

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37621
Docket No. MW-36674
05-3-01-3-212

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern 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 (Wood Waste Energy, Inc.) to perform Maintenance of Way work (pickup and stack ties on the right of way) at Jamestown, North Dakota and continuing westward beginning May 10, 1999 and continuing instead of Machine Operators D. E. Nygren and M. C. Lee (System File T-D-1829-W/11-99-0463 BNR).
- (2) The Carrier violated the Agreement when it assigned outside forces (Wood Waste Energy, Inc.) to perform Maintenance of Way work (pick up and pile ties on the right of way) on the Mitchell Subdivision of the Dakota Division beginning on October 11, 1999 and continuing instead of Group 3 Machine Operators W. L. Appl and D. E. Anderson (System File T-D-1904-B/11-00-0030).
- (3) The Carrier further violated the Agreement when it failed to provide the General Chairman with an advance written notice of its plan to contract out the aforesaid work as required by the Note to Rule 55 and Appendix Y.

- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Machine Operators D. E. Nygren and M. C. Lee shall now each be compensated for an ' ***equal and proportionate share of all hours expended by outside concerns until claimants are placed on the job. Pay is to be at Claimants' respective rates of pay.'
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Group 3 Machine Operators W. L. Appl and D. E. Anderson shall now each be compensated'... for an equal and proportionate share of all straight time and overtime hours worked by the contractor beginning on October 11, 1999 and continuing until the violation ceases. *** ' "

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.

This claim was initially handled as two separate continuing claims on the property. One claim was filed on behalf of Group 3 Machine Operators D. E. Nygren and M. C. Lee for the work of picking up and stacking ties performed by outside forces beginning on May 10, 1999 and continuing from Jamestown, North Dakota, westward. The second claim was filed on behalf of Group 2 Machine Operators W. L. Appl and D. E. Anderson for the work of picking up and stacking ties performed by outside forces beginning on October 11, 1999 and continuing on the Mitchell Subdivision of the Dakota Division. Because both claims involve

identical work (picking up and stacking ties) on an "as is, where is" basis by Wood Waste Energy, Inc., the claims have been appropriately consolidated.

The Claimants hold seniority in the Roadway Equipment Subdepartment and were assigned to and working their respective positions on the dates involved in this dispute.

This case involves the Carrier's sale of scrap ties on an "as is, where is" basis. According to the record developed on the property, the Carrier entered into a contract with Wood Waste Energy, Inc. (WWE), which provided that WWE take title to scrap ties removed from the Carrier's track and dropped onto its right-of-way by the Carrier's forces. The financial arrangement between the parties provides that WWE would pay the Carrier \$1.31 per net ton for the ties. In turn, the Carrier would pay WWE \$14.69 per net ton for processing and disposal of the scrap ties at the WWE facility in Duluth, Minnesota. According to the Carrier, WWE has the ability and expertise to properly dispose of the ties.

The Organization contends that the Agreement was violated when the Carrier assigned outside forces (Wood Waste Energy, Inc.) to perform maintenance-of-way work (pick up and pile ties on the right-of-way). First, it claims that the Carrier did not provide adequate notice to the Organization as is required. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to the Organization. The Organization argues that because the Claimants were denied the right to perform the relevant work, they should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the ties were sold on an "as is, where is" basis, which historically has been allowed. Because the work was performed pursuant to a sale, there was no need to give notice to the Organization. The fact that there was a financial arrangement between the Carrier and the purchaser (WWE) does not change the basic nature of the arrangement to sell ties on an "as is, where is" basis.

In Third Division Award 37104, the Board held:

“It is well settled that a genuine sale of Carrier property on an ‘as is, where is’ basis does not constitute an impermissible contracting of reserved work. Because such sales do not involve work performed for the Carrier, the notice requirements pertaining to contracting of reserved work are not applicable.”

After a review of the record, we find that the instant matter qualifies as an “as is, where is” sale and, therefore, is outside the purview of the Agreement. The fact that there was a reciprocal financial arrangement between the Carrier and WWE does not change the fact that this was a bona fide sale and, therefore, the Carrier was not required to provide notice to the Organization.

Based on the on-property evidence as well as the above-cited precedent, we cannot find that the sale to and removal of ties by WWE was improper. The Organization has been unable to meet its burden of proof. The claim is therefore 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 19th day of October 2005.

LABOR MEMBER'S DISSENT
TO
AWARD 37621, DOCKET MW-36674
(Referee Bierig)

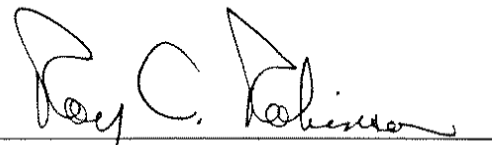
The Majority has clearly overlooked the glaring contract violation in this case and a dissent is required because the reasoning of the Majority in denying the claim is based on false premises. First, the Majority found that the purported sales agreement between the Carrier and the Contractor created an "as is, where is" sales transaction. According to the Majority such a transaction relieved the Carrier from its obligation to issue notice of its intention to contract out the work. The General Chairman requested and received a copy of the alleged sales agreement from the Carrier. Thereafter, the General Chairman pointed out to the Carrier that the alleged sales agreement with the outside Contractor, was in fact not an "as is, where is" sale but was a contract for work or services. This is glaringly true from a perusal of the document itself. Within the alleged sales agreement were the instructions on how many used ties could be loaded per gondola car, how the ties would be situated in the gondola car, how much the Carrier would pay the contractor to pick up the ties and how much the Carrier would receive after the contractor sold the ties. This certainly is not an "as is, where is" sale but clearly is a contract for work or services. It is submitted that the terms and conditions for the pick up and disposal of the scrap ties would not be significantly altered by eliminating the sentence "Purchaser will pay BNSF \$1.31 per net ton for all ties." and stating BNSF will pay Wood Waste Energy, Inc. \$13.68 (\$14.69 less the \$1.31 purchase price) per net ton for processing and disposal of scrap ties at Wood Waste Energy, Inc.'s facility in Duluth, MN for the years 1999 through 2001. Clearly, the Carrier's January 20, 1999 Letter of Agreement with Wood Waste Energy, Inc. is not an "as is, where is" sale of scrap ties to Wood Waste Energy, Inc., but a contract for services with Wood Waste Energy, Inc. for pick up and disposal of the scrap ties under the Carrier's control. This is especially true when as here, the Carrier is paying to have the ties picked up and disposed of and is to receive credit from the sale of the ties.

In light of the fact that the Carrier retained the right to receive all credits from the sale of the ties, there can be no doubt that the scrap ties stacked by Wood Waste Energy, Inc. were for Carrier's benefit. Even if the agreement with Wood Waste Energy, Inc. could somehow be considered a valid sale contract (which we emphatically deny), the Carrier was not relieved of its obligation to serve notice prior to contracting the Scope covered work in this instance. The agreement between the Carrier and Wood Waste Energy, Inc. clearly revealed that the work was performed at the Carrier's Expense; the Carrier retained sufficient control over the work performed by the outside forces; and, received benefit therefrom. Therefore, it is bound by the provisions of the Maintenance of Way Agreement regardless of the fact that it denies ownership of the subject property. In this instance, there is no dispute that notice was not served, therefore, the instant claim should have been sustained. The Carrier maintained total and complete control over the removal and handling the ties.

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Inasmuch as the Majority premised its denial of this claim on the basis of the false premise that it sold the ties on an "as is, where is" basis, this award is erroneous and can have no precedential value.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson", written over a horizontal line.

Roy C. Robinson
Labor Member