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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35772
Docket No. MW-34379
01-3-98-3-5**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside contractor to load and haul scrap in the old South Yard on November 15 and 18, 1996 (Carrier's File MW-97-020).
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman of its intent to contract out said work in accordance with Article IV of the May 17, 1968 National Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator J. Mireles shall be allowed sixteen (16) hours' pay at the machine operator's straight time rate.”

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.

It is undisputed that the Carrier hired a contractor (Midwest Metallics, L.P.) to load and remove from its property certain scrap rail and scrap steel. In its January 15, 1997 denial of the claim, the Carrier clearly asserted that the scrap was sold on an “As Is Where Is” basis.

The Organization's March 8, 1997 appeal did not challenge the Carrier's "As Is Where Is" assertion nor did it request a copy of the sale contract. Instead, the appeal merely reiterated the features of the original claim and requested a conference; the "As Is Where Is" aspect of the dispute was entirely ignored.

Conference was held on April 7, 1997 and the Carrier issued its denial decision the following day. The Carrier's letter restated its "As Is Where Is" defense.

The Carrier's April 8, 1997 conference decision letter completed the formal steps of the parties' claim handling specified in Rule 24 of their Agreement.

According to the Carrier's Submission, its April 8, 1997 conference decision concluded the on-property record. Nonetheless, the Carrier produced the sale contract and related documents as a Submission exhibit to support its "As Is Where Is" position. The documents appear to be in order.

The Organization's Submission, however, contains an April 22, 1997 letter that requested a copy of the sale contract.

It is well settled that genuine "As Is Where Is" sales of Carrier property do not constitute impermissible contracting of scope covered work. Accordingly, notice is not required. See Third Division Awards 24280 and 30220. Other Awards, however, have held that the Carrier fails to establish its affirmative defense when it does not produce supporting documentation after a timely challenge by the Organization. See Third Division Awards 30971 and 31521.

The differing accounts of the on-property record shown by the parties' Submissions presents us with the issue of whether the Organization's request for a copy of the sale contract was received by the Carrier. If the Carrier did not receive it, then the Carrier had no obligation to provide the supporting documentation and no adverse inferences may be drawn from its failure to do so.

Precedent in the railroad industry imposes the burden of proof to prove receipt of a letter upon the sender. On this record, no such evidence has been provided. We must find, therefore, that the Carrier's affirmative defense has been successfully established as a matter of fact on this record. As a result, the sale of its scrap did not violate the Agreement. Because the sale did not trigger the contracting Rules, no notice was required.

AWARD

Claim denied.

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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 24th day of October, 2001.