

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32638
Docket No. MW-32119
98-3-94-3-524**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Chesapeake 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 to perform Bridge and Building (B&B) Subdepartment work (cut down and remove two fuel tanks and a water tank and clean up scrap) at New Port News, Virginia beginning May 24 and continuing through June 16, 1993 [File C-TC-5586/12(93-981) COS].**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out the work.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman R. L. Wood, Jr. and B&B Mechanic E. Hancock shall each be compensated, at their respective and appropriate straight time, time and one-half and double time rates, for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question."**

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 centers upon Carrier's assignment of outside forces (Steel Processing Services, Incorporated) to cut down and remove two fuel tanks and a water tank at Newport News, Virginia. The Contractor's forces were also used to clean up scrap behind Carrier's main office at the same location.

On June 22, 1993 the Organization submitted a claim asserting that Carrier had violated Rules 1, 2, 3, 66, 83 and Appendix B of the Agreement when it allowed the Contractor to perform work which B&B forces had "historically and contractually" performed. The Organization further asserted that Carrier did not notify the General Chairman of its intent or provide opportunity to discuss the work at issue.

Carrier denied the claim, maintaining that it sold its property "as is, where is" to the outside concern, which, under the terms of the sales agreement, retrieved its purchase from Carrier's property. According to Carrier, the transaction was a sale, and as such, no subcontract existed and no violation of the Agreement transpired.

The Organization stated throughout the handling of the claim, without dispute or denial from Carrier, that when Carrier required such work to be performed in the past it had been "historically and contractually" performed by B&B forces. However, Carrier responded with the affirmative defense that the fuel and water tanks had been sold, and that the Contractor was merely retrieving the purchased scrap from Carrier property. If proven, that might well have been the end of the case, but Carrier bears the burden of proof on that critical point. Carrier asserted that it had sold the scrap at issue to Steel Processing Services Incorporated. The Organization maintains that Carrier did not timely furnish any evidence in support of that assertion, and that failure to produce the requested documentation was fatal to its defense. On that point, the evidence clearly favors the Organization's position.

Throughout handling on the property, the General Chairman repeatedly requested such proof, asking that a bill of sale be furnished to the Organization. The record supports the Organization's assertion that Carrier did not furnish a bill of sale at any time during handling on the property. In fact, it was not until January 5, 1994, that Carrier hand delivered a bill of sale, curiously dated January 5, 1994, to the General Chairman. Although Carrier contended that it had sold the tanks as scrap back in Spring 1993, there is no probative evidence on this record to support that assertion.

There is no dispute that Carrier did not notify the General Chairman and discuss performance of the work in dispute. The issue of dismantling tracks and structures has been decided by the Board, on this property, in two previous Awards. See Third Division Awards 27112 and 28759. As noted, *supra*, Carrier's defense to Scope Rule coverage of the work was not persuasively established. Based upon all of the foregoing, this claim must be sustained.

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 20th day of July 1998.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 32638; DOCKET MW-32119
(Referee Eischen)**

The Organization filed its Notice of Intent with the Board on October 13, 1994.

Under Board Rules, any documents found by the Board to have been exchanged between the parties prior to the filing of the Notice of Intent must be considered. The Majority decision shows it failed to do so in this case.

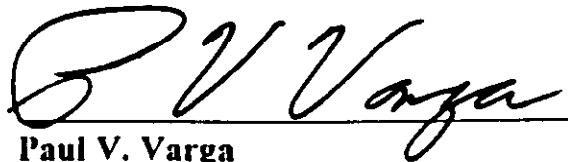
We dissent.



Michael C. Lesnik



Martin W. Fingerhut



Paul V. Varga

July 20, 1998

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENTING OPINION
TO
AWARD 32638, DOCKET MW-32119
(Referee Eischen)

The Majority was correct in its ruling in Docket MW-32119 and nothing present in the Carrier's dissent distracts from the correctness and precedential value of this award.

The dissent attempts to portray the referee as ignoring evidence that was submitted during the on-property handling of this case. The Board is not required to accept evidence that does not support the submitting party's position. Here, the Carrier alleged that it had sold the material at issue here on an "as is, where is" basis at some unknown time prior to the filing of the initial claim on June 22, 1993. After repeated requests by the Organization to present evidence of the sale, the Carrier delayed presenting said evidence until January 5, 1994. As was pointed out by the referee, the alleged bill of sale was "curiously dated January 5, 1994", the same date it was submitted into the record. The problem with the Carrier's dissent is that the referee did consider the alleged evidence and found it to be lacking in probative value. The Board held:

"Throughout handling on the property, the General Chairman repeatedly requested such proof, asking that a bill of sale be furnished to the Organization. The record supports the Organization's assertion that Carrier did not furnish a bill of sale at any time during handling on the property. In fact, it was not until January 5, 1994, that Carrier hand delivered a bill of sale, cur-

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"iously dated January 5, 1994, to the General Chairman. Although Carrier contended that it had sold the tanks as scrap back in Spring 1993, there is no probative evidence on this record to support that assertion."

A review of the above-cited language from the award reveals that the referee was more than kind to the Carrier when it disregarded the alleged evidence. This is so because the referee could have very easily declared the alleged evidence for what it actually is, i.e., fraudulent evidence. The Minority should have recognized this failing and held silent to the Majority's findings. It did not do so and this response was necessary. The award is correct and stands as precedent.

Respectfully submitted,

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

Roy C. Robinson
Labor Member