

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37573
Docket No. MW-36531
05-3-01-3-23**

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 Employees
(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 (L. B. Foster Rail Relay Division) to perform routine Maintenance of Way cleaning work (cutting up rail and general cleanup work related to rail and scrap metal left by Steel Curve Gang after track renewal project) between Mile Posts 193 and 206 on the Pocatello Subdivision beginning October 11 and continuing through October 15, 1999 (System File J-9952-258/1214853).**
- (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, Track Welder C. W. Sirois, Welder Helper D. J. Robinson, Track Machine Operator G. D. Gallegos and Truck Operator E. Ibarra shall now each be compensated “***at his applicable rate a proportionate share of the total hours, both straight and overtime hours worked by the contractor doing the work claimed as compensation for loss of**

work opportunity suffered starting on October 11, 1999, continuing until and including October 15, 1999. Additionally, in an effort to make Claimants whole for all losses suffered, we are also claiming that the Carrier must treat Claimants as employees who rendered service on the days claimed qualifying them for vacation credit days, railroad retirement credits, insurance coverage and any and all other benefits entitlement accrued as if they had preformed (sic) the work claimed.”

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 case arises from the Carrier's serving of a 15-day notice dated February 9, 1999 to the General Chairman concerning the Carrier's intent to contract certain work, as follows:

“Location: 1999 Scheduled Locations of Gangs Series 8500, 9100, and 9000.

Specific Work: Provide labor, materials, equipment, and supervision for purchase and removal of rail & otm ‘as is where is’ behind system rail gangs during annual Track Maintenance Program.”

The Board carefully reviewed the entire record in this case. We find that it is identical in all respects to the claims considered by the Board in Third Division Awards 36723 and 37023. Specifically, we find from the record that, on February 26, 1999, the parties met in conference to discuss the notice, however, no agreement or understanding was reached. According to the record, on March 1, 1999, the Carrier and L. B. Foster Company entered into a standard agreement which provided for the removal and purchase of used rail and other scrap materials on an "as is, where is" basis.

We find from our review of the record that, during the on-property handling of this matter, the Carrier produced a copy of the March 1, 1999 "Purchase and Removal Agreement" and the pertinent Sales Orders, as well. The Board's finding in this regard is supported by the Organization's November 20, 2000 letter (following the parties' October 17, 2000 claims conference) which specifically acknowledged that the Carrier had provided a copy of the contract "allegedly covering the work at hand."

Given the above, the Board rejects the Organization's contention that the Carrier's tendering of the "as is, where is" sales contract was untimely and prejudicial to the Organization from the standpoint of its supposed inability to rebut the document for reason of having insufficient time. We note that the Organization did not file its Notice of Intent with the Board until January 11, 2001. Again, the above comment included in the Organization's post-conference letter confirms that the Carrier furnished the contract well before the record had closed, we hold.

Accordingly, the Board finds no procedural errors warranting the denial or dismissal of this claim without considering the merits. Turning to the substantive issue of whether a genuine "as is, where is" contract actually existed between the Carrier and the L. B. Foster Company for the dates, location and gang covered by this claim, we find that the March 1, 1999 contract between those parties was a legitimate "as is, where is" sale agreement. Indeed, as the Carrier pointed out during the Hearing in this matter, this same purchase contract was at the core of the cases denied by the Board in Third Division Awards 36723 and 37023. As the Board stated in Award 37023:

“It is well settled that genuine ‘as is, where is’ sales of Carrier property do not constitute impermissible contracting of scope covered work under the Rule applicable here. As such notice is not required. See, for example, Third Division Award 35772 and Awards cited therein.”

Therefore, given the entire record before us, and the factually identical circumstances surrounding this claim and those underlying the cases denied by the Board in the above-cited Awards, the instant claim likewise must be denied. There is no reason for the Board to depart from the holdings of Awards 36723 and 37023 given their factual parallels in all respects to the instant case and their adherence to a long line of established authority recognizing the Carrier’s managerial right to dispose of its property on an “as is, where is” basis. Thus, in the interest of maintaining arbitral stability, the instant claim is denied, under the principle of stare decisis, we hold.

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 24th day of August 2005.