

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30901
Docket No. MW-29138
95-3-89-3-581

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 (Midwest Tie Sales) to dismantle and recover track material from Track Nos. 8 and 12 in South Plainfield Yard, south Plainfield, New Jersey on July 22, 25, 26, 27 and 28, 1988 (System Docket MW-169).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intention to contract out said work as required by the Scope Rule
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. G. Fallon, F. Swarrow, E. Swarrow, P. Hackenberg, R. Jacques and J. Constantine shall each be allowed forty (40) hours of pay at their respective straight time rates."

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.

On the dates set forth in the claim, the Carrier used the services of a contractor to remove and dismantle Track Nos. 8 and 12 in the Carrier's Yard, South Plainfield, New Jersey. In the performance of its duties, the contractor utilized a front end loader, a cherry picker truck and six employees.

The Carrier defended the claim by asserting that the tracks were sold to the contractor on an "as is, where is" basis and the purchase contract made the contractor responsible for dismantling the material. Therefore, according to the Carrier, because it had sold the material, the work did not come under the Scope Rule.

Examination of the agreement between the Carrier and the contractor shows that the materials were sold to the contractor on an "as is, where is" basis. In similar circumstances, this Board has held that because of the sale of the material in such a fashion, "the work was not contracted out." Third Division Awards 28615, 28489, 28488 and 24280. That authority is persuasive.

The Organization argues that on the property it requested a copy of the sales contract between the contractor and the Carrier and did not receive the same. Pointing to authority such as found in Third Division Award 28430, the Organization argues that the Carrier cannot now produce the sales contract and rely on its terms. As discussed in that Award, the Organization is correct that failure to produce a sales contract as requested on the property precludes this Board from later considering its terms. But, the record in this case shows that by letter dated May 17, 1989 (seven months before the matter was brought to this Board), the Carrier advised the Organization that "... a copy of the contract/lease to Midwest Tie Sales is available in our offices for your inspection, should you so desire." Under the circumstances, the Organization cannot argue that the Carrier did not produce a copy of the contract on the property so as to bring this case under the rule discussed in Award 28430.

AWARD

Claim denied.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of June 1995.