

PUBLIC LAW BOARD 6430

Award No. 5
Case No. 5

PARTIES TO 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 (Heavy Railroad Excavating) to perform routine Maintenance of Way work of cleaning the right of way of ties on the Ayer Subdivision starting at Cheney, Washington and working toward Matthews, Washington commencing November 8, 1998 and continuing (System File J-9852-82/1177216).
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 said work and failed to make a good-faith attempt to reach an understanding concerning said 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 Operator D. W. Dacus, Foreman P. S. Gonzales, Truck Operator B. J. Lamb and Sectionmen T. J. Castorena and E. A. Leija shall now each be paid '*** at his applicable straight time and overtime rate a proportionate share of the total hours worked by the contractor doing the work claimed as compensation for loss of work opportunity suffered from November 8, 1998, until the contractor is removed from Company property or until the project is completed.***'

FINDINGS:

This Board, upon the whole record and all of the evidence, finds

and holds as follows:

1. That the Carrier and the Employees involved in this dispute are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended; and


2. That the Board has jurisdiction over this dispute.

OPINION OF THE BOARD:

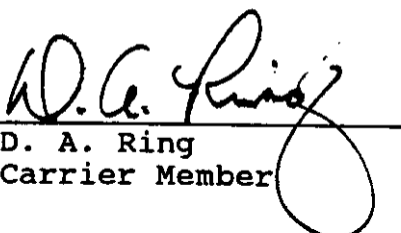
A careful review of the record indicates that the present dispute involves an alleged "as is, where is" transaction. The record concerning the transaction, however, lacks the necessary clarity to determine whether a bona fide "as is, where is" transaction occurred. (Attachment No. 1 to Employees' Exhibit A-7 at sheet 1 of 1; Carrier's Exhibit B-1 at page 1; and Carrier's Exhibit B-7.) In the absence of sufficient evidence, the record must be construed against the Carrier. Although some evidence exists that a transfer of ownership of the relevant material actually did occur, a technical violation of the collective bargaining agreement also occurred insofar as the Carrier made certain payments for the outside forces to remove the relevant material. Such payments by the Carrier therefore preclude a finding that a completely bona fide "as is, where is" transaction occurred. Thus the Carrier's affirmative defense for contracting out is not completely valid. In the absence of any further evidence in the record and in the context of these special and unusual circumstances, each Claimant shall receive 40 hours of straight time compensation as a remedy for the violation of the collective bargaining agreement by the Carrier.

AWARD:

The Claim is sustained in accordance with the Opinion of the Board.


Robert L. Douglas
Chairman and Neutral Member


D. D. Bartholomay
Employee Member


D. A. Ring
Carrier Member

Dated: 9/9/2002