

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32095
Docket No. MW-31630
97-3-93-3-639**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Chesapeake and
(and Ohio Railway Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Tampa International Forest Products, Inc.) to perform Maintenance of Way work (load and haul away ties that were removed by SPG Tie Force 5XT5) in the vicinity of Logan, West Virginia beginning April 15 through May 13, 1992 (System File C-TC-5374/12(92-919) COS].**
- (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 the work as described in Part (1) above.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Claimants G. Wendell and T. Rakes shall each be allowed one hundred seventy (170) hours' pay at their respective rates of pay for the total number of man-hours expended by the outside 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 were given due notice of hearing thereon.

This claim arose when the Carrier hired an outside contractor, Tampa International Forest Products (TIFP), to load and haul away ties that were removed by SPG Tie Force 5XT5 in the vicinity of Logan, West Virginia. The Organization filed the instant claim contending that the Claimants were on furlough and awaiting recall and should have been assigned the work. The Organization argued that the Claimants were available, qualified, and willing to perform the work involved herein. The Organization argues that the Carrier was in direct violation of Rule 83(b).

The Carrier denied the claim contending that it had sold the scrap ties to TIFP and that because the "ownership" of the ties had been transferred, TIFP was merely picking up its property. The Carrier argues that it did not violate the Agreement.

The Board reviewed the evidentiary record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement by allowing non-Carrier forces to load and haul away ties.

The Carrier demonstrated with sufficient proof that it had transferred ownership of the old crossties to another company, and therefore, that company had the right to remove those ties from the Carrier's right-of-way. There is a purchase and removal agreement which is part of the record.

The Board has held on numerous occasions in the past that once materials are sold to another company those materials are under the control of the purchaser and the purchaser can then determine who performs any work related to those materials. Because the ownership of the crossties had changed in this case, the Claimants had no protected right to demand the work from the Carrier. See Third Division Awards 30637 and 30224.

The Organization failed to meet its burden of proof in this case, and therefore, the claim must be denied.

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 9th day of July 1997.

LABOR MEMBER'S DISSENT
TO
AWARD 32095, DOCKET MW-31630
(Referee Meyers)

This award is erroneous as the Majority failed to base its decision on the record and a dissent is required.

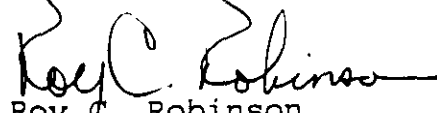
The premise of this claim was quite simple and uncomplicated. The Organization contended that the Carrier contracted out track work belonging to the employees represented by the BMW, i.e., loading and hauling ties removed by an SPG gang. During the handling of this dispute on the property, the Carrier contended that the ties in question were sold and that the buyer was merely retrieving its property. The Organization promptly requested a copy of the sales agreement. Thereafter, the Carrier supplied a purported sales agreement to the General Chairman. Upon receipt of the alleged sales agreement, the General Chairman discovered that the contract was not a sale on an "as is, where is" basis, but that the Carrier was paying the contractor for each tie removed. As it was pointed out by the General Chairman, the agreement was actually a contract for services, not a sales agreement. The Carrier never disputed the General Chairman's findings. Hence, the Majority's conclusion that the material in question was sold to another company is not a factual representation of what transpired between the Carrier and the outside contractor. The record clearly reveals that the Carrier violated the Agreement when it contracted out

Labor Member's Dissent
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Maintenance of Way work without issuing notice of its intention to do so. Hence, this award is erroneous, the findings were not based on the record and therefore is of no precedential value.

Therefore, I dissent.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Roy C. Robinson".

Roy C. Robinson
Labor Member