

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40087
Docket No. MW-38421
09-3-NRAB-00003-040376
(04-3-376)

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 (former Missouri
(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 (Brown Construction Company) to perform routine Maintenance of Way truck operator work (remove rail from existing track) at Mile Post 30 on the McFaddin Wye on the Dequincy Division on April 28, 2003, instead of A. Landry, G. Welch, A. Morgan, C. Dennis, M. Landry, J. Cherry, F. Chimney and W. Jackson, Jr. (System File MW-03-226/1368299 MPR)
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance notice of its intent to contract out said work or make a good-faith effort to reduce the amount of contracting, as provided in Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. Landry, G. Welch, A. Morgan, C. Dennis, M. Landry, J. Cherry, F. Chimney and W. Jackson, Jr. shall now each be compensated for eight (8) hours' pay 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.

Foreman A. Landry, Machine Operator G. Welch, Welder A. Morgan, Welder Helper C. Dennis, Truck Operator M. Landry, Trackman J. Cherry, Trackman F. Chimney and Trackman W. Jackson, Jr. established and hold seniority within the Maintenance of Way Department. On the date involved herein, the Claimants were assigned and working positions within their respective classifications on the Dequincy Seniority Division.

On Monday, April 28, 2003, the Carrier allegedly assigned outside forces (Brown Construction Company) to remove rail from the McFadden Wye following a derailment at Mile Post 30 on the Beaumont Subdivision. The contractor utilized eight employees who each expended eight hours on the claim date. In addition, the contractor utilized machinery, equipment and tools, including one single axle dump truck, one back hoe, rail cutting equipment and various hand tools. According to the Organization, the Claimants were available for duty on the claim date, fully qualified and willing to perform the aforementioned work, but were not afforded the opportunity to do so by the Carrier.

The Organization contends that the Agreement was violated when the Carrier assigned Brown Construction Company to remove rail from the derailment site. First, it claims that the Carrier did not provide adequate notice to the Organization as is required. 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 BMW-represented employees. The Organization argues that because the Claimants were denied the right to perform the relevant work, the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that the rail debris removed by Brown Construction Company was sold on an "as is, where is" basis, which historically has been allowed and the consequent work is not within the province of the Organization. Because the work was performed pursuant to said sale, there was no need to give notice to the Organization. The Carrier contends that it has an ongoing relationship with Brown Construction Company which removes rail after derailments.

After a thorough review of the record, the Board concludes that the instant matter qualifies as an "as is, where is" sale and, therefore, is outside the purview of the Agreement. See Third Division Award 37104 wherein the Board held:

"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. See, for example, Third Division Awards 29559 and 30216. Because such sales do not involve work performed for the Carrier, the notice requirements pertaining to contracting of reserved work are not applicable."

The instant sale of rail, scrap and other materials by the Carrier to Brown Construction Company constitutes an "as is, where is" sale. The record is clear that there was an ongoing agreement between the Carrier and Brown Construction Company to provide for said removal in the case of a derailment. Thus, the scrap rail and other material became the purchaser's property and its removal did not constitute contracting out. This was a bona fide sale and, therefore, the Carrier was not required to provide notice to the Organization.

Based on the record evidence and the above-cited precedent, the Board finds that the removal of rail by Brown Construction Company forces was proper. The

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Organization has been unable to meet its burden of proof. Accordingly, the claim is 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 19th day of November 2009.