

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37997
Docket No. MW-36694
06-3-01-3-171

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 (Bannock Paving Company, Inc.) to perform routine Maintenance of Way work (cleaning right of way of ties and general cleanup work) at Mile Posts 225.25, 226.76, 229.30, 233, 238.75, 227.75 and 317 in the Pocatell and Nampa, Idaho Yards on the Nampa Subdivision on December 3, 6, 7, 8, 9, 10 and 15, 1999 instead of Idaho Group 15 Truck Operators D. A. White, D. K. Hanson, E. Ibarra, Northwestern Roadway Equipment Operator M. J. Dunn, Idaho Division Track Subdeparment employes G. L. Purkey, J. Trevino, III and R. Rascon (System File J-0052-51/1221575).
- (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 D. A. White, D. K. Hanson, E. Ibarra, M. J. Dunn, G. L. Purkey, J. Trevino III, and R. Rascon shall now each be compensated "**** at his applicable straight time and overtime rate a proportionate share of the total hours worked by the contractor doing the work claimed

as compensation for loss of work opportunity on December 3, 6, 7, 8, 9, 10 and 15, 1999.”

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.

Although key factual details were not developed until the later portions of the on-property handling, the record establishes that Carrier forces were used to gather used ties and other track material into debris stockpiles at nine different locations on the Idaho Division. Bannock Paving Company, Inc. then removed the stockpiled materials from the Carrier's property.

The record contains copies of the Carrier's October 1, 1999 letter to the General Chairman by which notice of its contracting plan was communicated. The record does not reflect that the Organization requested a conference to discuss the plan. The record also establishes that a copy of the complete contract between the Carrier and Bannock Paving Company, Inc. was provided to the Organization. Section C.2. of the contract Specifications provided that the contractor would take ownership of the materials on an "As Is Where Is" basis once stockpiled. The contract further provided for the removal of the materials thereafter.

There was disagreement between the parties whether the notice requirements were fulfilled despite the presence of the Carrier's letter in the record. In our view, however, the notice issue is effectively moot. It is well settled that the work associated with the purchase and removal of material pursuant to a valid "As Is

Where Is"contract is outside the scope of the Agreement. See, for examples, Third Division Awards 29559 and 30216 as well as the Awards cited therein.

In this case, the Carrier also asserted that the Organization had previously taken the position that the use of Carrier forces to gather and stockpile material for later removal by a contractor, as was the case here, was specifically permitted by the Agreement. The Carrier cited five specific prior claim files where the Organization had taken this position. The Carrier's assertion, in this regard, was not effectively refuted by the Organization on the property.

Given the foregoing state of the record, we find that the Carrier did not violate the Agreement.

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 25th day of October 2006.