Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37470
Docket No. MW-36515
05-3-01-3-8

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (pick up ties) along the right of way following a tie gang between Mile Posts 31 and 54 on the Barstow Subdivision of the Illinois Division beginning April 12, 1999 and continuing through May 7, 1999 [System File C-99-C100-62/10-99-0244(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman advance written notice of its plans to contract out the above-described work as stipulated in the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 1 Work Equipment Operator J. F. Hays shall now be compensated for one hundred fifty-two (152) hours' pay at his respective straight time rate of pay and for thirty (30) hours' pay at his respective time and one-half rate of pay."

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 Organization contends that from April 12 through May 7, 1999, the Carrier assigned Wood Waste Energy, Inc., of New Bern, North Carolina, to perform track maintenance work by picking up used ties following a tie gang working between Mile Posts 31 and 54 on the Barstow Subdivision of the Illinois Division. According to the Organization, the contractor's employees expended the equivalent of 152 hours at straight time and 30 hours at overtime in the performance of work clearly belonging to the Carrier's Maintenance of Way Department employees, pursuant to Rules 1, 2, 5, 55 and Appendix Y of the Agreement.

According to the Organization, on June 25, 1999, the Manager Maintenance Support denied the claim as follows:

> "Reference is made to your letter dated May 24, 1999, File WE 1/Gr. 116, filing claim on behalf of Group 1 Operator J. F. Hays (311322-2), for alleged violation of the Agreement when Claimant suffered a lost work opportunity and monetary loss when the Carrier contracted for the picking up of scrap ties along the Carrier right-of-way during the period of April 12 thru May 7, 1999.
>
> Our investigation reveals that these scrap ties were sold 'as is/where is' to an outside third party. Because the ties were no longer the property of BNSF, Wood Waste Energy, Inc. had the right to come onto the property and remove the scrap ties that were purchased.

Based on the above, this claim is therefore declined in its entirety."

The Organization points out that in its August 3, 1999 appeal letter to Labor Relations, the General Chairman requested "a copy of the contract that was executed between the contractor and the Carrier." In a subsequent letter dated October 24, 1999, written in response to the September 27, 1999 denial of the claim by Labor Relations, the General Chairman wrote:

> "In reference to Claim Number C-99-C100-62, Carrier's File Number MWA-10-99-0244 I, it was stated that Contractor by the name of Wood Waste Energy INC. purchased the scrap ties.
>
> In order to save time at claims conferences would you please send me a copy of the contract where they did purchase the scrap ties."

Citing the above correspondence, the Organization stressed that despite the above requests, the Carrier never furnished the General Chairman a copy of the contract. Because it never furnished a copy of the purchase contract, the Carrier failed to substantiate its "as is, where is" affirmative defense, the Organization argued. Thus, citing Third Division Awards 30661 and 31521, the Organization asserted that the Carrier's failure to produce the contract upon which its affirmative defense was founded goes to the heart of this dispute, and requires that the claim be sustained.

Indeed, as the Board stated in Third Division Award 31521:

> "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 Ties Sales . . . 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." (Emphasis added)

In addition, Organization cited Third Division Award 30661, as follows:

> "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. . . ."

The Organization secondarily argued that the work performed by the contractor has customarily and historically been performed by Carrier employees working in the Work Equipment Sub-Department and is contractually reserved to them under the Scope Rule. The Organization further maintained that the Carrier's failure to provide a 15-day notice violated the Note to Rule 55 of the Agreement and Appendix Y, the December 11, 1981 Berge-Hopkins Letter of Understanding.

The Carrier responded that procedurally, the claim warrants dismissal because, as initially submitted, on May 24, 1999, it was vague and lacked information necessary for the Carrier's proper investigation of the allegations. For example, the Organization failed to identify the state, division or subdivision on which the alleged work was performed. Moreover, it was not until December 18, 2000 that the Organization "told" the Carrier the specific location where the tie removal work took place, the Carrier stated.

With regard to the merits, the Carrier emphasized that the contracting work at issue here involved the Carrier's routine sale of scrap ties and materials to a third party, and that under such sales agreements, the purchaser is responsible to remove its materials from the Carrier's property. Specifically, in its September 27, 1999 letter, the Carrier stated:

". . . Even if there were adequate information to determine where the work took place, there has been no violation of the Agreement. The initial claim indicates the company picking up the ties was following a tie gang. The Carrier routinely sells scrap ties and the purchaser of the ties is responsible to remove their ties from the Carrier's property. In those cases where the ties are sold, the Carrier enters into a contract with the purchaser. The contract provides that the scrap ties are sold on an as is, where is basis and the new owner of the scrap is responsible to remove them from Carrier's property.

The Carrier's selling of the scrap ties and the new owners retrieving his property did not violate the Agreement in any way. Therefore the claim is without merit.

Further, the Claimant was fully employed during the claim period and lost no earnings."

The Board carefully studied the factual record and the positions advanced by both parties. Initially, we find that the claim as originally presented bore no procedural defect warranting dismissal by the Board. From our review of the claim, it is clear that the Organization supplied the name of the contractor whose employees were picking up ties, as well as the dates encompassed by the claim. We additionally note that the Manager Maintenance Support confirmed the contractor's identity in the first level claim denial, and asserted the "as is, where is" affirmative defense.

Moreover, from our review of the above denial letter, we are convinced that the Labor Relations Department possessed enough information to logically answer the claim as evidenced by its unequivocal position that the existence of the "as is, where is" purchase contract between the Carrier and Wood Waste Energy, Inc. removed the disputed work from the scope of the Agreement. Thus, we conclude from our review of the correspondence of record that the claim was sufficiently specific at the outset and contained enough information for the Carrier to investigate it and prepare a response. The Carrier's request that the Board should dismiss the claim without regard to the merits is denied on that basis, we rule.

As an alternative argument, the Carrier, in its Submission to the Board, laid out several arguments suggesting that, without retreat from its position that the "as is, where is" purchase agreement permitted the contractor to retrieve the ties, the pick-up work performed by the contractor's employees was specialized and unlike that which has been customarily performed by the Carrier's Roadway Equipment Sub-Department employees. According to the Carrier, factors such as the volume of ties removed and the fact that they had been treated with creosote, requiring their disposal in an environmentally sensitive manner, placed the work outside the scope and thus allowed the Carrier to use the contractor without serving any 15-day notice. We disagree for the following reasons.

First, the Board carefully considered the parties' positions in light of the factual record and the precedent Awards cited and quoted herein. We agree with the Organization that the Carrier's "as is, where is" defense is central to this case, because that line of defense, if applicable, and proven, means that the claim virtually does not involve a contracting out of work, where notice and conference is required.

Second, given the Carrier's assertion of the "as is, where is" defense in its June 25, 1999 claim denial, quoted above, the Organization, in a timely fashion, made two requests for a copy of the contract, the record bears out, so as to see the "as is, where is" provisions.

Third, it is clear from the record that, despite the General Chairman's dual written requests, on August 3 and October 24, 1999, while this claim was clearly in the midst of on-property handling, the Carrier never furnished a copy of the requested contract, nor did it tender any other proof that it had entered into an "as is, where is" purchase agreement, with Wood Waste Energy, Inc. As countless Awards of the Third Division have held, we also hold that when the "as is, where is" affirmative defense is raised by the Carrier, it is incumbent upon the Carrier to furnish persuasive evidence in support of that defense while the claim is still in on-property handling. See Third Division Awards 30661, 31521, 32320, 32858, and 36093. From the record before us, the Carrier did not tender any evidence of probative value. Therefore, it unsuccessfully carried its burden of proof in this critical defense, we hold.

With respect to the Organization's assertions concerning the lack of notice and conference, we find that the Board need not reach any conclusion in that regard because the fact is that, as the Carrier consistently asserted, ". . . in this case the

Carrier sold scrap, creosote treated, wood ties to a vendor . . . on an as-is-where-is basis." As a result, the case does not turn on the notice issue.

Thus, given our careful review of the record and the on-property arguments advanced by the parties, we conclude that the instant controversy arose when the Carrier allowed employees of Wood Waste Energy, Inc., to pick up ties removed by the Carrier's track maintenance gangs. Again, the Carrier consistently maintained that the contractor's retrieval of the used ties was predicated upon the "as is, where is" sale of those materials to Wood Waste Energy, Inc. But, the factual record before us confirmed that the Carrier never came forth with the required proofs in support of its affirmative defense while the claim was being handled on the Carrier's property. As a result, Parts 1 and 3 the instant claim must be sustained. Given the loss of work opportunity experienced by the Claimant, the monetary remedy requested herein is appropriate, we also rule. See Third Division Awards 30661, 31521, and 36093.

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 19th day of April 2005.