

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41049
Docket No. MW-41155
11-3-NRAB-00003-090486**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago &
(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 (Thomkins Trucking) to perform Maintenance of Way and Structures Department work (remove/dismantle track and related work in preparation for Switch No. 750 relocation) on Main Track No. 1 at Mile Post 2.9 at Clinton, Iowa on the Clinton Subdivision on April 1 and 2, 2008 (System File S-0801C-353/1504857 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 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 J. Sawvell and E. Imel shall now each “***be compensated at the applicable overtime rate of pay an equal and proportionate share of the forty eight (48) man hours expended by the Contractor employees on April 1 and 2, 2008.”**

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 claim concerns the use of an outside contractor to dismantle and remove existing tracks and switches at Mile Post 2.9 in Clinton, Iowa, on April 1 and 2, 2008.

It is the Organization's position that the work was customarily and historically performed by its members and required no special abilities and/or equipment. It argued that the Carrier failed to serve a proper advance notice of its intention to contract out covered work. It further argued that the Claimants were qualified and available for the work. When advised by the Carrier that Thomkins Trucking had purchased the track material on an "As Is, Where Is" basis, which required the contractor to remove the material, the Organization argued there was no proof offered that a sale agreement had occurred, and because of that, it concluded by requesting that the claim be sustained as presented.

It is the position of the Carrier that the instant dispute involves an "As Is, Where Is" sale of scrap material, which the Board has previously held does not involve work reserved to BMW-represented employees. It argued that many Awards have upheld the Carrier's right to sell its property in such a manner, and those Awards further confirm that advance notice is not required, because such sales do not constitute contracting of scope-covered work, and there is nothing in the record to suggest that any of the materials were retained by the Carrier. It closed by asking that the claim remain denied.

The record substantiates that during the handling of the claim on the property the Carrier provided a statement from Manager G. Stewart, the Carrier's local representative, who stated the following:

“This switch and material was sold to Tompkins Trucking on a ‘as is basis.’ He took possession of this material and was allowed to remove said material from the property.”

In Third Division Award 40820 involving the same parties to this dispute the Board ruled, in pertinent part, as follows:

“A thorough review of the record reveals evidence supplied by the Manager of Track Maintenance to break the deadlock of competing assertions. According to his statement, the work in question was performed by RCMP Recycle pursuant to a sale of the involved scrap material on an ‘As Is, Where Is’ basis.

It is well settled that sales of material on an ‘As Is, Where Is’ basis transforms the recovery and removal work of the purchaser; it is not work of the Carrier. As a result, the work of the purchaser falls outside of the coverage of the applicable Scope Rule of the Agreement. Accordingly, because the work is not scope-covered, the Carrier was not required to provide notice to the Organization. See, for example, Third Division Awards 37104 and 37119, as well as the Awards cited therein.” (Emphasis added)

Award 40820 determined that a statement from a Manager is sufficient evidence that a transfer of ownership occurred. Therefore, the statement offered by Manager Stewart in the instant case meets the on-property standard for sufficient proof that an “As Is, Where Is” sales transaction occurred, which removed the disputed work from Agreement coverage. The Board finds and holds that the claim must be denied.

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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 23rd day of August 2011.