Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36723
Docket No. MW-36283
03-3-00-3-501

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Determan Morrill Limited Co., Progress Rail Inc. and SMI Rail) to perform routine Maintenance of Way right of way cleaning work (cut, load, transport and stockpile rail and other track material) between Mile Posts 749.50 and 778 and between Mile Posts 830 and 847 on the Laramie and Salt Lake Subdivisions within the Wyoming Division commencing March 22, 1999 and continuing through May 7, 1999 (System File W-9952-156/1196017).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or, (2) above, Eastern District Roadway Equipment Operators L. E. Loya, T. B. Micek, Wyoming Division Group 15(D) Truck Drivers M. T. Carter, J. W. McBee, Wyoming Division Group 15(C) Truck Drivers G. A. Delgado, K. B. Poledna, Wyoming Division Group 14(F) Welder Helpers J. G. Busboom, L. Pena, S. P. Campbell, E. P. Cruz, Group 18

Laborers R. J. Medina, J. A. Hernandez, S. A. Hayes, B. J. Lopez, D. E. Thomas and S. L. Laurence shall now be paid at their respective straight time and overtime rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of said work commencing on March 22, 1999 and continuing through May 7, 1999."

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 February 9, 1999, the Carrier sent the Organization the following notification:

"This is a 15-day notice of our intent to contract out the following work:

Location:	1999 Scheduled Locations of Gangs Series 8500, 9100, and 9000.
Specific work:	Provide labor, materials, equipment, and supervision for purchase and removal of rail & tie otm 'as is where is' behind system rail gangs during annual Track Maintenance Program.

> Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE. In the event you desire a conference in connection with this notice, all follow up contacts should be made with Wayne Naro in the Labor Relations Department. . . ."

In a February 17, 1999 reply, the Organization contended that the Carrier's February 9 Notice was "procedurally inadequate and/or defective" with respect to the requirements of Rule 52 and the December 11, 1981 Letter of Understanding. Specifically, the General Chairman alleged that the Carrier's February 9 Notice was "vague" and failed to include even "basic" information.

The General Chairman further contended that the work at issue was "customarily assigned and performed" by the Carrier's Maintenance of Way Department, and therefore "specifically reserved" to the Claimants under the terms of the Agreement.

In its denial of the claim, the Carrier asserted that the work at issue came as the result of an "as is, where is" sale, after which the material became the property of the vendor. The vendor loaded and transported its newly purchased property from the Carrier's right-of-way and the work is not scope covered, according to the Carrier.

The Carrier noted that although notice is not required under Rule 52 when the Carrier sells material to an outside vendor, the Carrier did provide advance written notice to the General Chairman in the February 9, 1999 Notice.

The Carrier further noted that during the claim period the Claimants were fully employed or were otherwise unavailable and therefore suffered no loss. Finally, the Carrier maintained that the issue before the Board has been previously decided, and under the principle of stare decisis, "there is no need to examine it further."

The issue was conferenced, via telephone, on February 26, 1999, however, neither party retreated from its original stance. Therefore, the dispute has been placed before the Board for resolution.

Both the Organization and the Carrier assert procedural violations. However, a review of the record evidence does not support either of the parties' assertions in that regard. Therefore, we will turn to the merits of the dispute.

The Organization asserts that the Carrier "improperly engaged" outside forces to perform work which it alleges was exclusively reserved to the employees. The Organization admits that it was advised of the Carrier's plan in the February 9, 1999 Notice, however according to the General Chairman, the Notice did not properly contain the dates on which the work would be performed or the number of outside forces who would perform the same.

For its part, the Carrier maintains that it properly informed the Organization of its intent to sell its property to an outside vendor on an "as is, where is" basis, noting that "numerous" Awards have held that the Carrier may contract such work. As such, the Carrier argues that such work is not covered by the Scope Rule. In that connection, the Carrier further notes that the Claimants were fully employed throughout the claim period and therefore suffered no loss.

Following careful review of this lengthy record we are persuaded that the work involved herein constituted an "as is, where is" sale transaction. Specifically, in a July 21, 1999 response to the Organization's claim, the Carrier provided "Sales Orders" for the work in question which stipulated that the materials were sold on an "as-is, where is" basis, after which the newly purchased materials were picked up and transported by the vendor.

We find no violation of the Agreement occurred. Accordingly, the claim is 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 17th day of September 2003.