Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32857
Docket No. MW-30126
98-3-91-3-555

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 Employes
(
(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 an outside concern (Tampa International Forest Products, Inc. of Tampa, Florida) to perform maintenance work (operating on-track equipment to recover crossties alongside the track on the right of way) on the Manchester Subdivision of the Atlanta Division beginning March 5, 1990 and continuing [System File 90-47/12(90-699) SSY].

(2) As a consequence of the aforesaid violation, Maintenance of Way General Subdepartment, Group A Machine Operator H. J. Walls shall be allowed his appropriate straight time and overtime rate of pay for all straight time and overtime hours expended by the outside contractor in the performance of the work described in Part (1) above beginning March 5, 1990 and continuing."

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.

Claim was filed by the Organization on April 26, 1990 alleging that commencing March 5, 1990, Tampa International Forest Products, Inc. ("TIFP") began picking up crossties on the Manchester Subdivision on the Atlanta Division. The Carrier responded that it had an agreement with TIFP where the contractor purchased all of the crossties on the system and the crossties therefore became the property of TIFP. The Organization replied that it had not seen the contract between the Carrier and TIFP. The Carrier then offered to allow the Organization the opportunity to examine the documentation when the parties discussed the claim in conference. Eventually, the Organization was permitted to examine the documentation and was given a copy of that document which was provided to the Board as part of the on-property handling.

The documentation provided by the Carrier to the Organization is a "proposal" dated December 2, 1988 stating at paragraph 12 that:

> "12. TIFP proposes to perform all work in the removal of all used ties in 1989 on a no cost - no charge basis. Our remuneration will be the salvaging and resale of the merchantable used ties. . . ."

Based on what is before us, we are satisfied that the Carrier entered into an arrangement whereby TIFP removed the ties on an "as is, where is" basis. As such, no violation of the Agreement has been shown. See Third Division Award 30637:

> "The ties were sold on an 'as is, where is' basis. Accordingly, the removal by the outside concern did not violate the Agreement since the ties were no longer owned by the Carrier."

See also, Third Division Awards 30080, 30224, 30231, 30901, 31716 and Awards cited therein.

Third Division Award 30971 cited by the Organization does not change the result. In that case, ". . . Carrier did not at any time during the handling of this dispute on the property provide the Organization with a copy of the contract it allegedly had made with TIFP." Here, the Carrier gave the Organization relevant documentation.

During proceedings before the Board, the Organization pointed out certain alleged deficiencies in the documentation used by the Carrier to support the "as is, where is" transaction between the Carrier and TIFP. Specifically, we note that the document provided by the Carrier to the Organization was a "proposal" dated December 2, 1988 covering 1989 work on the Tampa, Florence and Baltimore Divisions. The Organization argues to us that there was no bill of sale presented and what was given to it by the Carrier was old and covered different work. Under the circumstances of this particular case, we believe that argument places form over substance. Those detailed problems with the documentation were not all raised on the property to the same degree as they have been raised to the Board. But, in any event, on the property the Carrier took the position that it had an arrangement whereby TIFP was removing TIFP's property. The documentation provided to the Organization substantiates the Carrier's assertion that it has had such a similar arrangement with TIFP. Coupled with the foregoing, we note that similar arrangements have existed between the Carrier and TIFP which the Board has found constituted "as is, where is" transactions for tie removal. See e.g., Third Division Awards 30231, 30224, 30637. While it would have been easier had the Carrier simply provided the documentation for the specific work in question, we are sufficiently satisfied that given all the above, the transaction between the Carrier and TIFP was no different than those previously decided by the Board.

Under the circumstances, the claim will be denied.

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 21st day of October 1998.

LABOR MEMBER'S DISSENT
TO
AWARD 32857, DOCKET MW-30126
(Referee Benn)

This award is erroneous as the Majority failed to base its decision on the record and a dissent is required.

The premise of this claim was quite simple and uncomplicated. The Organization contended that the Carrier contracted out track work belonging to the employes represented by the BMWE, i.e., loading and hauling ties removed by an SPG gang. During the handling of this dispute on the property, the Carrier contended that the ties in question were sold and that the buyer was merely retrieving its property. The Organization promptly requested a copy of the sales agreement. Thereafter, the Carrier supplied a purported sales agreement to the General Chairman. Upon receipt of the alleged sales agreement, the General Chairman discovered that the contract referred to a "proposal" to load the ties during the calendar year 1989. As was pointed out no fewer than **three (3) times** by the General Chairman on the property, such alleged evidence did not pertain to this dispute, but was in fact a proposal from the previous year. In fact, the alleged documentation presented by the Carrier in this case was the very same "evidence" that it failed to provide in a companion case decided by Third Division Award **30971** involving these same parties.

The Majority alleged that:

> "Third Division Award 30971 cited by the Organization does not change the result. In that case, '. . . Carrier did not at any time during the handling of this dispute on the property provide the Organization with a copy of the contract it allegedly had made with TIFP.' Here, the Carrier gave the Organization relevant documentation."

The problem with the Majority's findings here is that the alleged "evidence" it referred to in its findings pertained to work at issue in Award **30971**. Clearly, said "evidence" pertained to the previous year's work and had absolutely no relevance to this dispute. What the Carrier did in the instant case was reached into the slop bucket of alleged "evidence" and resurrected alleged "evidence" from a previous dispute, which it failed to present in that case, and attempted to convince the Board that it was pertinent here. The Majority was duped into accepting such alleged "evidence" in this case even though the Carrier failed to present such "evidence" in the case to which it actually pertained. Moreover, in Award **30971**, the Carrier did not provide a copy of the contract based on an alleged "confidentiality" assertion. The Board held in that case:

> "Carrier's primary argument, on the property, was that the crossties had been purchased by or donated to TIFP on an 'as is where is' basis. That is an affirmative defense and Carrier has the burden of proving, by at least a preponderance of record evidence, all material elements of its 'as is where is' defense. Moreover, when faced with a colorable claim of the disputed work, Carrier must provide such evidence to the Organization on the property. In this case, Carrier failed to fulfil its obligation in both respects. Carrier apparently allowed the General Chairman to take a peek at the proported contract with TIFP, but when the General Chairman challenged the efficacy of that contract, Carrier refused to provide a copy. Belated assertions of 'confidentiality' are of no comfort to Carrier in this situation. Carrier cannot have it both ways, if it asserts an 'as is where is' defense, it must provide the Organization and this Board with sufficient information to support that assertion. Based upon the failure of proof on the as is where is defense, the claim must be sustained."

For this Board to accept alleged "evidence" that the Carrier failed to present in a previous case, as supporting its position in the instant case, makes a mockery of the principle of probative evidence.

The Majority's recklessness does not stop there. The Majority clearly erred when it stated that:

> "During proceedings before the Board, the Organization pointed out certain alleged deficiencies in the documentation used by the Carrier to support the 'as is, where is' transaction between the Carrier and TIFP. Specifically, we note that the document provided by the Carrier to the Organization was a 'proposal' dated December 2, 1988 covering 1989 work on the Tampa, Florence and Baltimore Divisions. The Organization argues to us that there was no bill of sale presented and what was given to it by the Carrier was old and covered different work. Under the circumstances of this particular case, we believe that argument places form over substance. Those detailed problems with the documentation were not all raised on the property to the same degree as they have been raised to the Board. But, in any event, on the property the Carrier took the position that it had an arrangement whereby TIFP was removing TIFP's property. The documentation provided to the Organization substantiates the Carrier's assertion that it has had such a simi-

> lar arrangement with TIFP. Coupled with the foregoing, we note that similar arrangements have existed between the Carrier and TIFP which the Board has found constituted 'as is, where is' transactions for tie removal. See e.g., Third Division Awards 30231, 30224, 30637. While it would have been easier had the Carrier simply provided the documentation for the specific work in question, we are sufficiently satisfied that given all the above, the transaction between the Carrier and TIFP was no different than those previously decided by the Board."

The Majority's characterization of the Organization's argument of "putting form over substance" is simply not true. A review of the record reveals that the General Chairman repeatedly asked the Carrier, no fewer than **three (3) times**, to provide the alleged evidence that pertained to the instant dispute. After all, the Carrier was raising the sale of the ties as an affirmative defense to the Organization's prima facie case. The principles that have been adopted by this Board as a guide for the resolution of similar cases has been long established. One of the most important principles is that the party raising an affirmative defense is obligated to prove such defense by the presentation of evidence of probative value. The Board has long held that assertions and allegations are not evidence and cannot serve to support an affirmative defense. The Majority should not, therefore, apply varying degrees of protestation of one party's position as the Majority has here, when the Carrier failed to meet its affirmative defense in the first instance. The Majority should have held that the Carrier's presentation of a document from a previous year to support its affirmative defense in the current year did not rise to the level of proof required to support its position in this case. To put the onus on the Organization to raise an objection to an unspecified "degree" was in error. For all the reasons cited above, this award is palpably erroneous and I therefore dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member