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

Award No. 42223
Docket No. MW-41983
15-3-NRAB-00003-120346

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 (R.T.I.) to perform Maintenance of Way work (haul track material) between Mile Posts 580 and 679 on the Brooklyn Subdivision between Oakridge, Oregon and Springfield, Oregon beginning on February 1, 2011 and continuing through February 28, 2011 (System File T-1152U-504/1552873).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out said work and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces 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, Claimant M. McCarthy shall now '... be allowed compensation equal to the amount of hours that the outside contracted employee worked performing the previously described duties. Claimant must be allowed compensation for the loss of work opportunity suffered. Specifically, Claimant must be allowed no less than three hundred and eight (308) hours of compensation at his respective straight time. *'"**

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.

This claim alleges that the Carrier utilized R.T.I., an outside contractor, using its own equipment, to perform work that properly should have been assigned to BMWE-represented forces and that the Carrier failed to provide notice as required pursuant to Rule 52 of the Parties' Agreement. According to the initial letter of claim:

> **"On February l, 2011 through February 28, 2011 every day of the month of February, R. T. I. contractors spotted rail cars at various locations on the Brooklyn Subdivision between m.p. 580 and m.p. 679. R. T. I. worked eleven (11) hours a day, each day on the dates listed above. These outside contractors utilize their own equipment, recognized as a makeshift Brant Truck, by Track Sub-department employees. The Carrier has multiple Brandt Trucks parked during the claimed hours herein. Claimants' job duties were simply being replaced by the outside contractors named herein."**

Spotting cars is undisputedly work that ordinarily would be done by the Carrier's Maintenance of Way forces, and subcontracting that work would have to be done pursuant to notice and the requirements set forth in Rule 52. However, the facts here establish that the Carrier was not in violation of the Agreement when it permitted R.T.I. to perform the work in question, or when it failed to give notice.

R.T.I. had an "as is, where is" contract with the Carrier for used ties and other track material. Under an "as is, where is" contract, the purchaser (R.T.I.) is responsible for picking up the material wherever it is; in the case of used rail ties, this may be at any

number of points on the Carrier's line of road, which necessitates R.T.I's forces using rail cars to go wherever the material is and pick it up. The record establishes that in the past, R.T.I. had used Carrier forces to load and move rail cars owned by R.T.I. (The Organization acknowledges this point in its July 12, 2011 letter to the Carrier.) At some point, however, R.T.I. decided to use its own forces to load and move its own equipment, presumably for reasons of cost and efficiency.

The Organization made an argument that the work was being performed for the benefit of the Carrier, which would bring it within the purview of the Parties' Agreement. The fact is, however, once the used material covered by the "as is, where is" contract has passed into R.T.I.'s ownership, the work of handling that material is no longer covered by the Parties' Agreement, and BMWE-represented forces have no right to it. Rather, R.T.I. has the right to use its equipment and its forces to move its material. Obviously, it must coordinate with the Carrier in doing so, but that coordination does not bring the work back within the scope clause of the Parties' Agreement. Furthermore, because the work is no longer Carrier work, it is not actually being subcontracted, and the notice provisions normally attendant upon subcontracting do not apply – in other words, no notice was required from the Carrier to the Organization when R.T.I. decided to stop using Maintenance of Way forces to move R.T.I. rail cars and to replace them with its own employees.

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 17th day of November 2015.