PUBLIC LAW BOARD NO. 6538

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	AWARD NO. 10
and	)	CASE NO. 10
	)	
BNSF RAILWAY COMPANY	)	

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Wood Waste Energy, Inc.) to perform Maintenance of Way work (load and haul ties on the right of way) on the Marshall Subdivision of the Dakota Division beginning November 16, 1999 and continuing, instead of Truck Driver V. G. Van Voorst and Group 2 Machine Operator J. P. DeSchepper.

(2) The Carrier further violated the Agreement when it failed to provide the General Chairman with an advance written notice of its plan to contract out the aforesaid work as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Truck Driver V. G. Voorst and Group 2 Machine Operator J. P. De Schepper shall now each be compensated for '...eight (8) hours straight-time and all overtime worked by the contractor' employees for each day beginning on November 16, 1999 and continuing until the violation ceases.'"

FINDINGS:

Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The instant claim contends that the Carrier violated the provisions of the Agreement when it engaged the services of an outside company (Wood Waste Energy, Inc.) to load and haul ties from the Carrier's right of way on the Marshall Subdivision of the Dakota Division beginning on November 16, 1999 and thereafter on a continuing basis. The Organization argues that the work performed by Wood Waste Energy, Inc. falls within the scope of the Agreement and has traditionally and

customarily been performed by BMWE employees. In addition, the work was contracted out without the required prior notice. For these reasons, Claimants should be compensated for the lost work opportunities. See, Third Division Award No. 37572.

Carrier's principal defense is that the ties were sold to Wood Waste Energy, Inc. on an "as is, where is" basis. The work involved in the loading, hauling and removal of the ties did not violate the Agreement since the ties were no longer owned by the Carrier. Since Carrier relinquished to the outside concern all rights and legal title to the property, it was not required to provide notice to the Organization, Carrier submits. See, Third Division Award Nos. 37621 and 37270.

During the on-property handling, the Organization was provided a copy of the January 20, 1999 Agreement between the Carrier and Wood Waste Energy, Inc. The Organization argues that, although the document purports to be a sale, close examination reveals that it is nothing more than a subcontracting arrangement designed to circumvent the Agreement. The Organization points out that ownership of the ties allegedly was transferred to Wood Waste Energy, Inc. for $1.31 per ton, yet the Carrier agreed to pay Wood Waste Energy, Inc. $14.69 per ton for processing and disposal of the ties. In the Organization's view, it is doubtful that the Carrier would enter into such a financial arrangement to process and dispose of ties it no longer owned.

The Board finds, after careful consideration, that the same argument has been addressed on this property and it has not been resolved in the Organization's favor. In Third Division Award No. 37621, involving an identical contractual arrangement with Wood Waste Energy, Inc., the Board concluded as follows:

> ...[W]e find that the instant matter qualified as an 'as is, where is' sale and, therefore, is outside the purview of the Agreement. The fact that there was a reciprocal financial arrangement between the Carrier and [Wood Waste Energy, Inc.] does not change the fact that this was a bona fide sale, and, therefore, the Carrier was not required to provide notice to the Organization.

The Organization argues that there is another award which should be relied upon here. Having reviewed Third Division Award No. 37522, however, we find that it is distinguishable from the case at hand as it did not involve either the same parties or the same contractual arrangement with an outside concern.

To insure predictability and stability in labor-management relations, we must follow precedents on this property, particularly where the same factual

predicates are present. The Organization failed to show that Third Division Award No. 37621 was palpably erroneous. We adopt the logic and findings of that award and find that the instant claim must be denied on the same basis.

AWARD

Claim denied.

ANN S. KENIS, Neutral Member

Carrier Member
William A. Osborn

Organization Member
Roy C. Robinson

Dated this 24th day of July 2007.