

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37023
Docket No. MW-36508
04-3-01-3-5

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
(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 (L. B. Foster Rail Relay Division and Hebel Construction) to perform routine Maintenance of Way right of way cleaning work (general cleanup work related to rail and scrap metal left by Steel Curve Gang 8514 after track renewal project) starting at Huntington, Oregon at Mile Post 387.95 on the Huntington Subdivision beginning August 16, 1999 and continuing (System File J-9952-255/1212996).**
- (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, System Track Foreman P. M. Piggott, System Roadway Equipment Operators K. S. Robins, S. W. Pfel, System Track Laborers B. M. Blaylock and T. L. Zbylut shall now each be compensated *** at his applicable rate a proportionate share of the total hours, both straight and overtime hours worked by the contractor doing the work**

claimed as compensation for loss of work opportunity suffered starting on August 16, 1999, continuing until such time as the contractor employees are removed from the property as the work claim is considered continuous. Additionally, in an effort to make Claimants whole for all losses suffered, we are also claiming that the Carrier must treat Claimants as employees who rendered service on the days claimed qualifying them for vacation credit days, railroad retirement credits, insurance coverage and any and all other benefits entitlement accrued as if they performed the work claimed.”

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.

The record establishes that the Carrier sent a notice dated February 9, 1999 to the General Chairman that read, in pertinent part, as follows:

“This is a 15-day notice of our intent to contract 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 & otm "as is where is" behind system rail gangs during annual Track Maintenance Program."

The parties met to conference the notice on February 9, 1999, but no agreement was reached. Nevertheless, the Carrier entered into a contract with L. B. Foster Company on March 1, 1999 which provided for the purchase and removal of scrap on an "as is where is" basis. A copy of the contract was provided to the Organization as part of the on-property record. The Carrier also provided a copy of the Sale Order related to the contract. The Sale Order also notes the "as is where is" basis of the sale.

It is well settled that genuine "as is where is" sales of Carrier property do not constitute impermissible contracting of scope covered work under the Rule applicable here. As such, notice is not required. See, for example, Third Division Award 35772 and Awards cited therein.

The record herein convincingly establishes that the instant dispute involves a genuine "as is where is" sale and that the Carrier provided the requisite documentation, on the property, to perfect its position. Third Division Award 36723 denied a nearly identical claim that differed only as to date and location arising out of the same February 9, 1999 notice of intent to contract. We see no reason to depart from its rationale or the long-established line of authority regarding "as is where is" sales. Accordingly, we deny the instant claim.

Although the Organization raised a contention in its Submission that some of the scrap material was retained by the Carrier, careful review of the record shows that this contention was not raised while the claim was being handled on the property. Being new before us, we may not consider it.

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 18th day of May 2004.