

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39722
Docket No. MW-39015
09-3-NRAB-00003-040571
(04-3-571)**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Grand Trunk Western Railroad, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (A&K Railroad Materials, Inc.) to perform Maintenance of Way work (dismantling tracks) at various locations within the Battle Creek Home Territory beginning June 21 and continuing through July 25, 2003 instead of Foreman K. Martens, Welder Helper W. Hackett and Trackmen M. Switzer, J. Forsyth, J. James, D. Mahmat and J. Prideaux. (Carrier’s File 8365-818).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Martens, W. Hackett, M. Switzer, J. Forsyth, J. James, D. Mahmat and J. Prideaux shall be compensated at their respective straight time rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work**

during the period beginning June 21 and continuing through July 25, 2003.”

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 Organization protested A&K Railroad Materials, Inc. performing the dismantling work described above by presenting a claim to the Carrier.

The Organization maintains that the instant work was work historically, traditionally, and customarily performed by BMW-employees. In addition, the Carrier did not notify the Organization of the sub-contracting as required by the Agreement. The Carrier counters that the dismantled track at issue was sold in an “AS IS - WHERE IS” sale to A & K that had been in effect for a number of years, with track being added to the sale on a periodic basis. According to the Carrier, the instant work is beyond the Scope Rule because it involved a sale. Notice was not necessary because it was a sale of Carrier property. Further, the Organization has never performed dismantling work of Carrier property that is sold on an “AS IS - WHERE IS” basis. Finally, this same issue was decided in Third Division Award 37070 and that claim was denied.

The Board carefully reviewed the evidence regarding whether the material at issue was the subject of a sale by the Carrier. The record establishes that the track was no longer in use and the materials were sold. When the Organization requested

a copy of the sale contract with A&K, the Carrier referenced the previously tendered contract and addendum in Award 37070, involving the Organization and the Carrier. That contract is a pre-paid sales contract for the materials. A&K assumed ownership when the sales price was paid. The record in the instant matter establishes the existence of the Carrier's sale of the material to A&K on an "AS IS - WHERE IS" basis.

The Board agrees with the rationale of Award 37070 that "... genuine 'as is - where is' sales of material and equipment do not constitute impermissible contracting of scope work. As such, the advance written notice provisions regarding contracting of scope covered work do not apply." The purchaser was free to remove what it purchased. The Carrier did not violate the Scope Rule when it sold the track in an "AS IS - WHERE IS" sale.

Accordingly, having determined that the cited Rules do not support the Organization's position, the Board finds that the Organization has not met its burden of proof and the claim is 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 26th day of June 2009.