

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40380
Docket No. MW-38680
10-3-NRAB-00003-050096
(05-3-96)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Thompkins Trucking Inc.) to perform Maintenance of Way and Structures Department work (clean up debris and load scrap material) at the Clinton Yards in Clinton, Iowa on October 21, 23 and 28, 2003 instead of Messrs. J. Sawvell, E. Imel, D. Coy, Jr., M. Clevenger and K. Spooner (System File 3SW-2072T/1390224 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 1(b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Sawvell, E. Imel, D. Coy, Jr., M. Clevenger and K. Spooner shall now be compensated for nineteen (19) hours 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.

Claimants J. Sawvell, E. Imel, D. Coy, Jr., M. Clevenger and K. Spooner have each established and hold seniority in their respective classes in the Track Subdepartment. On the dates involved, they were regularly assigned to positions headquartered in the vicinity of Clinton, Iowa, on Seniority District T-3 working Monday through Friday, 7:00 A.M. until 3:30 P.M. with Saturday and Sunday designated as rest days. The Claimants worked under the supervision of Manager of Track Maintenance M. Lubbs.

On October 21, 23 and 28, 2003, the Carrier assigned Thompkins Trucking, Inc. to clean up debris and load scrap material in the yards at Clinton, Iowa. Said contracting forces consisted of five employees who performed the track material and debris cleanup work utilizing a skid loader, backhoe, semi-truck and a dump truck. The contractor's employees each worked eight hours on October 21 and 23, and three hours on October 28, 2003 for a total of 19 man-hours each.

First, the Organization 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, they 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 debris removed by Thompkins Trucking, Inc. 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.

After a thorough review of the record, the Board finds that the instant matter does qualify as an "as is, where is" sale and, therefore, is outside the purview of the Agreement. We note that the phrase "as is, where is" is defined as follows in Third Division Award 37104:

"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."

We reviewed the record of the instant case and find that the sale of rail, scrap and other materials by the Carrier to Thompkins Trucking, Inc., constitutes an "as is, where is" sale. The record is clear that there was an agreement between the Carrier and the contractor 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 does 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 as well as the above-cited precedent, we cannot find that the removal of rail, scrap and other materials by Thompkins Trucking, Inc. was improper. The Organization failed to meet its burden of proof. The claim is therefore denied.

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 25th day of March 2010.