

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40811
Docket No. MW-40759
10-3-NRAB-00003-080652**

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 (Scarsella Brothers, Inc.) to perform Maintenance of Way work (fabrication of track panels, removal of track panels, grade and ballast removal, installation of track panels and related work) at Tunnel No. 17 between Mile Posts 407.75 and 408.20 in the vicinity of Dorris, California beginning on May 12, 2007 and continuing through June 11, 2007 (Carrier’s File 1481510).**
- (2) As a consequence of the violation referred to in Part (1) above, the employes assigned to System Gang 8567 during the period beginning May 12, 2007 through June 11, 2007, shall now ‘. . . each receive a proportional share of the total man hours worked by the outside contractor which shall be no less than the one thousand five-hundred twenty (1,520) man hours already identified herein. Payment shall be calculated by observing all straight time and overtime rules under the current agreement.’”**

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 instant claim was filed by the General Chairman of the Pacific Federation of the Organization, which covers the territory of the former Southern Pacific Western Lines (SPW) on behalf of the members of System Gang 8576, which is governed by the terms of the main Union Pacific-BMWE Agreement and not the SPW Agreement.

The claim contends that the contracted work has been historically, customarily, and traditionally performed by Carrier forces and is, thereby, reserved to such employees. The Carrier, to the contrary, refuted the Organization's assertions about past performance and counter-asserted that the Carrier has "... customarily and traditionally utilized contractor's forces to perform the type of work disputed in this case." In addition, the Carrier contended that the removal of materials by the contractor was pursuant to an "As Is, Where Is" type of sale. The Organization did not challenge the Carrier's contention about the removal of the materials.

Our review of the record discloses that the Carrier served notice dated March 8, 2007, upon the Pacific Federation General Chairman to announce its intention to contract out the work in question. The General Chairman requested a conference regarding the notice, and the record reflects that a conference was held. No understanding was reached.

Because the Carrier's contention about the "As Is, Where Is" sale was not contested, we must accept the nature of that sale as proven fact. It is well settled that such sale arrangements do not constitute an impermissible contracting of work. Accordingly, no violation of the Agreement is found to have occurred in connection with the work of removing materials.

For the remaining work, we note that the applicable Scope Rule is a general Rule. Therefore, to establish scope coverage and the resulting reservation of the work, the Organization must prove that the disputed work has been customarily, historically, and traditionally performed by covered employees. The Organization made such assertions, but they were effectively refuted by the Carrier. With the past performance issue thus joined, it was incumbent upon the Organization to present actual evidence of the past practice to demonstrate and support its position. No such evidence was included in the record.

Given the state of the record evidence, we must find that the Organization failed to satisfy its burden of proof to validate the allegations of its claim. The claim, therefore, must be 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 15th day of December 2010.