

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40089  
Docket No. MW-38429  
09-3-NRAB-00003-040388  
(04-3-388)**

**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**  
**(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 (T C Taylor Company, Ltd.) to perform routine Maintenance of Way work (operate loader) in conjunction with Switch Tie Gang 9067 and the cleaning right of way of ties in the Council Bluffs Yard beginning April 21, 2003 and continuing (System File UPRM-9450T/1369381).**
- (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 contacting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant V. Wheeler shall now be compensated at the applicable roadway equipment operator’s rate of pay for all hours expended by the contractor employe in the performance of the aforesaid work beginning April 21, 2003 and continuing.”**

**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.**

**Claimant V. L. Wheeler established and holds seniority as a Roadway Equipment Operator dating from February 6, 1998. The Claimant, who was assigned to System Switch Tie Gang 9071, was displaced on April 17, but was not released from the Gang until April 23, 2003.**

**Beginning on Monday, April 21, 2003, the Carrier allegedly assigned outside forces (The Taylor Company) to load used ties along the Carrier's right-of-way in the Council Bluffs, Iowa, Yard. One of the contractor's employees operated a hydraulic boom type crane loading ties onto two rail carts which were subsequently unloaded in a secure area. According to the Organization, beginning on April 21, 2003, the contractor's employee worked in conjunction with Gang 9067 for the same hours and under the same work order. According to the Organization, the Claimant was available for duty on the claim date, fully qualified and willing to perform the aforementioned work, but was not afforded the opportunity to do so by the Carrier.**

**The Organization contends that the Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (removal of ties from the Carrier's right-of-way). First, it claims that the Carrier did not provide adequate notice to the Organization as is required. Second, it claims that it was improper for the Carrier to contract out the above-mentioned work. This is**

work that is properly reserved to BMW-represented employees. The Organization argues that because the Claimants were denied the right to perform the relevant work, the Claimant 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. It contends that the ties removed by The Taylor Company were sold on an “as is, where is” basis, which historically has been allowed and the consequent work is not within the province of the Organization. Because the work was performed pursuant to said sale, there was no need to give notice to the Organization. Although the Carrier contends that it was not required to give notice to the Organization, it nonetheless did so. In addition, the Carrier contends that there was a procedural violation in that the claim was processed by the incorrect General Chairman.

After a thorough review of the record, the Board concludes that the instant matter qualifies as an “as is, where is” sale and, therefore, it is outside the purview of the Agreement. See Third Division Award 37104 wherein 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. See, for example, Third Division Awards 29559 and 30216. Because such sales do not involve work performed for the Carrier, the notice requirements pertaining to contracting of reserved work are not applicable.”

The instant sale of ties by the Carrier to The Taylor Company constitutes an “as is, where is” sale. Thus, the ties became the purchaser’s property and the removal does not constitute contracting out. Because this was a bona fide sale, the Carrier was not required to provide notice to the Organization.

Based on the record evidence and the above-cited precedent, we conclude that the tie removal performed by The Taylor Company was proper. The Organization has been unable to meet its burden of proof. Accordingly, the claim is denied.

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**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 November 2009.**