

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37745
Docket No. MW-36594
06-3-01-3-105

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 (Cando Contractors) to perform routine Maintenance of Way right of way cleaning work (cutting and general cleanup work related to rail and scrap metal left by system steel gangs after a track renewal project) starting in the vicinity of Baker, Oregon (between Mile Posts 340 and 346) on the Huntington Subdivision beginning October 11, 1999 and continuing (System File J-9952-261/1219347).
- (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 J. A. Wheeler, Track Laborer, T. L. Zyblut, Truck Operator M. R. Patterson, Track Welder J. S. Cimmiyotti and Welder Helper R. R. Garcia 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 October 11, 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 had 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 Claimants have all established seniority on the Huntington Subdivision. On the dates involved, the Claimants were all regularly assigned to positions in their respective classes.

This claim concerns the Carrier's sale of its property to an outside party. Scrap rail and other track materials set along the Carrier's right-of-way were sold to an outside concern on an "as is, where is" basis. The Carrier and the purchaser agreed the change in ownership of the material would occur as soon as it was removed from the track. According to the Carrier, under "as is, where is" property status, the purchaser loaded and transported its purchased property, taking it from the Carrier's right-of-way to its own property.

Beginning on October 11, 1999, the Carrier assigned outside forces (Cando Contractors) to perform the right-of-way clearing work between Mile Posts 340 and 346 at Baker, Oregon, on the Huntington Subdivision. The right-of-way clearing work occurred behind System Gangs who left materials along the right-of-way. The contractor's employees worked straight time and overtime performing the non-emergency right-of-way clearing work.

The Organization contends that the Agreement was violated when the Carrier assigned Cando Contractors to perform Maintenance of Way work (cutting and general cleanup work related to rail and scrap metal left by System Steel Gangs after a track renewal project). First, it claims that the Carrier did not provide the required adequate notice to the Organization. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to the Organization. Third, the Organization argues that the Claimants should be compensated for the lost work opportunity because they were denied the right to perform the relevant work.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the scrap material was sold "as is, where is." Historically such sales have been allowed and therefore subsequent sales are not within the scope of work reserved to the Organization. Because the work was performed pursuant to said sale, there was no need to give notice to the Organization.

We find that the instant matter qualifies as an "as is, where is" sale and is outside the purview of the Agreement. We note that an "as is, where is" sale is defined in Third Division Award 37104, as follows:

"It is well settled that a genuine sale of Carrier property on an 'as is, where is' basis does not constitute an impermissible contracting of reserved work. . . . Because such sales do not involve work performed for the Carrier, the notice requirements pertaining to contracting of reserved work are not applicable. "

Thus, the rail scrap and other track material at issue in this claim became the purchaser's property and its subsequent removal is not considered contracting out.

Because this was a bona fide sale, the Carrier was not required to provide notice to the Organization. Thus, the Organization's claim over failure to give notice also is denied.

Based on the evidence in this matter as well as the above-cited precedent, we find that the removal of rail, scrap and other material by Cando Contractors was proper. The Organization did not prove otherwise. The claim is therefore 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 21st day of March 2006.