

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 30661  
Docket No. MW-30718  
95-3-92-3-517

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier used an outside concern [Metals of Texas Inc. (METEX)] to perform track dismantling work (remove angle bars, pull spikes, load rail and trim) from the West switch of the Wye, known as 102 Track, all the way to Mill Street and at the East leg of the Wye at Liberal, Kansas on March 12, 13 and 14, 1991 (System File MW-91-37-CB/501-65-A).

(2) The Agreement was further violated when the Carrier entered into the above described contracting transaction without giving the General Chairman at least fifteen (15) days' advance written notice of its plan to do so as set forth in Article 33.

(3) As a consequence of the violations referred to in parts (1) and/or (2) above, Foreman J. C. Martinez, Machine Operator S. K. Stallsmith, Laborer Driver J. A. Martinez and Laborer W. L. Kelley shall each be allowed twenty-four (24) hours' pay at their respective straight time rates of pay and six (6) hours' pay 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 waived right of appearance at hearing thereon.

On March 12, 13 and 14, 1991 four employees of METEX removed the rail from the west switch of the wye (known as the 102 track) to Mill Street. In addition, the entire switch was removed from the east leg of the wye in Liberal, Texas. On May 1, 1991, the Organization submitted a claim due to Carrier's "use of outside forces" to clean up track site for Carrier's "benefit." The Organization submitted that the Claimants: (1) Have seniority in their respective classes; (2) Carrier M of W forces have performed the work in the past, using Carrier owned or leased equipment and; (3) Carrier did not show "good faith efforts" to reduce the use of contractors and increase the use of Carrier employees, thereby violating Articles 1, 2, 6, 8, 17 and 33 of the Agreement. Carrier denied the claim submitting that the track materials were sold to METEX on an "as is, where is" basis, and that METEX was "responsible for dismantling and removing the materials from Carrier property."

It is well established by precedent decisions of this Board that "as is, where is purchasers" may remove their purchased property from Carrier's facility without running afoul of the Scope Rule. However, bare assertions by Carrier are not sufficient when the Organization challenges the validity of such a transaction. In this case, Carrier asserted the existence of a Scrap Sale Contract with Metals of Texas Inc. (METEX) for approximately 830 net tons of mixed scrap rail. In subsequent correspondence, the Organization requested that Carrier provide a copy of the sale ticket for the materials at issue, but Carrier failed to provide the documentation which might have defeated the claim. The Organization put Carrier to its proof but, for reasons not apparent on this record, Carrier failed to meet its burden of proof in handling on the property. Evidence submitted for the first time at the Board level comes too late for our consideration.

#### 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.

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.