Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37572
Docket No. MW-36530
05-3-01-3-22

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 to perform routine Maintenance of Way work of cleaning the right of way of ties and debris between Mile Posts 1.00 and 30.00 on Nos. 1 and 2 tracks on the Omaha Subdivision and between Mile Posts 123 and 150 on the No. 1 track on the Columbus and Kearney Subdivisions within the Nebraska Division commencing on September 1, 1999 and continuing (System File W-9952-161/1214535).

(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 L. E. Loya, T. B. Micek and Truck Drivers D. L. Callan and S. P. Wetz shall now each be '***allowed an equal proportionate share of the man hours worked by the outside contracting force as described in this claim, at their respective Roadway Equipment Operators and Truck Operators Straight Time and Overtime rates of pay as compensation for the violation of the Agreement

for hours worked by the outside contracting force in cleaning the Right of Way of scrap ties and debris.'"

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 served a 15-day notice of its intent to contract work for the calendar year 1999. Entitled "Service Order No. 8419," the notice identified the locations at which the contracting would be performed as "Various locations on the Railroad's system." With respect to the specific work to be performed, the Carrier identified the work as "Furnishing labor and equipment for pickup and disposal of used secondhand wood railroad ties behind system production tie gangs."

On February 9, 1998, the Organization objected to the Carrier's position on grounds that the notice failed to comply with the precise requirements of Rule 52 and the December 11, 1981 Letter of Understanding. According to the Organization, the notice was deficient in that it was merely a "blanket" notice, substantially lacking in specific information. The Organization furthermore contended that the work at issue has been performed by the Carrier's Roadway Equipment Operators and is contractually reserved to them under Rules 1, 2, 3, 4, 5, 9 and 10 of the current Agreement.

According to the record, on February 26, 1999, the parties conducted a conference, via telephone, to discuss the planned subcontracting. By letter dated March 2, 1999, the Carrier confirmed that the work to be contracted involved "picking up second hand ties," and stated that the Organization would be provided

an "updated gang schedule." With respect to the four contracting notices apparently discussed on that date, including Service Order No. 8419 pertaining to this case, the Carrier defended its decision to contract out the work of removing the used ties on grounds that it has consistently subcontracted such work in the past and it lacked the necessary equipment to properly accomplish the work.

On October 29, 1999, the Organization filed the instant continuing claim, alleging that, beginning on September 1, 1999, four employees of a contractor, Jack Munn, cleaned the right-of-way of scrap ties and wood debris between Mile Posts 1.00 and 30.00 (on Tracks 1 and 2 within the Omaha Subdivision) and between Mile Posts 123 and 150 on Track 1 on the Columbus and Kearney Subdivisions. The Organization asserted that the work performed by the contractor's employees involved the use of equipment normally operated by the Claimants, and that such work included "piling and loading scrap ties and debris" in conjunction with the Carrier's tie renewal program.

On December 23, 1999, the Carrier denied the claim for various reasons. It essentially asserted that the disputed work has been "customarily and traditionally" subcontracted, and that the Organization could not demonstrate that the Claimants possessed exclusive rights to the work, given the general nature of the Scope Rule. In addition, the Carrier contended that the claim was excessive because the Claimants did not incur any financial loss, and such earnings loss was never proven by the Organization.

In its April 13, 2000 denial of the Organization's February 18, 2000 appeal, the Carrier subsequently argued that the claim was "vague" with respect to the locations, dates and hours of the alleged violations. Later on in the claim handling process, the Carrier further contended that the October 29, 1999 claim was untimely because, according to its records, the contractor had been working "well before" the September 1, 1999 initial date of claim.

Regarding the merits, the Carrier asserted that, on April 6, 1998, it notified the Organization of its intent to "utilize outsiders to dispose of removed ties." The Carrier also stated that the contractor would receive "transfer of ownership of the removed ties as they are removed from the track." According to the Carrier, in an April 13, 1998 response, the Organization argued that "even though there had been no conference" the Organization "could not enter into an agreement with the Carrier." The Carrier maintained that the February 2, 1999 letter was a follow-up

"courtesy notice," and was not the initial 15-day notice as the Organization contended.

The Carrier furthermore argued, in that same April 13, 2000 letter, that the ties were sold on an "as is, where is" basis and, contractually, "no notice was even required." According to the Carrier, the issue of whether the Carrier has the right to dispose of property on "as is, where is" basis, without any ensuing violation of the Scope Rule or Rule 52, has been well-settled in the Carrier's favor. In support of its position, the Carrier cited Third Division Awards 29559, 29561, 30216, and 30220, among others.

The record shows that, on October 17, 2000, the parties discussed the claim in conference, and the Organization subsequently requested a copy of the "as is, where is" contract. On January 5, 2001, the Carrier sent the Organization a statement from Vicky Shade, of Shade Railroad Services, and a signed copy of the "Contract for Work or Services," dated May 1, 1998, between the Carrier and Shade Railroad Services.

The Carrier emphasized that the above documentation was conclusive proof that the Carrier had sold the ties to Shade Railroad Services on an "as is, where is" basis. According to the Carrier, Shade's statement confirmed that Jack Munn, a subcontractor of Shade Railroad Services, performed no services on the Omaha Subdivision, and that neither Shade nor any of its subcontractors had performed any work on the Columbus Subdivision, between Mile Posts 123 and 145 during the claim period identified above. Hence, given those serious factual errors, the claim should be dismissed, the Carrier stressed.

The Board carefully studied the extensive factual record and the positions advanced by both parties. Initially, we find that the claim as originally presented contains no procedural defect warranting its dismissal by the Board. From our review of the claim, it is clear that the Organization identified the contracting transaction with sufficient specificity, despite its reference to Jack Munn as the contractor, instead of Shade Railroad Services. Thus, we conclude from our review of the above correspondence of record that the claim was sufficiently specific at the outset and contained enough information for the Carrier to investigate it and prepare a response. We furthermore find that the claim was not untimely, given the October 29, 1999 claim filing date and the beginning claim date of date of

September 1, 1999. Therefore, the Carrier's request that the Board dismiss the claim without regard to the merits is denied, we rule.

Turning to the merits, the Board first considers whether the Carrier established its affirmative defense that the ties were sold on an "as is, where is" basis in light of the "Contract for Work or Services," dated May 1, 1998, between the Carrier and Shade Railroad Services. From our review of that document, we find that, as the Organization pointed out in its January 9, 2001 letter, Section 1(A), Nature and Location of the Work or Services, clearly stated that the work to be performed by the contractor was "for providing labor and equipment for pickup and disposal of used (second hand) wood railroad ties . . . in the States of Nebraska and Kansas. . . ." Section 2(A), Compensation, specified that ". . . the Railroad will pay to the Contractor for work actually performed by the Contractor at the Contractor's unit rates as set forth in Schedule of Billable Service Items. . . ." (Emphasis added.)

Furthermore, the "Description of Work," contained in the "Schedule of Billable Services Form," confirms that the Shade Railroad Services was to "provid(e) labor and equipment for pickup and disposal of used (second hand) wood railroad ties at or near various locations." Thus, it is clear that the "as is, where is" contract purportedly at the heart of this claim was not the typical sales contract. Rather, it appears to have been an agreement reflecting the Carrier's intention to pay the contractor to perform the clean-up and removal of the used railroad ties, work which the Claimants have performed in the past, we are convinced, given the available precedent. See, for example, Third Division Awards 30063 and Award 14 of Public Law Board No. 5546.

The terms of the above agreement between the Carrier and Shade Railroad Services thus fail to support the Carrier's affirmative defense regarding the existence of a bona fide "as is, where is" sales agreement, we conclude. Consequently Third Division Awards 24280, 29559, 29561, 30216 and 30220, supporting the Carrier's position that work performed by a contractor pursuant to an "as is, where is" contract sale does not constitute an improper subcontracting of work, are wholly inapplicable to the instant case, where the factual circumstances clearly show much more than a sale of ties was contained in the above contract.

With respect to the Carrier's alternative position that the disputed work was subcontracted in accordance with Rule 52 and the December 11, 1981 Letter of

Understanding, given the facts of record, the Board must disagree. Contrary to the Carrier's contention, there is no evidence in the record to support its assertion that the notice concerning Service Order No. 8419 was sent to the Organization prior to the May 1, 1998 effective date of the contract. The Carrier did not produce any evidence of an April 6, 1998 notice, nor did it submit a copy of the Organization's supposed response. Given the lack of proof, the Board must accept as fact the Organization's position that the operative notice was not issued until February 2, 1999. Pursuant to that finding, we conclude that the February 2, 1999 notice, the only 15-day notice made part of this record, cannot be construed as timely. Hence, with respect to this contracting transaction, the Carrier failed to satisfy the procedural requirements of Rule 52 and the December 11, 1981 Letter of Understanding, we also conclude.

From the above, and in accordance with our determination that there is an absence of a controlling "as is, where is" sales agreement, and also where no timely notification was shown to have been issued, the Carrier failed to shoulder its burden of providing probative evidence in support of its asserted two-pronged affirmative defense, we emphasize. We thus rule that, for all of the foregoing reasons, the instant claim must be sustained.

Additionally, given the facts and circumstances underlying this specific case, the Board rules that the Claimants indeed suffered a lost work opportunity and they are entitled to compensation for that loss. The parties are directed to jointly undertake a careful review of the records to determine the dates and hours worked by either Shade Railroad Services or one of its subcontractors for the work of picking up used wood railroad ties at the locations identified in Parts (1) and (3) of the claim. We note that the records may reveal that no work was performed by any contractor at certain locations on the Columbus Subdivision, as the owner of Shade Railroad Services asserted, without rebuttal by the Organization. Hence, the Claimants would not be entitled to any hours worked on the Columbus Subdivision if the joint records check confirms the information contained in the January 5, 2001 letter from Vicky Shade.

Given the loss of work opportunity experienced by the Claimants, the monetary remedy requested herein is appropriate, we emphasize. See, specifically on-property Third Division Awards 37315 and 37316 which recently affirmed the payment of such compensation and correctly rejected the Carrier's position that

proven claims of inappropriate subcontracting, in circumstances similar, if not identical, to this claim, do not constitute an improper pyramiding of claims.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of August 2005.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37572, DOCKET MW-36530
(REFEREE GOLDSTEIN)

After a thorough review of this Award, it is patent that the Referee erred in sustaining the Organization's claim.

First and foremost, there was a definite procedural violation on the part of the Organization that the Referee erroneously ignored. The work by a Contractor on the Subdivision, as shown in the on-property record, commenced on August 16, 1999. This was later acknowledged by the General Chairman in his letter of January 9, 2000; however, the Organization did not submit a claim until October 29, 1999, well beyond the sixty-day time limit period specifically provided for in the Agreement. The Carrier introduced in the handling of this claim, three on-property Third Division Awards, 30267, 31043, and 28826, that supported its position that this claim was barred by the time limits. There are a substantial number of Awards finding in a like manner. It is hardly a new issue. Yet the Referee, *with no explanation whatsoever, merely wrote:*

> ". . . We furthermore find that the claim was not untimely, given the October 29, 1999 claim filing date and the beginning claim date of September 1, 1999. Therefore, the Carrier's request that the Board dismiss the claim without regard to the merits is denied, we rule."

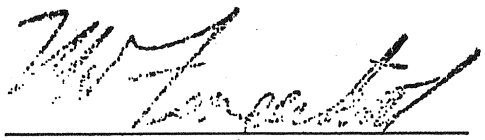
It is impossible to understand how the Referee can ignore the advice of the owner of the firm (Shade Railroad Services) in her statement that work commenced on August 16, 1999. Yet, based on that same statement the Referee expanded the remedy of the claim. In rendering his decision the Referee imposed an obligation on the Carrier to research not only the subcontractor who was being claimed against (Jack Munn) but also found the Carrier is now liable for any and all subcontractors Shade Railroad Services may have employed. If the Referee was to base his decision on the statement from the owner of Shade Railroad Services then he should have used the entire statement in making his determination and found the time limit defect.

Secondly, the Referee has held that the claim was not an "as is where is" type of transaction. On page 23 of 24 of Carrier's exhibit "B-9" *the terms clearly stated that*

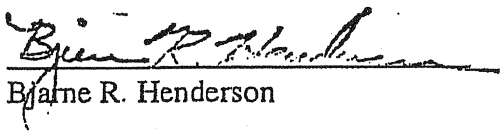
> "All material released from projects during the term of this agreement shall become the exclusive property of the Contractor at the time that the material is removed from the track structure."

Based upon a reading of the Award it appears that the Referee never took this language into consideration. In its submission, the Carrier addressed the appropriateness of the Awards concerning bartering which should have also been considered to be on point in denying the claim. In any event, since the released material was the property of the Contractor, the Referee has now placed the Carrier in the unenviable position of paying for someone handling its own property.

We consider this Award to be erroneous because the specific language in the Agreement was not considered. When an Award issues that does not follow precedent it serves to open a can of worms and makes way for the Organization to deluge the Carrier and the Board with claims that were not progressed in the past. It is disheartening that a Referee would not consider the whole record. When the Referee included other possible subcontractors to Shade Railroad Services in formulating a remedy he exceeded the scope of the claim and imposed a penalty on the Carrier. This was beyond the scope of his authority. While there was attempted mitigation this does not offset the fact the claim should have been dismissed outright for a time limit defect. For these reasons we must dissent.



Martin W. Fingerhut



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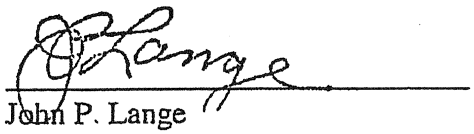

John P. Lange

Michael C. Lesnik

October 24, 2005