

**PUBLIC LAW BOARD NO. 7101
CASE NO. 1**

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 (McGuire & Hester Construction Company) to perform Maintenance of Way work (remove switch and ballast for new switch to be installed, remove ballast and material from adjacent crossings and remove road crossing panels) at Mile Post 38.0 on the Mococo Line in Martinez, California on June 22 and 23, 2001 instead of the employees assigned to System Gangs 8536 and 8539 (Carrier’s file 1286298).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants assigned to Gangs 8536 and 8539 on June 22 and 23, 2001 shall now ‘ ... each be paid twenty (20) hours of overtime at their respective rates of pay for the hours worked by the McGuire & Hester Construction Company on those same dates. Payment shall be in addition to any compensation they may have already received.

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.

All Claimants have established and hold seniority on their respective classes in the Maintenance of Way Department. On the pertinent dates, Claimants were regularly assigned to positions on Gangs 8356 and 8539 working compressed 4-day work weeks, scheduled from 6:00 a.m. until 4:00 p.m. Monday through Thursday, with Friday, Saturday and Sunday designated as rest days.

This case involves the Carrier's sale of its property to an outside party. Specifically, the Carrier's employees cut a retired switch from the rail, which was not being retired, at Mile Post 38.0 at Martinez, California. An outside contractor, McGuire & Hester, spent approximately 20 hours removing the switch and ballast from the location. The switch had been sold to McGuire and Hester on an "as is, where is" basis. According to the Carrier, according to the "as is, where is" Agreement, the purchaser loaded and transported its purchased property, taking it from the Carrier's right-of-way, to its own property. The switch and ballast were removed by the Contractor's employees on June 22 and 23, 2001 and consumed approximately 20 hours of time.

The Organization contends that the Agreement was violated when the Carrier assigned outside forces (McGuire & Hester Construction Company) to perform Maintenance of Way work, specifically the removal of a switch and ballast to allow for installation of a new switch, the removal of ballast and material from an adjacent crossing and the removal of road crossing panels. First, it claims that the Carrier did not provide adequate Notice to the Organization as is required. 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 retired switch was sold "as is, where is", which historically has been allowed and consequent work 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 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)

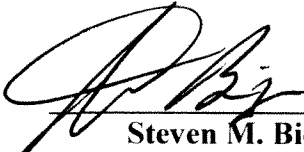
In the instant case, we have reviewed the record and find that the instant sale of the retired switch by the Carrier to an outside party constitutes an “as is, where is” sale. Thus, because the retired switch and ballast became the purchaser’s property, the removal does not fall under the purview of 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.

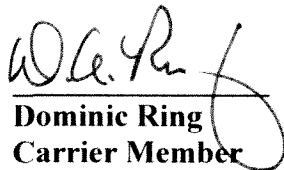
Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the removal of the retired switch and ballast by McGuire & Hester Construction Company was improper. The Organization has been unable to meet its burden of proof. The Claim is therefore denied.

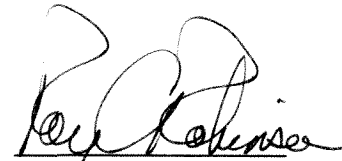
The Claim is denied.

AWARD

Claim denied.


Steven M. Bierig
Chairperson and Neutral Member


Dominic Ring
Carrier Member


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 27th day of Feb 2009.