Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42220
Docket No. MW-41944
15-3-NRAB-00003-120254

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division -**
(IBT Rail Conference
(
(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 (RTI) to perform Maintenance of Way and Structures Department work (remove used ties and related right of way clean up work) starting at Mile Post 49 and continuing south towards Mile Post 2.49 on the Spokane Subdivision commencing on November 15, 2010 and continuing through December 17, 2010 (System File D-1052U-727/1547872).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance written notice of its intent to contract out said work and when it failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Braddock, D. Hoffman, S. Webb and S. Wiyrick shall now each be compensated for two hundred and twenty (220) hours at their respective and applicable rates of pay."

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.

In brief, this claim arose when a contractor, RTI, removed used ties and performed related track work during the period of November 15 through December 17, 2010, between Mile Post 49 and Mile Post 2.49 on the Spokane Subdivision. The Organization filed the claim, alleging that the Carrier had violated Rule 52 in that it had not provided advance notice of the contracting transaction and that the work, traditionally performed by BMWE-represented forces, was not covered by any of the exceptions to Rule 52's limitations on contracting out. The Carrier responded that the work had been performed pursuant to an "as is, where is" contract under which the contractor was picking up and disposing of ties and debris that it owned under that contract. The Board has previously recognized that the sale of used material to a third party through an "as is, where is" contract removes that material from the Carrier's ownership and, accordingly, from the scope clause of the Parties' Agreement and its coverage. However, the Carrier has the burden of proof to establish the existence of an "as is, where is" contract.

During the on-property handling of the case, the Organization requested a copy of the contract between the Carrier and RTI, which the Carrier submitted. A review of that document establishes that it is not a true "as is, where is" contract. Rather, it is something of a hybrid: ownership of the used ties may transfer to the contractor when they are removed – but the Carrier is paying the contractor to remove them. This raises the question: if the ties do not belong to the Carrier, why is it paying for their removal? Under a true "as is, where is" contract, the new owner assumes responsibility for picking up the material "as is, where is" – that is the derivation of the phrase. Here, the "Nature of the Work" as set forth in Section 1.A is for the

contractor "to provide supervision, labor, operated equipment, materials, rail cars, and permits to purchase, remove and dispose of Railroad's scrap ties . . . ." Section 2.A under Compensation states: "In consideration of the performance of the work herein described . . . the Railroad will pay to the Contractor for work actually performed by the Contractor at the Contractor's unit rates as set forth in Schedule of Billable Service Items . . . ." Such language is not ordinarily found in a contract for the sale of goods (used ties). The Board will follow the precedent set by Third Division Award 37572 involving these same Parties, wherein the Board, with Referee Goldstein participating, held:

> **"Turning to the merits, the Board first considers whether the Carrier established is affirmative defense that the ties were sold on an 'as is, where is' basis in light of the 'Contract for Work or Services,' . . . between the Carrier and Shade Railroad Services. From our review of that document, we find that . . . Section 1(A), Nature and Location of the Work or Services, clearly stated that the work to be performed by the contractor was 'for providing labor and equipment for pickup and disposal of used (second hand) wood railroad ties . . . .' Section 2(A), Compensation, specified that '. . . the Railroad will pay to the Contractor for work actually performed by the Contractor at the Contractor's unit rates as set forth in the Schedule of Billable Service Items . . . .'**
>
> **Furthermore, the 'Description of Work,' contained in the 'Schedule of Billable Services Form,' confirms that the Shade Railroad Services was to 'provid(e) labor and equipment for pickup and disposal of used (second hand) wood railroad ties at or near various locations.' Thus, it is clear that the 'as is, where is' contract purportedly at the heart of this claim was not the typical sales contract. Rather, it appears to have been an agreement reflecting the Carrier's intention to pay the contractor to perform the clean-up and removal of the used railroad ties, work which the Claimants have performed in the past, we are convinced, given the available precedent. See, for example, Third Division Awards 30063 and Award 14 of Public Law Board No. 5546."**

The facts of the instant case mirror those set forth in Award 37572 closely, and the Board similarly finds that the Carrier did not meet its burden of proof to establish the existence of a true "as is, where is" contract. Accordingly, the claim is sustained,

and the Claimants are entitled to payment for their lost work opportunity – as Referee Marx noted in Third Division Award 24280, "If the Carrier had determined that the portion of the work on its own behalf was to be performed by Maintenance of Way employes, they would have been made available for this purpose." The Parties are directed to undertake a joint check of the actual dates and hours worked by RTI's forces in order to determine the number of hours to which the Claimants might be entitled, and at what rate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 17th day of November 2015.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 42220 - DOCKET MW-41944

(Referee Andria S. Knapp)

The Majority's rationale in this case is the same as in Third Division Award 37572 to which the Carrier Members dissented. The Majority held that the contract between the Carrier and R.T.I. could not be viewed as an "as is where is" bill of sale due to the fact that the Carrier was paying a fee for the disposal of the scrap material. We disagree. The contract presented during the on-property handling of the matter specifically states:

> **"All material released from projects during the term of this agreement shall become the exclusive property of the Contractor at the time the material is removed from the track structure."**

The scrap ties did become the property of the Contractor. The Carrier paid a disposal fee just the same as fees that are required when property is disposed of at a dump. Payment of a disposal fee did not change the ownership of the property. The Carrier did not own the ties when they were removed from its property and as such, the disputed work was not brought under the scope of the Parties' Agreement nor was it impermissible contracting of reserved work.

One of the oft-stated purposes of arbitration is to provide consistency in the work place so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent that has clearly and unmistakably recognized the long-standing practice of "as is where is" contracts on this Carrier's property does a disservice to the process and the Parties to these disputes. Without a doubt, the Majority's determinations that the notices were improper are palpably erroneous and cannot be considered as precedent in any future cases. Because they clearly create unwarranted chaos, we must render this vigorous dissent.

Katherine N. Novak *Michael C. Lesnik*

Katherine N. Novak **Michael C. Lesnik**

November 17, 2015