Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36745
Docket No. MW-36250
03-3-00-3-432

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (R.T.I. Railroad Contractors) to perform routine Maintenance of Way work of cleaning right of way of ties between Mile Post 63.30, in the vicinity of Hood River, Oregon and Mile Post 81.60, in the vicinity of Crates, Oregon on the Portland Subdivision beginning on March 16, 1999 and continuing (System File J-9952-80/1193736).

(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 Operators R. V. Robinson, J. A. Wheeler, Truck Operator W. S. Bates and Sectionman T. M. Heighes shall now each be '***allowed at his applicable straight time and overtime rate a proportionate share of the total hours worked by the contractor doing the work claimed as compensation for loss of work opportunity

suffered from March 16, 1999, continuous until the violation stops."

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.

On February 2, 1999, the Carrier sent the Organization Service Order No. 8419 which set forth the following:

"This is a 15-day notice of our intent to contract out work for the calendar year 1999.

Location: Various locations on the Railroad's system.

Specific Work: Furnishing labor and equipment for pickup and disposal of used secondhand wood railroad ties behind system production tie gangs.

Serving this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE.

> In the event that you desire a conference in connection with this notice. . . ."

The General Chairman responded to the Carrier's notice, maintaining that Service Order No. 8419 was "procedurally inadequate and/or defective" in that it was "vague and inconsistent" with the specific requirements of Rule 52 and the December 11, 1981 Letter of Understanding. The General Chairman further maintained that the Order did not contain requisite information, including exact locations, the dates the work is to be performed, the length of time contemplated to complete the project, and the reason Carrier is contracting out this specific work. The General Chairman requested that the Carrier provide a copy of the proposed contract at the conference.

On February 26, 1999, the parties conferenced, via telephone, the work at issue. Thereafter, on March 2, 1999, the Carrier documented the conference discussions with regard to Service Order(s) 2292, 2293, and 8419, stating that:

> "This work involves the unloading and loading of cross ties (2292), the loading and unloading of OTM (2293) and picking up second hand ties (8419). As requested, I will be forwarding to you an updated gang schedule.
>
> The work involved in 2292 and 2293 is being contracted out as it has been system wide for a number of years. While the Carrier does have some of its own equipment to perform this work, it does not have sufficient equipment to keep fifteen tie gangs running simultaneously. Estimates are that the Carrier will unload over 2 million ties in 1999 and over 3 million in 2000. Due to the fact that this unloading requires special equipment not owned by the Company, and since the Company is not adequately equipped to handle the work, this work will continue to be contracted out as necessary under Rule 52. Likewise with the work contemplated under Service Order 8419. "

The General Chairman responded to the Carrier's March 2 correspondence, reiterating the Organization's position with specific regard to Service Order 8419:

"In conference the Organization took the position that we have furloughed men who were capable of performing the work of cleaning the right of way, including pickup and disposal of secondhand wood railroad ties. We also have furloughed men who are willing to accept promotion to this type of work. The Organization has provided locations and sources as well as pricing of equipment that the Carrier can lease, without operators, which may be needed to perform work of this type. . . .

* * * *

Your response, as contained in your letter of March 2, 1999 is appreciated. However, your statement, as contained in your March 2, 1999 correspondence, that this work 'is being contracted out as it has been system wide for a number of years' is not completely correct. This Organization has objected to this type of contracting out work each time that we obtain contractors performing Maintenance of Way work. We ask you to review the numerous claims that have been filed in this regard on the property which are represented by the Union Pacific System Division Maintenance of Way employees. . . ."

Thereafter, on April 26, 1999, the Organization submitted a claim on behalf of the individuals noted supra maintaining that Carrier: "Assigned work to outside contractor, identified as R.T.I. Railroad Contractors, hereby denying Claimants of work and compensation they are entitled to by virtue of their established seniority."

Specifically, the General Chairman maintained the following:

". . . [O]n March 16, 1999, two (2) equipment operators, one (1) truck driver, and one (1) laborer employed by the contractor were observed cleaning the right of way of old cross ties from the right of way starting at Hood River, Oregon, Mile Post 63.30 working toward Crates, Oregon, Mile Post 81.60 on the Portland Subdivision. The cross ties came out of the track bed when system Tie Gangs

removed them installing new cross ties. A truck crane and truck is used by the contractor to load and transport the used ties. Each of the contractor's employes is working a Monday through Friday work week working from 7:00 a.m. to 6:00 p.m. on the project. The locations where the contractor worked is on Union Pacific property.

The work of operating, maintaining (running repairs) and servicing roadway equipment such as was used by the contractor has been customarily been (sic) assigned to employees assigned by the Roadway Equipment Subdepartment. . . .

* * * *

The operation of roadway equipment is work recognized as belonging to MofW employees. . . ."

On June 21, 1999, the Carrier denied the claim, alleging that the ties at issue were sold to R.T.I. Contractors on an "as is-where is" basis, and that such work is not within the scope of the BMWE Agreement. Factually, the Contractor employees were "picking up their own property," according to the Carrier.

The General Chairman appealed the Carrier's decision, reiterating the arguments set forth in the initial claim. The Carrier denied the Organization's appeal, again maintaining that the materials at issue were sold on an "as is-where is" basis, and that such work is not covered under the Scope Rule. The denial further noted that the use of a contractor was "in conformance" with the Carrier's "preserved right" to contract work, and that "numerous" Awards have held that the Carrier is entitled to contract such work. Finally, the Carrier included copies of the Claimant's payroll histories which demonstrated that they were "fully employed" throughout the claim period.

The case was discussed in conference on May 2, 2000 during which both Parties reaffirmed their positions. Thereafter, on June 12, 2000, the Organization sent the Carrier a letter arguing that by selling the material on an "as is-where is" basis, the Carrier was merely "discounting" the price of the material to cover the cost of the labor that would "otherwise be performed by agreement forces." The

Carrier responded to the Organization's post-conference letter, noting that prior Awards had have rejected the Organization's "barter theory" where title to the materials has been transferred to a contractor.

On June 27, 2000, one day after the Organization filed its Notice of Intent to file a Submission to the Board, the Carrier sent the Organization additional correspondence in which it included a copy of the contract with R.T.I. Railroad, having "failed" to honor the Organization's request for same in earlier correspondence.

At the outset, the Organization asserts that it did not receive "proper" notice regarding the issue now in dispute. Without regard to whether or not it was required to do so, we do not concur with the Organization that the Carrier "failed" to serve notice. The Carrier's February 2, 1999 Service Order No. 8419 provided notice to the Organization well before the 15-day time requirement specified in Rule 52 of the Agreement.

Turning to the merits of the dispute, the "Contract For Work or Services, made and entered into as of May 1, 1998, by and between Union Pacific Railroad Company and R.T.I.-Railroad Materials" specifies "all material released from projects during the term of this agreement shall become the exclusive property of the Contractor at the time the material is removed from the track structure." The contract further provides that "the Contractor agrees to accept transfer and assignment of the material as is, where is, and with all faults." Thus, it is clear that the ties were transferred to R.T.I. in place, at the locations specified.

Boards have consistently held that such an "as is, where is" sale as occurred in this instance does not fall within the Maintenance of Way scope. (See for example, Third Division Award 30185). In these specific circumstances, we find no violation of the Agreement between the Parties, and therefore, this claim must be 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 22nd day of October 2003.

LABOR MEMBER'S DISSENT
TO
AWARD 36745, DOCKET MW-36250
(Referee Nancy F. Eischen)

The Majority's error in denying this case based on material that was new and not exchanged between the parties during the handling of this dispute on the property requires dissent.

A review of the record reveals that during the handling of this dispute on the property, the Carrier alleged to have **sold** the material at issue here on an "as is, where is" basis. The General Chairman clearly and forcefully requested that the Carrier prove the existence of a bona fide sales agreement during the handling of this dispute on the property. After all, it was the Carrier that raised the sales agreement as an affirmative defense. Once the Carrier was challenged, it was obligated to produce evidence thereof while the case was still active on the property. The record reveals that **after** the Organization filed its letter of intent with the Board, the Carrier belatedly provided a copy of the alleged sales agreement. The Carrier had this document in its possession since May 1, 1998 but waited until the record was sealed before it foisted it upon the Organization in an attempt to prove its affirmative defense.

Notwithstanding the fact that the alleged sales agreement actually required the Carrier to pay the contractor for services provided, what is particularly disturbing here is the Majority recognized that the alleged evidence provided by the Carrier to support its affirmative defense was received by the Organization **after the record was closed**. Nevertheless, the Majority accepted the alleged evidence as proving the Carrier's case and improperly denied the claim. Circular No. 1 precludes any consideration of new evidence or argument not presented during the on-property handling and the Majority's disregard for this cardinal rule of the Board renders its findings palpably erroneous. Because the Majority's conclusions have no factual basis and were based on evidence not considered during the on-property handling of this case, Award 36745 can be of no precedential value whatsoever. Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 36745, DOCKET MW-36250
(Referee Nancy F. Eischen)

The "closed record" argument raised before the Board and in the dissent was not proven in the record presented to the Board for review. The evidence accompanying the Organization's Submission reveals that the Carrier supplied the disputed contract to the Organization by fax on June 27, 2000. The Organization's Notice of Intent, dated June 26, 2000, was received by the Board on June 27, 2000. Paragraph 9 of the Uniform Rules of Procedure states, "All time limits will be governed by the postmark date or its equivalent in the absence of a postmark." Assuming arguendo that a post office affixed postmark dated June 26, 2000, exists, or other proof that the letter either arrived at the Board or was deposited in the mail on June 26, 2000, no such documentation establishing a valid postmark of June 26, 2000 was ever included within the record before the Board. Given the absence of this essential fact, there was no reason for the Majority to give any weight to the Organization's argument that the Board's consideration of the contract was barred because the record was closed.

The instant Award is consistent with other Awards involving scrap sales to third parties (See: Third Division Awards 29559, 29561, 30216, 30220, and Public Law Board No. 5546, Case 14). Numerous Awards recognize the right to sell unused property on an "as is, where is" basis.

Bjarne R. Henderson

Martin W. Fingerhut

John P. Lange

Michael C. Lesnik