

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41050
Docket No. MW-41156
11-3-NRAB-00003-090491**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Happ Incorporated) to perform Maintenance of Way and Structures Department work (dismantle and remove track) on eight (8) tracks near Mile Post 137.0 in the area of Clinton, Iowa on the Geneva Clinton Subdivision on April 7, 8, 9, 10, 11, 14, 15, 16, and 17, 2008 (System File S-0801C-356/1505338 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Sawvell and E. Imel shall now each ‘***be compensated at the applicable overtime rate of pay an equal and proportionate share of the seven hundred four (704) man hours expended by the Contractor employees from April 7, 2008 until April 17, 2008.’”**

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 concerns the use of an outside contractor to dismantle and remove existing tracks near Mile Post 137.0 in the area of Clinton, Iowa, during the period of April 7 through 17, 2008.

It is the Organization's position that the work was customarily and historically performed by its members and required no special abilities and/or equipment. It argued that the Carrier failed to serve a proper advance notice of its intention to contract out scope-covered work. It further argued that the Claimants were qualified and available for the work. When advised by the Carrier that Happ Incorporated had purchased the track material on an "As Is, Where Is" basis, which required the contractor to remove the material, the Organization argued there was no proof offered that a sale agreement had occurred, and because of that, it concluded by requesting that the claim be sustained as presented.

It is the position of the Carrier that the instant dispute involves an "As Is, Where Is" sale of scrap material, which the Board has previously held does not involve work reserved to BMW-represented employees. It argued that many Awards have upheld the Carrier's right to sell its property in such a manner, and those Awards further confirm that advance notice is not required, because such sales do not constitute contracting of scope-covered work and there is nothing in the record to suggest that any of the materials were retained by the Carrier. It closed by asking that the claim remain denied.

This is a companion case to Third Division Award 41049 involving the same Claimants and nearly identical arguments, the only differences being the dates, location and outside contractor. The Board's close review of the record indicates that during the handling of the claim on the property the Carrier provided a statement from Manager G. Stewart, the Carrier's local representative, who stated the following:

“The track material at the car shop was sold to Happ's as is. Therefore, it was their responsibility to remove the material from our property. They took possession of all material at the job site and we provided flagging for protection when needed to remove that material.”

The Board finds and holds for the same reasons set forth in Third Division Award 41049 that the above statement constituted sufficient proof that an “As Is, Where Is” sales transaction occurred, which removed the disputed work from Agreement coverage. Accordingly, the Board finds and holds that the claim 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 23rd day of August 2011.