Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32514
Docket No. MW-31534
98-3-93-3-526

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Chesapeake &
(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 (Wintrow Construction Corporation) to perform Maintenance of Way work (removing rail) between Mile Post 15.5 to Mile Post 16.6 on the main line on the New Port News Subdivision beginning June 15, 1992 and continuing [System File C-TC-5011/12 (92-1223) COS].

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out the work described in Part (1) above.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Claimants J. Silver, C. W. Johnson, M. R. Van Buren, W. L. Pergram and R. Gunter shall each be compensated for eighty (80) hours' pay, at their respective rates of pay, for the man-hours expended by the outside forces."

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 case involves work performed by Wintrow Construction Corporation crews of removing rail between Mile Post 15.5 to 16.6 on the Newport News Subdivision. The work consisted of dismantling of the trackage in question, removal of crossties, rail, angle bars and associated track appliances. The work was performed eight hours a day for ten days beginning June 15, 1992.

The Organization argues that such work properly accrued to its members pursuant to the Scope Rule and that Carrier, by contracting out the performance of this work, violated the Agreement.

Carrier, on the other hand, disputes the contention that it violated the Agreement. Carrier asserts that it sold the material in question on an "as is, where is, basis." Carrier insists that because it no longer owned the material in question, work performed by the contractor on such material, which was no longer part of the railroad operation and over which the Carrier had no vested ownership, cannot be characterized as contracting out work. Carrier maintains that contracting out can only take place where it has ownership and control over the property on which the work is to be performed.

We reviewed the various applicable authorities on the issue presented. Suffice to say, we agree with Carrier that the dismantling work in question cannot be viewed as contracting out. Stated simply, the third track in question had been disconnected from and was no longer a viable part of Carrier's operation. As such, the track was abandoned or retired. Under such circumstances, the Organization has no claim for the disputed work and the claim must be denied.

One final point. We feel compelled to comment about the fact that Carrier delayed providing the Organization a copy of the sales agreement regarding the disputed

material. In proper cases, the failure to promptly supply such evidence may well be the basis, alone, for the Board to sustain a claim on behalf of the Organization. Carrier is put on notice that it must place into evidence copies of sales agreements when requested by the Organization in cases of this type. However, here, we can see no basis for sustaining the claim on that basis.

AWARD

Claim denied.

ORDER

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 25th day of March 1998.

LABOR MEMBER'S DISSENT
TO
AWARD 32514, DOCKET MW-31534
(Referee Scheinman)

Award 32514 which decided a dispute involving the contracting out of track dismantling work, is disconnected, palpably erroneous and of no value as precedent. Although the Majority does not deny that track dismantling work is expressly reserved to Maintenance of Way forces under the Scope of the Schedule Agreement, it chose to regurgitate the Carrier's unsupported assertions to improperly credit a **SOLD *as is, where is*** defense in this case. However, it is axiomatic that assertions are not proof and the Organization clearly challenged the Carrier to present evidence to substantiate its affirmative defense, i.e., a **copy** of the alleged sales contract, during the on-property handling of this case. While the Carrier's failure/refusal to provide such documentary evidence in its possession carried a strong negative inference, the Majority chose to ignore rules of evidence and fundamental contract construction to dispense its own anomalous brand of industrial justice.

While characterizing this case as other than proper, the Majority clearly put the Carrier "on notice" to promptly supply into evidence copies of requested sales agreements in cases of this type. However, such is only disingenuous dicta because this Carrier was put "on notice" long ago and to reiterate "notice"

after many monetary awards, including Awards **29059** (**SSY**), 30661 (SSW), **30971** (**SSY**), **30982** (**SSY**) and 31521 (CRC), renders this award an anomaly and of no precedential value.

Respectfully submitted,

Roy C. Robinson
Labor Member