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

Award No. 43585
Docket No. MW-42431
19-3-NRAB-00003-180472
NRAB-00003-140032

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Nevada Railroad Material) to perform Maintenance of Way Track Department work (removal of track siding) at the Baden siding on the Montgomery Subdivision beginning on August 16, 2012 through August 25, 2012 (System File B-1201C-129/1576202 CNW).

(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 the aforesaid work and 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 1 and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Pettis, D. Witt and D. Isaacson shall each be compensated at their respective rates for an equal and proportionate share of he two hundred forty-three (243) man-hours worked by the outside forces performing the above-described work

beginning on August 16, 2012 through and including August 25, 2012."

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 case arises out of the undisputed fact that beginning on or about August 16, 2012 and continuing until on or about August 25, 2012, the Carrier utilized a contractor, Nevada Railroad Material, to remove track from a siding in Baden, Minnesota, on the Carrier's Montgomery Subdivision. The Organization contends that its members had a right to this work pursuant to Rule 1—Scope of the parties' Agreement, and the Carrier violated the Agreement by assigning this work to the contractor's employees. The Organization maintains that the Carrier further violated the Agreement by failing to give the Organization advance notice of its intent to subcontract.

The Carrier asserts that there is no validity to the instant claim. The Carrier notes that the siding at issue had been abandoned for a decade, and states that it had transferred complete ownership of the siding materials pursuant to an "as is, where is" contract, so the contractor merely picked up and disposed of ties and debris it owned. It is well settled, the Carrier argues, that since the material was no longer the Carrier's property, the work did not fall under the Agreement's scope or subcontracting notification requirements.

As noted in Third Division Award 42189, removing old railroad ties and hauling them away is traditional Maintenance of Way work, covered by the scope rule of the parties' Agreement. However, "as is, where is" agreements are an exception. Where the Carrier has sold its interest in used materials, the Board has recognized the contractor's right to come onto the Carrier's premises to remove its property. As the material no longer belongs to the Carrier, the Carrier is not performing the work and the Carrier's employees have no claim to it.

The on-property record includes a "Contract for Work or Services" between the Carrier and Nevada Railroad Materials, Inc., dated September 15, 2010. Section 1. DESCRIPTION OF THE WORK, A. states that the work to be performed by the contractor is providing labor, materials, equipment and supplies necessary to remove and dispose of the materials. Paragraph B. states that the work to be performed by the contractor is set forth in a Schedule of Values/Schedule of Billable Service Items. Paragraph C. states that the work will be performed at times and locations authorized by the Carrier's representative, the Carrier has no obligation to give any particular work to the contractor, and the contract applies only to work the contractor is requested to perform.

Section 1. SPECIFICATIONS, A. General Scope of Work, 1) states, "The intent of this agreement shall be to cover the removal, crushing and spreading of all (materials) replaced and released (by the Carrier)" and 2) that the contractor agrees that the rates quoted in the attached Schedule of Billable Service Items are based on complete pickup and disposal of the materials at issue. The contract further provides that all material released from projects during its term shall become the contractor's exclusive property at the time the material is removed from the track structure,

We conclude that here, as in Third Division Awards 42189 and 42220 and cases cited therein, the instant contract is for services, not for the sale of goods. The material at issue does not become the contractor's property until after it has been removed; the Carrier is paying the contractor's employees to remove what is still the Carrier's property.

The Carrier has failed to establish that it sold the materials at issue prior to their removal. It has therefore not met its burden of proving the "as is, where is" defense.

The work was therefore subject to the usual notice and subcontracting provisions of the parties' Agreement. The Carrier did not fulfill its contractual responsibilities, and the claim must be sustained. See Third Division Award 41104.

As for the remedy, the Carrier asserts that the Claimants are due no monetary compensation, as they were fully employed at the time of the instant subcontracting. We have examined the numerous cases cited by the parties concerning this issue and are aware of the conflicting holdings concerning whether fully-employed claimants are entitled to monetary compensation. While, as the Carrier states, there are numerous awards holding that no compensation is due fully-employed employees, as it would represent a windfall, see, for example, Third Division Award 31016, we agree with the line of awards holding that the subcontracting represents a lost work opportunity and compensation for the employees, see Third Division Awards 40377, 40921, and 40964, and that a financial penalty is necessary to prevent the Carrier from subcontracting with impunity, see, for example, Third Division Award 42422. This is especially true in cases like this one, where the Carrier gave no notice and thereby deprived the Organization of any opportunity to dissuade the Carrier from contracting out the work. See Third Division Award 41104, and cases cited therein. The Claimants shall be made whole for the actual number of hours of work performed by the contractor, at the Claimants' respective rate of pay.

AWARD

Claim sustained.

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 27th day of March 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43585

(Referee Jacalyn J. Zimmerman)

The Majority held the contract between the Carrier and Nevada Railroad Material could not be viewed as an "as is where is" contract due to the fact the Carrier was paying a fee for the disposal of the scrap material. The Carrier would strongly disagree. The contract presented during the on-property handling of the matter specifically states as follows:

> **"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 did pay a disposal fee the same as fees are required when property is disposed of at dump. The disposal fee does 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 work was not brought under the Scope of the agreement nor 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 which has clearly and unmistakably recognized the long-standing practice of "as is where is" contracts on this property does a dis-service to the process and the parties to these disputes. Without a doubt, the Majority's determinations that the notices were not proper 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 Jeanie L. Arnold

Katherine N. Novak **Jeanie L. Arnold**

March 27, 2019