

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37070
Docket No. MW-36796
04-3-01-3-317**

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 Employes
(Grand Trunk Western Railroad, Inc.)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (A&K Railroad Materials, Inc.) to perform Maintenance of Way work (dismantle track and load and haul material) on the Eastbound Main Line between Mile Posts 248.7 and 241.3; 235.7 and 227.5; and 208.3 to 197.1 on the Flint Subdivision of the Chicago Division beginning October 26, 1999 and continuing through November 30, 1999, instead of Foreman B. Wireman, Assistant Foreman K. Martens, Machine Operators R. C. Avery, R. L. Merrow, T. K. Runyon, L. R. Stephenson, W. H. Franklin, J. R. Barnette, M. E. McVay, D. L. Kingman, C. E. Hoyle, B. L. Bechman, J. D. Master, P. A. Yuhos, D. E. Nelson, G. L. Coleman, R. J. Lurn, L. R. Marshall, S. M. Ocenasek, C. E. Collard, R. J. Buysee and Class 1 Maintainer J. C. Crandell (Carrier's File 8365-1-709).**
- (2) The Agreement was violated when the Carrier assigned outside forces (A&K Railroad Materials, Inc.) to perform Maintenance of Way work (dismantle track and load and haul material) on the Main Line between Mile Posts 248.7 and 241.3; 235.7 and 227.5; and 208.3 to 197.1 on the Flint Subdivision of the Chicago Division beginning December 1, 1999 and continuing through December 21, 1999, instead of L. Lohrke, W. Jackson,**

C. Sims, L. Taylor, J. Macko, E. Randall, M. Perez, A. Ramberg, M. A. Thompson, S. Koplan, C. Smith, J. Everett, M. Gilmore, P. Rhein, S. Miller, P. Moore, J. Tuzas, E. Miner, E. Pena, G. Reid, H. Echols and Class 1 Maintainer J. C. Crandell (Carrier's File 8365-1-711).

- (3) The Agreement was violated when the Carrier assigned outside forces (A&K Railroad Materials, Inc.) to perform Maintenance of Way work (dismantle track and load and haul material) on the Main Line between Mile Posts 248.7 and 241.3; 235.7 and 227.5; and 208.3 to 197.1 on the Flint Subdivision of the Chicago Division beginning January 3, 2000 and continuing through January 31, 2000 instead of L. Lohrke, W. Jackson, C. Sims, L. Taylor, J. Macko, E. Randall, M. Perez, A. Ramberg, M. A. Thompson, S. Koplan, C. Smith, J. Everett, M. Gilmore, P. Rhein, S. Miller, P. Moore, J. Tuzas, E. Miner, E. Pena, G. Reid, W. Hay and Class 1 Maintainer J. C. Crandell (Carrier's File 8365-1-716).
- (4) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work described in Parts (1) (2) and (3) above as required by the Scope Rule.
- (5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Foreman B. Wireman, Assistant Foreman K. Martens, Machine Operators R. C. Avery, R. L. Merrow, T. K. Runyon, L. R. Stephenson, W. H. Franklin, J. R. Barnette, M. E. McVay, D. L. Kingman, C. E. Hoyle, B. L. Bechman, J. D. Master, P. A. Yuhos, D. E. Nelson, G. L. Coleman, R. J. Laurin, L. R. Marshall, S. M. Ocenasek, C. E. Collard, R. J. Buysee and Class 1 Maintainer J. C. Crandell shall each be compensated for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work during the period beginning October 26, 1999

through November 30, 1999 at their respective straight time rates of pay.

- (6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimants L. Lohrke, W. Jackson, C. Sims, L. Taylor, J. Macko, E. Randall, M. Perez, A. Ramberg, M. A. Thompson, S. Koplan, C. Smith, J. Everett, M. Gilmore, P. Rhein, S. Miller, P. Moore, J. Tuzas, E. Miner, E. Pena, G. Reid, H. Echols and J. C. Crandell shall each be compensated for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work during the period beginning December 1, 1999 through December 21, 1999 at their respective straight time rates of pay.
- (7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimants L. Lohrke, W. Jackson, C. Sims, L. Taylor, J. Macko, E. Randall, M. Perez, A. Ramberg, M. A. Thompson, S. Koplan, C. Smith, J. Everett, M. Gilmore, P. Rhein, S. Miller, P. Moore, J. Tuzas, E. Miner, E. Pena, G. Reid, W. Hay and J. C. Crandell shall each be compensated for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work during the period beginning January 3, 2000 through January 31, 2000 at their respective straight time rates 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.

These three claims were combined due to the commonality of contentions and issues. The three on-property records are virtually identical except as to the dates of claim. The third also contained a procedural issue arising out of what turned out to be a typographical error in the claim dates: 1999 was referenced instead of the year 2000. This was immediately cleared up in the Organization's initial appeal and the claim proceeded normally thereafter.

The Carrier defended against the claims on the basis that the disputed work was a genuine sale on an "as is - where is" basis to a salvager of railroad materials who, in turn, sells the usable materials to other railroads, landscapers, scrap dealers, and other outside entities.

There is no dispute that the track in question on the Flint Subdivision had been retired for some time before the dismantling work began. Moreover, when the Organization requested a copy of the sale contract with A & K Railroad Materials, Inc., ("A & K") it was quickly furnished. That contract provided, among other things, that A & K pre-paid the sale price before the materials were removed. In accordance with the contract, ownership of the materials passed to A & K as of the date that full payment was completed. Without more, the record establishes that the transaction with A & K was a genuine "as is - where is" sale.

It is well settled that genuine "as is - where is" sales of material and equipment do not constitute impermissible contracting of scope covered work. As such, the advance written notice provisions regarding contracting of scope covered work are not applicable. See, for examples, Third Division Awards 31438, 31754 and 34986.

But there is more. This record presents additional facts that call for some discussion. The Carrier, the Grand Trunk Western Railroad, Inc. ("GTW") represents a combination of three smaller railroads: the former Grand Trunk Western, the former Detroit, Toledo and Ironton, and the former Detroit and

Toledo Shore Line. Each of these former railroads continues to operate under separate labor Agreements with the Organization. In addition to this combination, the GTW is apparently a wholly owned subsidiary of Canadian National Railway ("CN").

It is undisputed that some unspecified number of railroad ties dismantled from the Flint Subdivision ultimately were used in Canada on CN territory. While prior Third Division Awards exempt genuine "as is - where is" sales from the coverage and notice requirements of the applicable Scope Rule, they have carved out exceptions to this immunity where a significant amount of the material ostensibly sold is actually retained for use by the Carrier. In such cases, the Awards have found such arrangements to be "service contracts" that violate the applicable Agreement where scope coverage is established.

On this record, therefore, it is important to properly categorize the parties. The applicable Scope Rule is part of the Agreement between the Organization and the GTW. As such, it has limited, if any, application outside of GTW territory. Thus, the "Carrier" is the GTW and not CN notwithstanding the parent-subsidary relationship. On this record, therefore, we find that there was a genuine "as is - where is" sale of track materials to A & K. The record also establishes that none of the materials were retained by GTW. The record further establishes that in a separate subsequent transaction, CN purchased some of the ties from A & K. For purposes of this dispute, therefore, CN is merely another railroad with a separate geographical territory and is entitled to buy and sell without regard to the applicable GTW Scope Rule.

In light of the foregoing circumstances, we do not find the applicable Agreement to have been violated.

AWARD

Claim denied.

Form 1
Page 6

Award No. 37070
Docket No. MW-36796
04-3-01-3-317

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 22nd day of June 2004.