

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43630  
Docket No. MW-42721  
19-3-NRAB-00003-140402**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(BNSF Railway 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. J. Corman) to perform Maintenance of Way and Structures work (dismantling and removal of tracks and materials, right of way clean up and related work) at the runaround track at Havre, Montana Yard on the Milk River Subdivision of the Montana Division beginning on February 25, 2013 through March 20, 2013 (System File B-M-2664-E/11-13-0207 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. Hillard, S. Leo, J. Peterson and J. Dunbar shall ‘... each receive ninety six (96) hours of straight time at the respective rate 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.

This claim concerns the use of outside forces to perform Track Sub-department work, specifically tearing out and dismantling track, removing and hauling ballast, and cleaning the right of way. Claimants have established and hold seniority in various classifications in the Track and Roadway Equipment Sub-departments in Carrier's service.

The Organization contends that the disputed work is reserved to the Carrier's Maintenance of Way forces under Rules 1, 2, 5, 55 and the Note to Rule 55 and should have been assigned to them, rather than to outside contractors. The Organization contends that there should be no dispute that the work has been customarily performed by BMWE-represented employees for decades. The Organization further contends that the Carrier failed to notify the General Chairman in advance of its plans to assign outside forces to perform this work. The Organization contends that the claimed work does not belong to the alleged "as is, where is" sale, because the bill of sale is to a different contractor than the one performing the claimed work. The Organization contends that Claimants are entitled to the claimed remedy.

The Carrier contends that the disputed work was not contracted to outside forces but was done as part of an "as is, where is" sale of scrap to a third party. The Carrier provided a bill of sale showing the sale of the exact material at issue here. The Carrier contends that the buyer was responsible for removing the scrap from the Carrier's property. The Carrier contends that it is not answerable for the buyer's decision to hire another party to fulfill the contract with the Carrier.

From February 25 to March 20, 2013, RJ Corman was observed performing work at Havre, Montana Yard on the Milk River Subdivision. The Carrier presented an “Ongoing Personal Property Sale Agreement” dated June 12, 2010, with Steel Etc. showing that when this material was sold, the purchaser was responsible for its removal from BNSF’s property. This contract was presented to the Organization during the on-property handling. The Organization denies that this contract shows that the work was done as part of this sale, because the work was performed by RJ Corman’s forces, not Steel Etc.’s forces. The Carrier pointed out that it had no control over how Steel Etc. removed the material, because it had already been sold and was no longer under the Carrier’s control.

The Carrier’s point is well-taken. It has demonstrated a sale of this material to a third party on an “as is, where is” basis. The Carrier had no say in how that third party arranged to remove the scrap. Since the work was not done at the direction of the Carrier, the Organization’s members have no claim to the disputed work. Numerous Boards have considered this type of arrangement. See, Third Division Awards 35772, 32436, 30637, 30224, 28615 and Public Law Board No. 4768, Award 24. As explained in Third Division Award 36209, “the removal of material under the terms of an ‘as is, where is’ contract does not violate the Agreement and requires no advance notice because the material is no longer owned by the Carrier.” The Carrier presented ample evidence that the material had been sold to Steel Etc. Under these circumstances, the work was no longer the Carrier’s to direct.

**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 May 2019.