

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30224
Docket No. MW-29698
94-3-91-3-42

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former
(Seaboard Coastline Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

- (1) The Carrier violated the Agreement when, without conferring and reaching an understanding with the General Chairman as required by Rule 2, it assigned outside forces (Tampa International Forest Products, Inc. of Tampa, Florida) to perform maintenance work (recovering crossties on the right of way) between Mile Post ANJ 857 and Mile Post ANJ 940 on the Lineville Subdivision of the Atlanta Division from October 9 through 13, 1989 and October 23 through November 30, 1989 [System File 89-71/12(90-194) SSY].
- (2) As a consequence of the aforesaid violation, Maintenance of Way General Subdepartment Group A employees J. B. Taunton and W. J. Dills shall each be allowed pay at their respective straight time rates for an equal proportionate share of four hundred forty-eight (448) straight time hours and pay at their respective time and one-half rates for an equal proportionate share of ninety-six (96) overtime hours expended by the contractor's employees from October 9 through 13, 1989, and October 23 through November 30, 1989."

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 waived right of appearance at hearing thereon.

In this dispute, the Organization contends as follows:

"Beginning on October 5, 1989, the Carrier assigned and/or otherwise permitted two (2) employees of an outside concern (Tampa International Forest Products, Inc.) to perform maintenance work of loading/recovering bundles of crossties from along the right of way on the Lineville Subdivision between Mile Post ANJ 857 and Mile Post ANJ 940."

The Organization further asserts that the Carrier did not provide the General Chairman with advance notice of such activity.

While the Carrier offers other defenses to its action, its principal explanation is that it had an agreement with Texas International Forest Products to purchase used ties from the Carrier, with the condition that the purchaser would retrieve and remove the ties from the Carrier's property at its own expense.

Assuming that this arrangement is factually supported, this becomes a case of the purchase of material in an "as is, where is" condition. The conclusion that this is not contracting of work as defined in the Agreement has been well established in many Awards. Typical of such are Third Division Awards 28489 and 24280. Award 24280 sustained the claim as to portions of the work involving "dismantling and retaining Carrier property," but concluded:

"[T]he portion of the work involved in the sale and removal of Carrier property [ties and rails] was not improper and required no Article IV notice."

Here, however, the Organization asserts that the Carrier failed to prove its affirmative defense, because it did not provide the Organization with a copy of the agreement with the purchaser. While such copy was indeed not furnished, the record shows that during the claim handling procedure the General Chairman was offered and accepted the opportunity to review the document. This was acknowledged in an appeal letter from the General Chairman which stated in pertinent part as follows:

". . . I sincerely appreciated the opportunity on February 27, 1990, while in your office, to review the contract between CSXT, Inc., and Tampa International Forest Products for the removal of crossties from the right-of-way. Even though I had the opportunity to briefly view these documents, I was unable to ascertain at that time whether any contract violations did in fact occur as we contended while handling this dispute on the property."

The Board does not perceive any meaningful difference between actually supplying a copy of the document (which, for whatever reason, the Carrier was reluctant to do) and permitting its examination by the General Chairman to the extent he desired. On this basis, the Board finds no reason to believe that the document was other than a purchase agreement or that the sale was other than the usual "as is, where is" arrangement. It follows that there was no demonstrated contracting for the Carrier's benefit of work which would otherwise have been normally performed by Carrier employees.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.