

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37449
Docket No. MW-36112
05-3-00-3-269

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (Progress Rail) to perform routine Maintenance of Way right of way cleaning work (load, transport and stockpile rail and other track material) between Mile Posts 519.75 and 522.50 and between Mile Posts 593 and 594 on the Laramie Subdivision within the Wyoming Division commencing December 14, 1998 and continuing (System File W-9952-152/1183638).
- (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, Eastern District Roadway Equipment Operators M. L. Savor, J. G. Busboom, Wyoming Division Group 15(C) Truck Drivers G. A. Delgado and C. M. Tipsword shall now be paid at their respective straight time and overtime rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the

performance of said work beginning December 14, 1998 and continuing.”

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 dispute arose when Progress Rail personnel removed used rail and other track material from Carrier's property in Wyoming. The Carrier denied the claim on the basis that the material had been sold to Progress Rail on an "as is, where is" basis.

It is well settled that a genuine "as is, where is" sale of Carrier property does not constitute an impermissible contracting of scope covered work. See, for example, Third Division Awards 30980, 29561, 29559, and 24280. The contention, however, is an affirmative defense for which the Carrier bears the burden of proof. On the property, the Carrier provided copies of the sale documents to verify the legitimacy of the sale. No discrepancies to undermine their validity were established. The document shows sufficient proof that its expiration date was extended to cover the dates the work was actually performed. In addition, although the document referenced a right in the Carrier to retain some material, this right pertained to trackage in Nebraska, which was outside the scope of this claim. There was no evidence the Carrier similarly held a right to retain any of the material removed from the Wyoming trackage.

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Given the foregoing circumstances, we must find that the Carrier did not violate the Agreement as alleged in the claim.

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 March, 2005.