

PUBLIC LAW BOARD 6430

Award No. 13

Case No. 13

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 (Gillman Railway Services) to perform routine Maintenance of Way work (cleaning right of way of ties and wood debris) between Mile Posts 6.41 and 67 on the Marysville Subdivision of the Kansas Division beginning June 8, 1998 and continuing (System File W-9852-164/1151592).
2. The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intent to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Eastern District Group 19 Equipment Operators M. J. Coan, M. A. Glendening and Kansas Division Group 11 SPTMO's G. L. Yowell, D. A. Cox, B. A. Bell and R. L. Thorman shall now each be compensated '\*\*\* 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 and Special Power Tool Machine Operators Straight Time and Overtime rates of pay....'

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. (Employees' Exhibit G-1 at sheet 1 of 1 and Carrier's Exhibit B-1 at page 1 of 1.) 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.

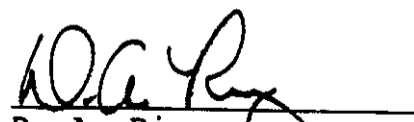
AWARD:

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

  
Robert L. Douglas  
Chairman and Neutral Member

  
D. D. Bartholomay  
Employee Member

Dated: 9/9/2002

  
D. A. Ring  
Carrier Member