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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37447
Docket No. MW-36089
05-3-00-3-216**

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 (Amrail) to perform routine Maintenance of Way work of cleaning the right of way of rail, anchors, tie plates, spikes and joint bars on the Ayer Subdivision between Eastport, Idaho and Marengo, Washington commencing November 11, 1998 and continuing through December 14, 1998 (System File J-9852-83/1175359).**
- (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 Operator D. Coronado, Oregon Division Track Subdepartment Foreman D. D. Hatfield and Oregon Division Track Subdepartment Truck Operator W. C. Huffman 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 November 11, to December 14, 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 instant dispute arose when Amrail personnel removed used rail and other track material from the Carrier's property. The Carrier denied the claim on the basis that the material had been sold to Amrail on an "as is where is" basis.

It is well settled that a genuine "as is, where is" sale of Carrier property does not constitute an impermissible contracting of scope covered work. See, for example, Third Division Awards 30980, 29561, 29559, and 24280. The contention, however, is an affirmative defense for which the Carrier bears the burden of proof. On the property, the Carrier provided copies of the sale documents to verify the legitimacy of the sale. No discrepancies to undermine their validity were established.

Given the foregoing circumstances, we must find that the Carrier did not violate the Agreement as alleged in the claim.

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 22nd day of March, 2005.