

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32335
Docket No. MW-32030
97-3-94-3-396**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(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 (B&B Excavating) to perform Maintenance of Way work (grading and removing excess ballast from the right of way) at Mile Post 2.5 on the Youngstown line beginning June 4, 1992 and continuing (System Docket MW-2983).**
- (2) The Agreement was further violated when the Carrier failed to 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, Messrs. P. A. Castrilla, E. Fisher and D. J. Rossetti shall each be allowed eight (8) hours' pay at their respective straight time rates for each day (beginning June 4, 1992 and continuing) the outside forces performed the work described in Part (1) above and they shall also receive credits and benefits associated therewith."**

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 dispute involves Carrier's contracting of grading and the removal of excess ballast on the date and at the location specified, without prior notification to the Organization. In its June 20, 1992 claim, the Organization anticipates the possibility that Carrier would assert that the removal of the ballast was a final disposition, and requests proof of any such contention.

In its August 18, 1992 denial of the claim, Carrier asserts that the work involved was not scope-covered as the ballast was sold on an "as is, where is" basis. The Organization's October 15, 1992 appeal of such denial renews its original request for documentation concerning such arrangement. Carrier's June 29, 1993 response reasserts its contention that the ballast was sold "as is, where is" and objects to any monetary remedy for Claimant Fisher who was fully employed. In a letter dated August 31, 1993, the Organization objected to Carrier's denial of the claim, stating that no proof had been furnished to date of the "as is, where is" relationship despite the passage of a lengthy period of time, and again asks for specific proof of such arrangement. The Organization also informs Carrier that Fisher was forced to work away from his home seniority district and travel 8 hours to secure work at the time of the contracting, and that he would have been available to perform the disputed work if it were offered.

Carrier's final response on the property occurred on October 29, 1993, where it reiterated the same contention, and again failed to furnish a copy of the sales agreement or any other proof in support of its assertion that this was an "as is, where is" arrangement. Carrier included a copy of the sales agreement with its Submission to the Board for the first time.

While there is no doubt that Carrier's sale of material on an "as is, where is" basis validly removes it from the coverage of the Scope clause of the Agreement, see Third Division Awards 30216, 30220, 30224, 30268, such contention is an affirmative

defense to a claim of subcontracting which Carrier bears the burden of proving. Carrier has clearly failed to meet such burden in this case. Despite three separate requests by the Organization for a copy of the alleged sales agreement, Carrier failed and refused to furnish it on the property. This Board cannot consider such "new" evidence furnished to it for the first time, and Carrier is precluded from relying upon its substantive terms as an affirmative defense to this claim. The Board has sustained claims on this basis alone. See Third Division Awards 31521, 30661.

Under such circumstances, the Board need not address Carrier's failure to give advance notice of this transaction as an independent basis for sustaining the claim. Claimant Fisher was "fully employed" off of his home seniority district at the time in issue and Claimants Castrilla and Rossetti were on furlough status. Suffice it to say that precedent on this property supports an award of damages regardless of Claimant's "fully employed" status. Special Board of Adjustment No. 1016, Awards 34 and 41; Public Law Board No. 3781, Award 7; Third Division Awards 31798, 31752, 31521.

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 13th day of November 1997.