Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37854
Docket No. MW-37027
06-3-01-3-637

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(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 (National Salvage and Service Corporation) to perform routine Maintenance of Way work (cleaning right of way of ties and general cleanup work) between Mile Posts 323 and 314.70 on the Nampa Subdivision commencing on August 10, 2000 and continuing, instead of Northwest District Roadway Equipment Operator R. S. Gomez and Idaho Division Track Subdepartment employes F. F. Fuqua, R. J. Scott, R. D. Eck, J. L. Sneed, R. R. Rodriguez and R. L. Sinclair (System File J-0052-75/1247799).

(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, Claimants R. S. Gomez, F. F. Fuqua, R. J. Scott, R. D. Eck, J. L. Sneed, R. R. Rodriguez and R. L. Sinclair, 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 on August 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, 2000. This claim is continuous for all additional work done by the contractor cleaning ties from the right of way starting at Mile Post 323 and ending at 314.70 on the Nampa Subdivision (806).'"

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 August 5, 1999, the Carrier issued to the Organization a notice (Service Order 14889) regarding the Carrier's intent to enter into a contract for "labor and on-track mounted equipment necessary to pickup, remove and dispose of scrap ties which have been released by the system tie gangs (on an As Is, Where Is basis)." The Organization requested a conference. In conference documentation dated August 19, 1999, the Carrier described the subject of the proposed contract as "system-wide pick-up and disposal of ties. It is this offices understanding that the ties have been stockpiled by Carrier forces and this work can therefore be contracted out by past practice."

On May 1, 2000, the Carrier entered into a contract with National Salvage and Service Corporation (National). Entitled "Contract for Work or Service," the Agreement with National identifies the work to be performed as providing "labor and equipment necessary to pick up and dispose of scrap ties from various locations

in the states of Nebraska and Idaho." The Agreement further describes the work as "the removal and disposal of all cross ties, switch ties and crossing timbers . . . replaced and released by the Railroad's System Tie Gangs. . . ." The Carrier agreed to pay rates established in a "Schedule of Billable Service Items" based on complete pickup and disposal of material including pieces of ties and timbers not able to be handled by Contractor's equipment." Under Section 1(D) of the attachment to the contract, disposal of ties is subject to certain requirements, including record keeping regarding the addresses where ties are either disposed or shipped for re-use. The Carrier is entitled to withhold payment if tie material is improperly disposed of by National. The Carrier also agreed to pay disposal fees for ties disposed of in an approved landfill. Section 1(C)(2) "Ownership of Ties, " states:

> "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. The Contractor assumes sole risk of loss at this time. The Contractor agrees to accept the transfer and assignment of the material as is, where is, and with all faults, and with the understanding that there is no warranty of any kind, expressed or implied, and specifically there is no warranty of merchantability or fitness for a particular use. Contractor acknowledges and agrees that none of the materials released by the Railroad shall be sold by the Contractor until such materials have been removed from Railroad property."

Section 1(E) provides, in pertinent part:

> "(1) Material may be temporarily stockpiled for further handling at locations with the prior approval of the Track Supervisor. . . . Material must be stockpiled at least 25 feet from the center line of the nearest track. . . . Ties should not be stacked more than 2 bundles high. . . .
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> (2) All material must be permanently removed from the Railroad's property within 60 calendar days after completion of the project by the Railroad's Tie Gang. . . . If the Contractor has not removed the material within 10 calendar days after . . .

notice, the Railroad may remove the material using its own forces or contracted labor and deduct the actual and reasonable cost . . . from amounts due to the Contractor."

On September 2, 2000, the Organization filed a claim alleging that on August 10, 2000, two National employees began work at MP 323, "picking cross ties and cleaning the right of way working east." The Organization asserted that a boom with grapple hooks was used to load ties into a hi-rail semi tractor trailer. The ties were then dumped or stockpiled. According to the Organization, the National employees stopped the work on August 19, but were scheduled to return to remove stacked ties from the right-of-way.

The Carrier responded on October 27, 2000, informing the Organization that National employees had picked up and cleaned up ties behind a System Tie Gang at Shoshone, Idaho, and that the System Tie Gang had been responsible for setting up National to pickup and remove ties behind the gang. Having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

The Carrier contends that its contract with National was for an "as is – where is" sale of scrap ties. According to the Carrier, when title to the ties passed to National, the parties' Collective Bargaining Agreement became inapplicable to the ties and National was entitled to take its property wherever it was found, including from the Carrier's right-of-way. The Carrier argues that the Organization's members are not entitled to handle materials belonging to a third party.

The contract between the Carrier and National makes no reference to a sale or purchase of the ties. The contract does indeed assign ownership of the ties in question to National as soon as they have been taken from the track structure and released by the System Tie Gang. The remaining terms of the contract, however, call into question whether National's work in removing and disposing of the ties was more for the Carrier's benefit than for National's. There is no evidence in the record that National paid any consideration to the Carrier for the ties. Nor is this a barter arrangement with National performing the pickup and removal work in exchange for the ties. Even assuming arguendo that the ties constituted a portion of the consideration for National's work, another portion was paid directly by the

Carrier in accordance with the contract's "Schedule of Billable Service Items." In addition, the Carrier is required to pay disposal fees for any ties disposed of in an approved landfill. The contract between the Carrier and National simply does not bear the hallmarks of a sale. One generally does not pay a third party to remove and dispose of that third party's own property. The Board finds it noteworthy that the Carrier made no reference to the contract in question being a sale transaction in its August 5, 1999 notice of intent to contract, nor even in its correspondence subsequent to the Organization's claim in the instant case until February 21, 2001. Only then did the Carrier assert that "ties were picked up on an 'as is, where is' basis and the ownership of the ties transferred to National Salvage." Insofar as the removal and disposal of ties was performed by National for the Carrier's benefit rather than in order to simply retrieve its own property, the Carrier's "as is, where is" defense must fail, under the particular circumstances of this case.

This conclusion as to the "as is – where is" issue does not resolve the entire matter, however. While the Carrier asserts that Carrier forces stockpiled the ties for National to pick up, the Organization asserts that in reality National cleaned the right-of-way of ties and performed general clean-up work. The facts as to who performed what work with regard to the ties were not fully developed in the record and remain somewhat confusing. Nevertheless, according to the Organization, the work National performed is reserved to Track and Roadway Equipment Sub-departments under Rules 1 through 5 of the parties' Agreement (governing Scope, Departments, Sub-departments, Seniority Groups and Classes, and Classification of Work) and Rules 9 (Track Sub-department) and 10 (Roadway Equipment Sub-department). In addition, the Organization submits, the Carrier's August 5, 1999 notice regarding the work disputed herein was a flawed "blanket" notice in contravention of the good faith required by the December 11, 1981 Letter of Understanding. The Organization contends that in the absence of proper advance notice, the Organization is not required to show exclusive right to the disputed work, but only that the Track and Roadway Equipment Sub-departments have customarily and traditionally performed such work.

The Board finds that the notice provided by the Carrier in the instant case was sufficient to meet its obligations under the parties' Agreement, including the December 11, 1981 Letter of Understanding. The August 5, 1999 notice provided enough specificity to allow the Organization to determine if there might be a work

jurisdiction issue, and request a conference. In addition, the Organization failed to offer any evidence in support of its only specific allegation of lack of good faith by the Carrier - that the Carrier falsely asserted at conference that Carrier forces would stockpile the ties, but that National actually did stacking and "general cleanup." The Board finds that the Organization's contentions with regard to notice in the instant case are without merit.

The Board further finds that the Organization failed to demonstrate that any work performed by National was contractually reserved to the Organization's members. No express language in the parties' Agreement gives ownership of such work to those covered by the Agreement. Rule 1 of the Agreement, governing Scope, is general in nature, listing the positions covered by the Agreement without specifying any particular work reserved to them. The Board has ruled many times that Rule 1 thus does not provide any "exclusive grants of work" to the listed classifications.

In the absence of a contractual reservation of the work, as a matter of well-established arbitral precedent, the Organization must show that such work has been customarily and traditionally performed by the Organization's members systemwide, to the practical exclusion of others. The Organization provided no evidence whatsoever - for example, employee statements - in support of its assertion that its members have customarily or traditionally performed the work in question, or to the exclusion of others. In contrast, the Carrier submitted a summary of past subcontracting, initially provided to the Organization on February 16, 1997 (and subsequently updated) which stands unrefuted by the Organization in the instant case. The summary includes numerous occasions on which work very similar to that at issue here was contracted out (see e.g., contract for removal of replaced ties on the Nebraska Division; contract for purchase of removal of used ties in North Platte Yard; contract for sale and removal of used ties in Yermco, California; contract for purchase and removal of materials including ties at Loup City, Nebraska.) At best, the record shows that the Carrier has had a mixed practice with regard to assigning work of the type in question in the instant case. Where such mixed practice has existed, the Carrier is entitled to contract out the work under Section 52(b) of the parties' Agreement.

Having found that the Organization failed to prove any violation of the Agreement in the instant case, the Board must deny 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 1st day of August 2006.

LABOR MEMBER'S DISSENT
TO
AWARD 37854, DOCKET MW-37027
(Referee Parker)

The Majority clearly erred when it rendered its decision in this case and a dissent is therefore required.

This case involved the Carrier contracting out the work of clearing of crossties that had been removed from the track structure by the Carrier's Maintenance of Way forces. Under date of August 10, 2000 and continuing, the Carrier assigned National Salvage and Service Corporation.

The Majority spends quite a lot of time and effort justifying the Carrier's actions as if the Organization did not even file a submission in this case. The record is replete with citations of previous awards involving these same parties wherein this Board has held that such work is reserved to Maintenance of Way employes. Those awards are in the record; however, you would not know that truth from reading this award. For the record, those awards are **28817, 29561, 30005, 30528, 31037, 31042, 31044, 31045, 32327, 37315, 37316** and **37572.** The seminal award in this group for the purpose of establishing scope coverage is Award **28817,** which held:

> "On March 24, 1987, the Carrier served notice on the Organization that it intended to dispose of scrap ties on the Western District through Mid-South Railway Service. The notice further advised the ties, once removed from the track structure, would become the property of Mid-South, which would then be responsible for their disposition. The Organization took exception to the Carrier's position, and a conference was held to discuss the matter. No agreement was reached between the parties.
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> First, without regard to whether or not it was required to do so, we do not agree the Carrier failed to serve notice. While the notice did contain erroneous information, there is no indication the Organization was unaware of the location where the work was to be performed. The identification of the contractor is immaterial as this information is not required under Rule 52. The intent of the notice requirement was satisfied in this case. Serving the notice, however, does not relieve the Carrier of all liability. The Rule provides that:
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> > 'Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless

> '"proceed with said contracting, and the Organization may file and progress claims in connection therewith.'
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> * * *

The work complained of consisted of stacking and removing the material once it was removed from the track structure. Under Rule 9, this work belongs to employees covered by the Agreement. The Rule reads, in pertinent part, as follows:

> 'Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences, construction of new fences up to one continuous mile, ordinary individual repair of way, loading, unloading and handling of track material and other work incidental thereto shall be performed by forces in the Track Department.'

Because this Rule is specific in stating that tie renewal, cleaning right of way and loading, unloading and handling of track material is to be performed by forces in the Track Department, we find the work to be exclusively reserved to employees within the scope of the Agreement. It is not necessary for the Organization to demonstrate it has been historically performed by covered employees to the exclusion of others where the rule clearly includes such work. (Emphasis added)

The Carrier notes, however, that Rule 52, unlike the May 17, 1968, National Agreement, contains a provision which provides as follows:

> '(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.'

"The Carrier argues this provision allows it to contract out such work because it had a prior right to do so. It has proven neither a prior right nor a prior practice. This burden of proof is on the Carrier, not the Organization. The fact that the Carrier may have contracted out such work without notice to or objection by the Organization after Rule 52 was written does not establish prior and existing rights and practices.

On the basis of the above, we find the Agreement was violated. This Board has in a considerable number of cases rejected the argument advanced by the Carrier that it should have no liability to Claimants who were fully employed at the time of the contracting out. See Third Division Awards 19899, 24137 and 25968. The fact that one Claimant left the service of the Carrier subsequent to the dates of claim has no bearing on the validity of the claim on his behalf in the absence of anything to indicate he waived any rights to the claim.

A W A R D

Claim sustained." (Underscoring in original)

This award does not stand alone in these type of disputes. It simply is an abomination to now have an award that questions whether this type of work is scope covered. The findings of the Board in Award **28817** preserved the interpretation of contract language and was decisively upheld in subsequent Awards **29561, 30005, 31037, 31042, 31044, 31045, 32327, 37315, 37316** and **37572**. The Majority's assertion that there were no statements presented by the Organization in this case was not necessary in light of the fact that the previously cited awards confirmed scope coverage. There was no need to further burden an already voluminous record with testimonials of past performance by the Maintenance of Way employes when the previously cited awards between the parties involving identical work held that this work is scope covered. Hence, the uninformed and erroneous comments by the Majority that questions the reservation of this work to Maintenance of Way employes is mind-boggling.

Finally, Award **37572** is the seminal award addressing the Carrier's purported "sales agreement". In this case, the Carrier clearly entered into a contract between it and National Salvage to perform the work of cleaning the right of way of the ties removed by the Carrier's Maintenance of Way employes. It should not have been hard to figure that out when the title of the document was:

CONTRACT FOR WORK OR SERVICES

Moreover, Section 2 of the document clearly and unequivocally states:

"Section 2. COMPENSATION.

A. In consideration of the performance of the work herein described and the fulfillment of all covenants and conditions herein contained to the satisfaction and acceptance of the Railroad Representative, 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, which includes all applicable sales and/or use taxes with such sum not to exceed _____ [redacted by Carrier] without the written approval of the Railroad Representative."

Clearly, the Carrier was compensating National Salvage for work that heretofore had been reserved and performed by Maintenance of Way employes. That is the issue that was resolved by Award **37572**. In Award **37572**, the identical language was presented by the Carrier and the Majority held that:

"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." (Underscoring in original)

Clearly, the Board found in Award **37572** that the Carrier's assertion that it had sold the ties in that dispute on an "as is, where is" basis was found **not** to be a bona fide "as is, where is" agreement. In this case, the contract provided to the Organization is support of its position and is identical to the contract at issue in Award **37572**. In this case, there can be no doubt that the Carrier had substituted the Maintenance of Way employes for those of National Salvage. The behavior of the Carrier and the endorsement by the Majority in this case is simply at odds with the overwhelming precedent of this Board. Because the Board previously held that cleaning the right of way was work contractually reserved to BMWE forces, this case should have been sustained.

This award is palpably erroneous and I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member