Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32858
Docket No. MW-30694
98-3-92-3-476

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 (Railroad Recovery Resources, Inc.) to perform Maintenance of Way work (operating log loading truck, pick-up truck, bulldozer and front end loader to retire track) on the Bethlehem Secondary Track, Bethlehem, Pennsylvania beginning December 20, 1990 and continuing (System Docket MW-1902).

(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 G. Mondschein, Vehicle Operator D. Heffner, Casual Driver A. Zabrecky, Class 2 Machine Operators M. Gerber, C. Bentz and Trackman R. Behler shall each be allowed pay for an equal proportionate share of the total straight time and overtime hours consumed by the contractor during the claim period."

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.

The January 24, 1991 claim alleges that the Carrier contracted out track retirement work on the Philadelphia Division starting on December 20, 1990 and did so without prior notice to the Organization. The Carrier denied the claim, responding on February 15, 1991 that:

> "The material was purchased on an 'as is, where is basis.' Accordingly, it was permissible to have them [the contractor] remove the materials they purchased."

On February 25, 1991, the Organization appealed the denial. With respect to the "as is, where is basis" assertion by the Carrier, the Organization stated:

> "The organization has a problem with this statement. First of all, this is without doubt, railroad material (property). Since Conrail made the 'sale agreement pitch', the Organization is requesting a copy of this alleged Agreement. If Conrail will not supply the Organization with a COPY of said Agreement, it will be mutually agreed upon by both Conrail and the Organization that no such Agreement exists. If this is the case, then this claim is payable as presented."

By letter dated May 10, 1991, the Carrier again denied the claim and stated:

> "Our investigation establishes that the subject work cited in the instant claim, involved inactive tracks sold to the contractor and not regular rail operation tracks. Under these circumstances, there was no requirement for the Carrier to notify your Organization of our intent to dispose of subject track material, nor was there a violation of the Scope of our Agreement. The material was purchased on an 'as is, where is basis' and

accordingly, it was permissible to have the contractor remove the materials they purchased."

Further appeal was processed by the Organization by letter dated June 17, 1991. There, the Organization stated:

> "District Chairman Wise requested a copy of the alleged sales Agreement. This reasonable request has not been honored, therefore the Organization will continue its stand that this is therefore Conrail property. With this in mind, Conrail employees should have been used to 'retire' this track, as per the BMWE Agreement."

By letter dated August 22, 1991, the Carrier asserted that the Organization could not rely upon the nationally negotiated December 11, 1981 Letter of Agreement because it was never adopted by the Carrier. The Carrier again reiterated that it sold the material on an "as is, where is basis."

Initially, and contrary to the Carrier's assertion, we find the claim sufficiently specific. We further find that the Carrier's argument that it is not bound by contracting out terms of Article IV of the 1968 National Agreement to be new argument which cannot be considered at this time. That specific argument was not raised on the property and cannot now be considered by this Board. The only objection raised by the Carrier on the property to nationally negotiated terms is found in the Carrier's August 22, 1991 letter which only addresses the December 11, 1981 letter. In light of the discussion below which finds a violation of the Agreement, we find the Carrier's argument concerning the December 11, 1981 letter insufficient to change the result in this case.

With respect to the arguments which we can consider, in short, the Carrier argues that it was not obligated to give the Organization notice of its intent to contract out the work in dispute and it had the right to contract the work because the material was sold to the contractor on an "as is, where is basis" and, under well established authority, the Carrier was free to do so without violating the Agreement. With respect to selling material which is retrieved by a contractor on an "as is, where is basis," the Carrier is correct. ". . . [T]his Board has held that because of the sale of the material in such a fashion, 'the work was not contracted out.'" Third Division Award 30901 and

Awards cited therein. If that were all we had in this record, we would deny the claim. However, there is more.

After the Carrier took the position that the material was sold on an "as is, where is basis," the Organization requested to examine a copy of the contract establishing that fact. The Carrier refused to produce that contract or any portion thereof which would have reasonably assured the Organization (and this Board) that, beyond mere assertion, that the Carrier had, in fact, sold the material to the contractor on an "as is, where is basis." Indeed, in its Submission to this Board (at 21), the Carrier takes the position:

> ". . . Carrier records are inherently private documents. There is nothing in the Conrail-BMWE Agreement that requires their disclosure to the Employees."

The "as is, where is basis" argument raised by the Carrier is an affirmative defense. Because it raises this affirmative defense, the Carrier has the burden to demonstrate the facts and validity of that defense. Here, by asserting that it does not have to produce the contract (or even offer to produce redacted versions of the relevant documents supporting its position which would protect its privacy concerns and at the same time sufficiently establish the existence of the contract providing for the "as is, where is basis" for disposing of the material), the Carrier effectively takes the position that it can raise this affirmative defense but yet produce no facts or evidence in support of that defense. We have previously rejected the Carrier's position. See Third Division Award 31521 between the parties:

> ". . . Having failed to produce the very contract upon which it bases its defense . . . the Carrier is precluded from relying upon the substantive terms of the contract as an affirmative defense to the claim. Third Division Award 30661:
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> > 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. . . .
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> 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.
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> 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."

The Agreement states that "[i]n the event the Company plans to contract out work within the scope of this Agreement . . . the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto." The basic nature of the work in dispute in this case and the equipment used was "work within the scope of this Agreement" (see Rule 1 where covered employees "dismantle track and appurtenances thereto . . . perform welding of track and appurtenances thereto . . . vehicle operators" etc.) Contrary to the Carrier's position, in contracting disputes the Organization need not prove that it performed the work on an exclusive or system wide basis. Third Division Award 31386 quoted in Third Division Award 32863 and Awards cited therein ("A myriad of Awards have concluded that, while exclusivity may be an appropriate test as to division of work among various crafts and classes of the Carrier's employees, it is not an appropriate requirement under the Agreement provision concerning contracting of work").

The Carrier therefore violated the Agreement when it contracted out the work without giving the required notice to the Organization. We find Award 31521 between the parties and the authority cited therein as firm basis for sustaining this claim in its entirety. As in that Award, the loss of work opportunities for covered employees resulting from the Carrier's violation of the Agreement requires that full relief be awarded for Claimants and, because of those lost work opportunities, we fashion that

relief irrespective of the fact that Claimants may have been working during the time that the contractor performed the work. The matter is now remanded to the parties to jointly determine the number of hours worked by the contractor. Claimants shall be compensated accordingly.

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 21st day of October 1998.