"In researching this claim, we find that all of the claimants listed in your claim were working and under pay during the dates of the claim and we can decline this claim on that account, however, we also find that a contract for the sale of the depot at Bridgeport, Al. was executed with the Bridgeport Area Historical Association in December of 1990 in which the land surrounding the depot and the depot itself was donated to the B.A.H.A.

Since the building was the property of the B.A.H.A. in December of 1990, any work done on it after that time does not belong to the Railroad. This claim is declined in its entirety."

Under date of December 3, 1991 the General Chairman wrote to the Director of Employee Relations disagreeing with the Division Engineer's declination of the claim. The General Chairman's letter included the following statements:

> "Mr. Dobbs states that the claimants were working and under pay during the time period of this claim. This is true. However, this does not give the Company a free hand to contract our Maintenance of Way work. Nor does it give the Company the right to ignore the May 17, 1968 National Agreement or the December 11, 1981 National Agreement.
>
> Mr. Dobbs further states that the Depot in question was sold to the City of Bridgeport, AL. However, Mr. Dobbs elected not to provide the Organization with a copy of such sale. Therefore, the Organization is requesting a copy of the alleged sale of the Depot at Bridgeport, AL." [Emphasis in original.]

Under date of August 5, 1992, the Director of Employee Relations advised the General Chairman as follows:

> "The Bridgeport Area Historic Association had leased from the Carrier property at Bridgeport, Alabama and in January of 1991 the depot at Bridgeport was sold to the Association. The depot ceased to be part of Carrier's operating facility years ago and with the sale of same to the BAHA, ceased to belong to the Carrier. Along with the purchase of the depot so went the responsibility for its maintenance. The work was no longer encompassed within the scope of the schedule Agreement and ceased to accrue to MofW employees.
>
> We are currently arranging for a copy of the bill of sale under which the Carrier donated the depot at Bridgeport to the BAHA.
>
> * * *"

Under date of April 13, 1993 the General Chairman made the following request of the Director of Employee Relations:

"You state in your letter dated August 5, 1982, that the Carrier would send the Organization a copy of both the lease agreement and the sale Agreement. To this date, the Organization has not received same.

However if you desire to send same and a time limit extension is needed, please contact my office and I will agree to a time limit extension."

The Director of Employee Relations did not request a time limit extension, nor did he provide the requested lease and/or sale agreements prior to the filing of notice of intent to file with the Third Division on April 28, 1993. In its Submission to the Board, the Carrier asserts that it sent a copy of the lease and bill of sale to the General Chairman by fax on May 11, 1993.

It is a well established rule that the Board should not consider de novo any new evidence not previously submitted by a party during the handling of the dispute on the property. See Third Division Award 20895. The Carrier's affirmative defense based upon the alleged lease and sales agreement was raised on October 8, 1991. Despite repeated requests from the Organization for production of said documents, the Carrier failed to produce the documents during the handling of the dispute on the property. The handling on the property was closed on April 28, 1993 when the Organization filed its Notice of Intent to submit the claim to the Third Division on April 28, 1993.

The Board was faced with very similar facts in Third Division Award 28430 wherein the Board held:

"Notwithstanding the Organization's request for production of the lease and further notwithstanding the fact that in denying the Claim, the Carrier relied solely upon the terms of the lease, a copy of the lease was not produced on the property. However, a copy of the lease was attached to the Carrier's submission in this matter.

* * *

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."

That claim was sustained. The same results have been reached in other cases under similar circumstances. See, e.g., Third Division Awards 19623, 20895 and 28229. Because the submission of the lease and bill of sale by the Carrier was untimely, such documents will not be considered by the Board.

Based upon evidence properly in the record, the Board finds that the Organization met its burden of proof in establishing that the disputed work was covered by the Scope Rule of the Agreement, and that the Carrier failed to give advance notice as required by the Agreement. The Agreement therefore was violated.

With respect to the issue of the appropriate remedy, the Carrier contends that the remedy for a proven Rule violation is measured by actual damages to the Claimants, and that the Claimants suffered no monetary loss as a result of the disputed work because they were fully employed at the time. A review of prior Awards of this Board reveal a divergence of opinion on this issue, as described in Third Division Award 26593:

> "... Many Awards support the proposition that even where there is a contract violation, a Claimant will not succeed unless there is a showing of actual loss of pay on the Claimants' parts. The opposing line of cases finds that to limit damages, in effect, gives a carrier a license to ignore the contract provisions. A third viewpoint which has also been expressed is the conclusion that each case must be considered on its merits taking into consideration such factors as intent or motive on the part of the carrier.
>
> * * *"

Under the circumstances of this case, although a technical violation of the Agreement occurred due to lack of notice prior to the subcontracting, there is no evidence of actual damage to the Claimants. The Board therefore declines to award the damages claimed as there is no basis in the record to support such claim for damages.

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 17th day of September 1997.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 32227, DOCKET MW-31323
(Referee Vause)

Since the award was sustained in part, the small concurrence required is only to the extent that the Carrier violated Article IV of the May 17, 1968 National Agreement. That wasn't difficult to surmise in light of the fact that the Carrier freely admitted that it did not do so.

The DISSENT is directed towards the Majority's erroneous finding that the violation was a "technical" one and therefore the appropriate remedy for the Carrier's admitted violation was to deny the awarding of a monetary remedy because the Claimants were working on the dates of the violation. This line of reasoning does violence to the Agreement by effectively endorsing the Carrier's blatant violation thereof.

A review of the record will reveal that the Majority's findings contains multiple errors. **First**, the record reveals that the Carrier committed a dual violation of the Agreement. The Board held the Carrier violated the Scope Rule and Article IV of the May 17, 1968 National Agreement, by stating thusly:

> "Based upon evidence properly in the record, the Board finds that the Organization met its burden of proof in establishing that the disputed work was covered by the

> "Scope Rule of the Agreement, and that the Carrier failed to give advance notice as required by the Agreement. The Agreement therefore was violated.
>
> * * *
>
> Under the circumstances of this case, although a technical violation of the Agreement occurred due to lack of notice prior to the subcontracting, there is no evidence of actual damage to the Claimants. The Board therefore declines to award the damages claimed as there is no basis in the record to support such claim for damages." (Emphasis added)

Then when it was commenting on the remedy portion of the award the Majority held that a "technical" violation of the Agreement occurred and this excuse was the basis to deny a monetary remedy. Such reasoning is contradictory.

The Organization is aware of other awards that have held that a violation of the notice provisions, standing alone, has been referred to as "technical" violation of the Agreement. The Organization does not, however, endorse the Majority's findings in those cases but does acknowledge the existence of such faulty reasoning. The problem here is that the Majority clearly found that not only a notice violation was present but also a violation of the Scope Rule occurred because such work is reserved to the Claimants. Hence, the Majority's findings of a "technical" violation is just patently wrong. The Majority's errors do not stop there.

The Majority was provided with ample ***on-property*** precedent by which it could have relied to award monetary relief in this case but chose to ignore said precedent. Instead, the Majority relied on Award 26593 as support for its decision to deny the monetary portion of this case. That award dealt with a case between the American Train Dispatchers and the St. Louis and Southwestern Railway Company. The Majority in this case cited the following language from Award 26593:

> "*** Many Awards support the proposition that even where there is a contract violation, a Claimant will not succeed unless there is a showing of actual loss of pay on the Claimants' parts. The opposing line of cases finds that to limit damages, in effect, gives a carrier a license to ignore the contract provisions. A third viewpoint which has also been expressed is the conclusion that each case must be considered on its merits taking into consideration such factors as intent or motive on the part of the carrier."

The problem with the Majority citing the above-cited portion of that award as authority is that it selectively quoted the dictum and ignored the substance. The following paragraph was ignored by the Majority in this case:

> "*** We are of the view that a better purpose is served in the long run which clearly provides a guideline for the parties in the future. With that in mind, we have concluded that there is no prohibition from awarding damages where there is no actual loss of pay. That finding is based on our belief that in order to provide for the enforcement of this agreement, the only way it

> "can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses. Numerous other Awards have reached the same conclusion, holding that where, as here, Claimants by Carrier's violation lost their rightful opportunity to perform the work, they are entitled to a monetary claim. See Third Division Awards 21678, 19899, 19924, 20042, 20338, 20412, 20754, 20892. Accordingly, we will rule to sustain the Claim in its entirety."

The Majority clearly held in Award 26593 that it is proper to award damages and that there clearly is no prohibition from doing so. In fact, the Majority held in that case that awarding of monetary relief to otherwise fully employed claimants serves as means to enforce the Agreement. The Majority's decision to cite Award 26593 as authority for denying monetary relief in this case is simply incredible, bordering on the absurd. This award is palpably erroneous, worthless as precedent and, therefore, I dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member