Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36959
Docket No. MW-36046
04-3-00-3-175

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
(
(CSX Transportation, Inc. (former 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 (Frank Tartaglia, Inc.) to perform Maintenance of Way work (dismantle track and handle track material) between Mile Posts 290.8 and 291.4 in Syracuse, New York beginning September 10 and continuing through October 6, 1998 (System Docket MW-5487).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work described in Part (1) above 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. Hayes, M. J. Freywald and G. F. Ashby shall now each be compensated for forty-eight (48) hours' pay at their respective straight time rates of pay and Claimants A. F. Egy and R. D. Zimmerman shall now each be compensated for one hundred forty-four (144) hours' pay 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.

The Claimants hold seniority in various Maintenance of Way classifications under the Agreement. This dispute concerns the Organization's allegations that the Carrier improperly subcontracted scope covered work (dismantling track and handling track material) and did so without prior notice to the Organization in violation of the Scope Rule. By letter dated December 17, 1998, the Carrier defended its actions stating:

* * *

> "This track was sold in place to Central New York Regional Transportation Authority. Frank Tartaglia Inc. was performing service for them (NYRTA) not the Carrier."

* * *

In its letter of February 1, 1999, the Organization requested a copy of the Agreement between the Carrier and NYRTA (". . . the Organization is requesting copy of the agreement which . . . [the Carrier] claims running track #8 was sold to NYRTA on an as is, where is basis"). By letter dated April 14, 1999, the Carrier stated that ". . . [i]nvestigation has revealed that on September 8, 1996, the Carrier leased the subject property to the Central New York Regional Transportation Authority, which undertook the track removal." However, no Agreement concerning the underlying transaction relied upon by the Carrier as a defense to the claim was given to the Organization.

In its letter of May 5, 1999, the Organization again requested a copy of the relevant Agreement:

* * *

". . . I must further point out that during Ms. Ross' and my March 23, 1999 claims conference I requested a copy of the contract between the carrier and the outside vendor, of which up to this point, has not been supplied.

The Organization is once again requesting a copy of the alleged sales (or lease) agreement with the Central New York Regional Transportation Authority. . . . If the Carrier will not supply the Organization with a COPY of said agreement, the Organization must assume that no such Agreement exists, and therefore this claim is payable as presented."

* * *

By letter dated June 8, 1999, the Carrier responded:

". . . As stated previously, the property in question where the work allegedly was performed was leased by the Carrier to the Central New York Regional Transportation Authority. Inasmuch 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.

The Organization has not carried its burden of proving that a violation of the BMWE Scope occurred on the above dates."

* * *

Again, no Agreement was provided as requested by the Organization.

While it did not provide a copy of the requested Agreement to the Organization on the property, the Carrier did attach a copy of a "Property Lease"

dated September 6, 1996 between the Carrier and the Central New York Regional Transportation Authority to its Submission filed with the Board.

A Carrier cannot refuse requests for information from an Organization which information forms the basis of the Carrier's defense to a claim and then take the position that the Organization has not carried its burden. That is precisely what happened here. Under the Scope Rule, the type of work involved falls ". . . within the scope of this Agreement" and, if in the Carrier's control, requires the Carrier to give advance notice to the Organization of its "plans to contract out [such] work. . . ." The Carrier's defense to the subcontracting claim is that the location where the disputed work was performed was previously leased to NYRTA and therefore the work was not within its control or for its benefit. On the property, the Organization repeatedly requested that the Carrier provide a copy of the Agreement between the Carrier and NYRTA. However, on the property, the Carrier did not comply with that request, but took the position as stated in its June 8, 1999 letter that "[t]he Organization has not carried its burden of proving that a violation of the BMWE Scope occurred on the above dates." The Carrier cannot take the position that information exists which is in its control; and assert that information disposes of the claim; refuse to produce that information after requested to do so; and then take the position that the Organization has not carried its burden.

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 sustaining the claim and the production of that Agreement when the dispute advances to the Board is too late. See First Division Award 25973:

> "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):
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> > '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."

The authority relied upon by the Carrier is not persuasive. Indeed, in Third Division Award 30947 cited by the Carrier, the Carrier did prevail on its argument that the disputed track had been leased and the Carrier had no control over the disputed work. However, as stated in that Award ". . . a copy of [the lease] was provided to the Organization on the property in accord with its request." That did not happen here.

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 the track and handle the 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.

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 21st day of April 2004.