

****CORRECTED****

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37119
Docket No. MW-36110
04-3-00-3-259**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 (R.T.I. Railroad Contractors) to perform routine Maintenance of Way work of cleaning right of way of ties at Mile Post 44 in the vicinity of Kemmerer, Wyoming and Mile Post 98 in the vicinity of Pegram, Idaho on the Pocatello Subdivision beginning on December 14, 1998 and continuing through December 23, 1998 (System File J-9952-54/1184206).**
- (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, Roadway Equipment Operators M. J. Dunn, G. L. Purkey, Truck Operator E. Ibarra, Foreman R. A. Skinner, Sectionmen D. LeFevre and P. M. Cantu shall now each be paid at his applicable straight time and overtime rate a proportionate share of the total hours worked by the**

contractor doing the work claimed as compensation for loss of work opportunity suffered from December 14, 1998, until December 23, 1998.”

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 Organization's description of the work in dispute in this case as "routine Maintenance of Way work of cleaning right of way of ties" does not withstand close objective scrutiny. Rather, the record persuasively supports the Carrier's affirmative defense that the ties were scrap material sold on an "as is-where is" basis to the outside contractor, R.T.I. Railroad Contractors (R.T.I.). Nor does the record show that R.T.I. performed any work other than picking up, stockpiling, loading onto railroad cars, and hauling away the used ties that were the subject of the "transfer of ownership" scrap-material removal contract between the Carrier and R.T.I. Finally, while the Carrier now argues that it was not required to give notice of this transaction under Rule 52, the record shows that the Carrier did provide timely and proper written notice to the General Chairman under date of April 6, 1998.

Unlike the facts in sustaining Third Division Awards 24280, 29561 and 32327, cited by the Organization, wherein the Carrier had retained an ownership interest in some of the assets, the Carrier in the instant claim expressly waived and transferred all ownership interests in the spent rail ties. Based on the foregoing

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facts and authoritative “as is/where is sale” precedent laid down in Third Division Awards 29559, 29561, 30216, and 30220 as well as Public Law Board No. 5546, Case 14, this claim must be 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 25th day of August 2004.