# PUBLIC LAW BOARD NO. 6538

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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES | ) | |
| | ) | AWARD NO. 7 |
| and | ) | CASE NO. 7 |
| | ) | |
| 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 from right of way) on the Lakes Subdivision of the Minnesota Division beginning September 7, 1999 and continuing through September 22, 1999, instead of Truck Driver E. G. Sams and Group 2 Machine Operator D. W. Kolodzeske (System File -T-D-1898-B/11-00-0023 BNR).**

**(2) The Carrier violated the Agreement when it assigned outside forces (Wood Waste Energy, Inc.) to perform Maintenance of Way work (load and haul ties from the right of way) on the Brainerd Subdivision of the Minnesota Division beginning on October 11, 1999 and continuing through November 11, 1999, instead of Truck Driver R. D. Lembke and Group 2 Machine Operator S. E. Edin (System File T-D-1905-B/11-00-0031).**

**(3) The Carrier violated the Agreement when it assigned outside forces (Wood Waste Energy, Inc.) to perform Maintenance of Way work (load, stockpile and haul ties from the right of way) on the Lakes Subdivision of the Minnesota Division on December 15, 1999 and January 26, 2000, instead of Truck Driver R. A. Nikstad and Group 2 Machine Operator L. E. Sanford (System File T-D-1998-B/11-00-0219).**

**(4) 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.**

**(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Truck Driver E. G. Sams and Group 2 Machine Operator D.**

W. Kolodzeske shall now each be compensated for ninety-two (92) hours' pay at their respective straight time rates of pay and for one hundred seven (107) hours' pay at their respective time and one-half rates of pay.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Truck Driver R. D. Lembke and Group 2 Machine Operator S. E. Edin shall now each be compensated for one hundred ninety-two (192) hours' pay at their respective straight time rates of pay and for fifty-six and one-half (56.5) hours' pay at their respective time and one-half rates of pay.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Truck Driver R. A. Nikstad and Group 2 Machine Operator L. E. Sanford shall now each be compensated for sixteen (16) hours' pay at their respective straight time rates of pay.

**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 claims, consolidated before this Board, contend 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 cross-ties on the Lakes and Brainerd subdivisions in Minnesota during various periods in 1999 and 2000. The Organization argues that the track 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 the same 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. This is particularly true where the cases involve nearly identical facts. 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

**ANN S. KENIS, Neutral Member**

William A. Osborn

**Carrier Member**
**William A. Osborn**

Roy C. Robinson

**Organization Member**
**Roy C. Robinson**

**Dated this** 24th **day of** July **2007.**