

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29561
Docket No. MW-29027
93-3-89-3-452

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 Carrier violated the Agreement when it assigned outside forces to perform work cleaning the right-of-way of ties, tie butts and debris between Mile Post 200 and Mile Post 247 near Alexandria, Nebraska during April and May 1988 (System File S-34/880505).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman prior advance written notice of its plans to contract out the work involved here, in accordance with Rule 52.

(3) As a consequence of Part (1) and/or (2) above, furloughed Group 19 Roadway Equipment Operator R. L. Wagner and Furloughed Sectionmen D. C. Selbe and F. R. Kennedy shall each be allowed one-hundred twenty (120) hours of pay at their respective straight time rates."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

This dispute involves the use of outside contractors without prior notice to the Organization. The work in question is described without contradiction by the Carrier as follows:

"This case is based on sale by the Company of discarded used railroad ties to a contractor. Under the terms of the sale agreement, the purchaser was responsible for picking up all of the ties where they lay along the railroad right-of-way and sorting them. The ties which were sold by the Company were damaged. Some of the ties which were sold were whole and others were in pieces. The purchaser bought them 'as is' and to be picked up in place. Union Pacific retained the first class ties. These were left with the Company on Company property."

A closely similar matter was considered in Third Division Award 24280, and the Board finds the reasoning therein appropriate to the dispute here under review. The right of the Carrier to sell material on an "as is, where is" basis is fully established. Here, however, the contractor's employees also performed work (collection, selection, storage) on ties which in fact were retained by the Carrier for its own use.

As in Award 24280, the Board concludes that the portion of the work concerning the ties retained by the Carrier is work "customarily" performed by maintenance of way forces. In this respect, the requirement for advance notice applies, and there is no showing of appropriate application of the exceptions permitting contracting of this part of the work.


Again as in Award 24280, the Board directs the parties to meet to determine what proportion of the work fell in the category of processing ties retained by the Carrier. A rough determination should suffice. The claim should then be adjusted by payment of such proportion of the total hours to the Claimants.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.