

**PUBLIC LAW BOARD NO. 7101
CASE NO. 19**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(and
(
(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 (Jacobs Contracting Services) to perform routine Maintenance of Way of cleaning right of way of ties and debris within Green River, Wyoming Yard on the Stauffer Branch and beginning at approximately Mile Post 847 near Granger, Wyoming on the Wyoming Division and working westward commencing on September 3, 2002 and continuing (System File D-0252-2/1242714).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith effort to reach an understanding concerning such contracting as required by Rule 52(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators R. M. Case, Truck Operator M. A. Matthie, Extra Gang Laborers S. S. Lucero, M. S. Condos, J. S. Wagstaff and J. J. Vasquez shall now '* * * each be allowed an equal proportionate share of the man hours worked by the outside contracting force as described in this claim, at their respective Roadway Equipment Operators, Truck Operators and Extra Gang Laborers Straight Time and Overtime rates of pay as compensation for the violation of the Agreement for hours worked by the outside contracting force in cleaning the Right of Way of tie butts and debris. This claim for compensation includes that Claimants be compensated for the loss in what is normally considered overtime hours for Maintenance of Way Employees.'

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant R. M. Case has established and holds seniority as a Roadway Equipment Operator on the Eastern District. Claimant M. A. Matthie has established and holds seniority as a Truck Operator on the Wyoming Division. Claimants S. S. Lucero, M.S. Condos, J. S. Wagstaff and J. J. Vasquez have established and hold seniority as Extra Gang Laborers on the Wyoming Division. On the dates involved in this matter, Claimants were regularly assigned to positions within their respective classes.

Beginning on September 3, 2002 and continuing, the Carrier allegedly assigned Jacobs Contracting Services to perform right of way cleaning work, specifically cleaning the right of way of used ties, butts and debris on the Wyoming Division within the Green River, Wyoming Yard on the Stauffer Branch and beginning at approximately Mile post 847 near Granger, Wyoming and working west. Two equipment operators and four laborers of Jacobs used equipment allegedly recognized as Maintenance of Way equipment to pile, load and transport ties, tie butts and debris. From September 3 through September 15, 2002, Jacobs employees worked a minimum of nine hours per day, five days per week. Beginning on September 16, 2002 and continuing, Jacobs employees worked a schedule of eight days of 10, 11 or 12 hours each followed by seven rest days.

This case involves the Carrier's sale of ties, butts, and debris on an "as is, where is" basis to an outside party, Kalamert Railroad Salvage. According to the Carrier, according to the "as is, where is" Agreement, Kalamert had the right to contract out the work of loading and transporting its purchased property, taking it from the Carrier's right-of-way.

The Organization contends that the Agreement was violated when the Carrier allegedly assigned Jacobs to perform Maintenance of Way work, specifically, cleaning the right of way of used ties, butts and debris on the Wyoming Division within the Green River, Wyoming Yard on the Stauffer Branch and beginning at approximately Mile post 847 near Granger, Wyoming and working west. First, it claims that the Carrier did not provide adequate Notice to the Organization. Second, the Organization claims that it was improper for the Carrier to contract out

the above-mentioned work, which is work properly reserved to the Organization. The Organization argues that because Claimants were denied the right to perform the relevant work, Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the ties and wood debris were sold to Kalamert Railroad Salvage on an "as is, where is" basis, which historically has been allowed and work consequent to said sale is not the province of the Organization. Because the work was performed pursuant to said sale, Notice to the Organization was not required.

After a careful review of the record, we find that the instant matter qualifies as an "as is, where is" sale and therefore, is outside the purview of the Agreement. We note that "as is, where is" is defined as follows:

It is well settled that a genuine sale of Carrier property on an "as is, where is" basis does not constitute an impermissible contracting of reserved work. ... Because such sales do not involve work performed for the Carrier, the notice requirements pertaining to contracting of reserved work are not applicable. Third Division Award No. 37104 (Referee Wallin, 7/21/04)

In the instant case, we have reviewed the record and the specific language of the Contract and find that the instant sale of the ties, butts and debris by the Carrier to Kalamert Railroad Salvage constitutes an "as is, where is" sale. Thus, because the ties and wood debris became the purchaser's property, the removal of said material does not fall under the purview of contracting. This was a *bona fide* sale and therefore, the Carrier was not required to provide Notice to the Organization. Thus, the Organization's Claim, including the issues of Notice and work assignment, is denied.

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the removal of the ties, butts and debris by Jacobs was improper. The Organization has been unable to meet its burden of proof. The Claim is therefore denied.

The Claim is denied.

AWARD

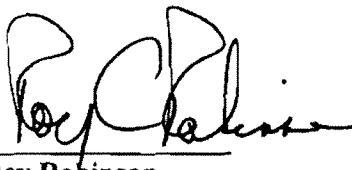
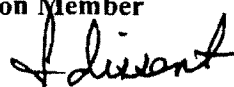
Claim denied.

**Steven
Bierig**

Digitally signed by Steven Bierig
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Date: 2010.06.14 13:32:36 -05'00'

Steven M. Bierig
Chairperson and Neutral Member


Dominic Ring
Carrier Member


Roy Robinson
Organization Member


Dated at Chicago, Illinois this 14th day of June 2010.