

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31521
Docket No. MW-30577
96-3-92-3-332**

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 it assigned outside forces (Midwest Tie Sales, Inc.) to perform Maintenance of Way work (operating a log loading truck and a pick-up truck and burning rail apart) on the Amboy Secondary between Mile Post 0.2 and Mile Post 8.5 on the New Jersey (Philadelphia) Division beginning July 23, 1990 and continuing (System Docket MW-1747).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman J. Constantine, Vehicle Operator D. Seamanik and Welder F. Swarrow shall each be allowed eight (8) hours' pay at the their respective straight time rates of pay for each day (beginning July 23, 1990) the outside forces performed the work described in Part (1) above, and that they also be allowed pay for all overtime worked by the contractor's forces."

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.

The claim asserts that the Carrier contracted out certain track retirement work to Midwest Tie Sales without prior notification to the Organization. In its September 26, 1990 response, the Carrier stated:

* * *

"The rail in question was removed as a result of a rail job in 1988; this was not track retirement work as indicated in your claim.

Contrary to your assertion, the Carrier is not required to notify your Organization of our intent to dispose of the subject track material. Midwest Tie Sales, Inc. purchased the rail on an 'as is, where is basis.' Accordingly, it was permissible to have them remove material they purchased."

* * *

On October 15, 1990, the Organization notified the Carrier that it was "requesting a copy of the sales agreement" between the Carrier and Midwest Tie Sales.

On March 11, 1991, the Carrier reiterated its position concerning the sale on an "as is, where is basis."

On April 9, 1991, the Organization reminded the Carrier that it had previously requested the Carrier to supply "a copy of the alleged Sales Agreement, which as of March 20, 1991, still has not been furnished to the Organization."

On June 28, 1991, the Carrier restated its position that the property in dispute

was sold to Midwest Tie Sales on an "as is, where is" basis and also stated that "... with regard to the said Sales Agreement, we will arrange to secure a copy for your inspection."

On July 31, 1991, the Organization wrote the Carrier with respect to the Carrier's representation that it would provide a copy of the sales agreement and stated, "[t]o date you have failed to provide us this. Please forward a copy of the Agreement."

A copy of the sales agreement was attached to the Carrier's Submission in this matter.

The Carrier is correct that similar contracting claims have been denied where the material is sold on an "as is, where is" basis. See Third Division Award 30216 ("... [T]he Carrier sold the scrap crossties to the outside firm in an 'as is, where is' condition. This sale does not represent 'contracting out'"). See also, Third Division Awards 30220, 30224, 30268.

But, the ultimate fact which the Carrier repeatedly premised its entire affirmative defense on is that the property in dispute in this case was sold on an "as is, where is" basis. After the Carrier made that factual contention known to the Organization, the Organization made three specific requests that the Carrier provide a copy of the contract with Midwest Tie Sales. Although representing that it would produce the contract to the Organization, the Carrier did not do so until it attached the contract to its Submission in this matter. That is too late. Having failed to produce the very contract upon which it bases its defense (and having failed to produce that contract notwithstanding its representation that it would do so), the Carrier is precluded from relying upon the substantive terms of the contract as an affirmative defense to the claim. Third Division Award 30661:

"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 this 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 30661 is on all fours with this case. See also, Third Division Awards 28229, 28430, 28475, 29016, 29059 and Awards cited in those cases.

Under the circumstances, we have no choice but to sustain the claim. Because the failure to assign the work to Claimants resulted in loss of work opportunities, the requested monetary remedy is appropriate.

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 25th day of July 1996.