

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42759
Docket No. MW-42823
17-3-NRAB-00003-140470**

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

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

**(CSX Transportation, Inc. [former Seaboard System
(Railroad]**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (T. C. Taylor Co., LTD) to perform Maintenance of Way and Structures Department work (collection and distribution of used crossties) located along the right of way between Mile Posts W 59.0 and W 14.5 in the vicinity of Albemarle, North Carolina on January 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 21, 22, 23 and 24, 2013 (System File B18803313/2013-140021 WSS).**
- (2) The Agreement was further violated when the Carrier failed to provide advance notice and failed to confer and reach an understanding setting forth the conditions under which the aforesaid work would be performed as required by Rule 2 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referenced in Parts (1) and/or (2) above, Claimant R. Tucker shall be compensated one hundred twelve (112) hours at his applicable straight time rate of pay and twenty-five (25) hours at his applicable time and one-half rate of pay.”**

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.

On the dates of claim, an outside contractor picked up and removed from the property crossties that had been taken out of service and left along the right-of-way. The Carrier did not meet with the Organization to discuss this work prior to it being performed. The Carrier contends it was privileged to have the contractor perform the work because the ties had been sold to the contractor on an as-is, where-is basis. When the Carrier made this assertion, the Organization requested a copy of the contract. None was ever provided.

The Carrier's contention that the work could be performed by the third party under an as-is, where-is contract is an affirmative defense to the claim. As such, the Carrier bears the burden of proof, which it could have met by providing a copy of the contract to the Organization. Because it failed to do so, we must find that the Carrier has not met its burden of proof. The Agreement was violated.

With respect to a remedy, the Board finds that there is arbitral precedence involving similar claims between these parties, particularly when a conference to discuss the work did not take place, for sustaining the claim for the hours worked by the contractor. See Awards 18365 and 30910. Accordingly, we will sustain the claim as presented.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of September 2017.