PUBLIC LAW BOARD NO. 7099

BROTHERHOOD OFMAINTENANCE OF WAY EMPLOYES, DIVISION OF I.B.T. **CASE No. 06**

-And-

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

The Claim, as described by the Petitioner, reads as follows:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (T.C. Taylor Company) to perform routine Maintenance of Way work (operate boom crane) in conjunction with System Tie Gang 9067 and cleaning the right of way of ties on the Mason City Subdivision beginning on March 31, 2004 and continuing (System File UPRM-9558T/1399849)

(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 referenced to in Parts (1) and/or (2) above, Claimant H. Olivas shall now be compensated at the applicable roadway equipment operator (REO) rate of pay for all hours expended by the contractor employe in the performance of the aforesaid work beginning March 31, 2004 and continuing.

The Carrier has declined this claim."

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record of this case together with the parties' presentation, the Board finds that the claim should be disposed of as follows:

On or about May 17, 2004, BMWE Vice Chairman R. D. Mulder filed an initial claim letter with Manager of Labor Relations Pam Allen in which Mr. Mulder alleged as follows:

> [S]tarting on Wednesday, March 31, 2004, the Carrier had a Contractor loading up the old ties replaced along the tracks following the 9067 Tie Gang, working in conjunction with the 9067 gang. The contractor employee works for The Taylor Company and works the same days and hours as the 9067 gang. The contractor uses a hydraulic boom type crane to perform this work. The Carrier owns similar equipment that could be used to perform his work. Claimant is experienced on boom type equipment and is able to perform this work if only given the opportunity.

On or about July 2, 2004, the Carrier responded with a denial of the claim. The Carrier offered the following as the rational underlying its denial:

> The Carrier does not have the proper equipment, as you allege in your claim, to pick up and dispose of the old ties. In this case, the Contractor also disposes of the old ties. Removal of the ties is clearly not a violation of our Agreement nor can it be considered to fall under the Scope of said Agreement. As is made explicitly clear by the contract, the scrap ties are the property of the Contractor and, therefore, it was not necessary to send notice of their removal from the Carrier's property.

Subsequently, on or about July 26, 2004, BMWE General Chairman K. L. Bushman appealed the decision, reiterating its position that the contractor was performing scope covered BMWE work. By letter dated September 25, 2004, the Carrier denied the Organization's appeal, offering the following for such denial

1. That the BMWE's claim is procedurally defective in that it was not handled in the usual manner in accordance with the Railway Labor Act;
2. That the scrap ties removed from the work site were not the property of the Carrier since they had been sold on an "as is, where is" basis;

3. Since the issue before the Board has already been addressed on numerous occasions, the principle of *stare decisis* applies, warranting dismissal of the instant claim;
4. Since the Carrier does not own the scrap material, the 15-day contracting notice to the General Chairman is not required;
5. That the Organization failed to set forth a prima facie case establishing the existence of any violation of the Agreement, and finally,
6. That the remedy sought by the Organization is excessive since the Claimant was fully employed and lost no wages or work opportunity.

We address the Carrier's claims in the order given.

First, the Board notes that subsequent to the filing of the instant claim together with the Carrier's responses, the Carrier raised virtually the identical procedural argument in its argument before the Board the NRAB, Third Division Award 37368 where it maintained that the claim had been submitted before the wrong General Chairman, who was not a recognized representative of the Claimants. The Board easily disposed of this argument, concluding that the claim had been properly submitted, due to the fact that "[t]he August 1, 1998 Agreement mooted the Carrier's contentions otherwise." Moreover, we note that even had this not been the case, it is telling that during the on-property correspondence between the parties, the Carrier, in its December 5, 2002 letter to the Organization, noted, in relevant part, "Without agreeing in any way with the positions raised in your letter, I do agree that the matter ultimately will be resolved in court." Given this stated position by the Carrier, it can be reasonably assumed that had the Courts ruled in a manner consistent with the Carrier's position, the procedural issue raised in this case would have been mooted. We therefore conclude that there is no basis for the Board's dismissal of the instant claim on the basis of a procedural defect.

Next, the Carrier maintains as an affirmative defense, that the ties at issue were part of a "as is, where is" transaction. The "Compensation" provision set forth in the "Contract For Work or Service" between the Carrier and T C Taylor provides in relevant detail:

> In consideration of the performance of the work herein described and the fulfillment of all covenants and conditions herein contained to the satisfaction and acceptance of the Railroad Representative, the Railroad will pay to the Contractor for work actually performed by the Contractor at the Contractor's unit rates . . .

The Specifications provision of the foregoing "Contract For Work or Service" provides, under Section C, "Ownership of Ties" that:

> 1) The Railroad reserves the right to retain material for use in other projects as it deems necessary. The Track Supervisor shall provide a list to the Contractor of those materials to be retained prior to commencement of a project.
> 2) All material released from projects during the term of this agreement shall become the exclusive property of the Contractor at the time that the material is removed from the track structure. The Contractor assumes the risk of loss at this time. The Contractor agrees to accept the transfer and assignment of the material as is, where is,

A fair reading of the foregoing provisions reveals that the Carrier contracted with the Contractor for the removal of ties, paid the Contractor for such services, and that unless specifically expressed otherwise, the Carrier retained all retention rights for the any ties removed by the Contractor. Since there is nothing in the record of this case establishing that the Carrier released the ties at issue on an "as is, where is" basis, it can reasonably be inferred that the Carrier retained all rights to the material removed by the Contractor. Accordingly, since the Carrier carries the burden of demonstrating otherwise, under the facts at hand, this Board cannot conclude that the contract at issue was a "as is, where is" agreement. This conclusion is not unlike that reached in NRAB Third Division Award No. 37572, where the Board noted:

> Thus, it is clear that the "as is, where is" contract purportedly at the heart of this claim was not the typical sales contract. Rather, it appears to have been an agreement reflecting the Carrier's intention to pay the contractor to perform the clean-up and removal of the used railroad ties, work which the Claimants have performed in the past . . .

(See also NRAB Third Division Award 37854, where the Board noted in relevant part:

> The contract between the Carrier and National simply does not bear the hallmarks of a sale. One generally does not pay a third party to remove and dispose of that third party's own property. . . . Insofar as the removal and disposal of ties was performed by National for the Carrier's benefit rather than in order to simply retrieve its own property, the Carrier's "as is, where is" defense must fail, under the particular circumstances of this case."

Next, the Carrier's stare decisis argument rests in its claim that it has the right to sell its own property. Whereas there is no dispute in this matter regarding the Carrier's right to sell its property in the general sense, the issue in this case focuses on the Carrier's right to sell the ties which are the subject of this dispute. Since, as noted and discussed above, the Carrier has not prevailed in its "as is, where is" claim, its *stare decisis* argument has no application in this case.

Next, in order to address the Carrier's 15-day notice argument, we must first decide whether the work at issue, namely the handling of ties, is work that is reserved to BMWE represented employes. To answer that question, the Board need look no further than the decision issued by the Board in NRAB Third Division Award No. 37572. To this Board, there is no question that said work accrued to BMWE forces and hence was protected, subject to the contracting exceptions delineated in Rule 52. (See also NRAB Third Division Award No. 28590). That being said, Rule 52 requires the Carrier to notify the General Chairman in writing as far in advance of the date of the contracting transaction as practicable, but not less than fifteen (15) days prior thereto, except in cases of a genuine emergency. Since there has been no claim that a genuine emergency existed in the case at bar, the Carrier's failure to provide the General Chairman said notice must be viewed as a violation of Rule 52, as well as the December 11, 1981 Letter of Understanding.

Having determined that the Carrier violated Rule 52 as well as the Scope Rule, there remains a question of the appropriate remedy. While we are aware of a number of awards that stand for the proposition that monetary awards are reserved only for furloughed claimants, we are also aware

of at least an equal number of awards that hold that the loss of work opportunity warrants a monetary remedy to the affected claimant(s). (See, e.g., Third Division Awards 37572, 32862). The remedy in the instant case seeks to restore lost work opportunities. It is indeed possible that the Claimant could have performed the contracted work on an overtime basis, or, in the alternative, that another covered employe could have been called in to work on the project. Had the Carrier given a Rule 52 notice, those questions could have been the subject for discussion in conference between the parties. Having failed to give the required notice, the Carrier cannot now claim that the result of affording the requested remedy is unfair. Accordingly, this claim will be sustained in its entirety. The case is therefore remanded to the parties to determine the number of hours worked by the contractor on the dates at issue in the claim. Claimant shall be compensated accordingly.

AWARD

Claim sustained.

Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

Dated: September 30, 2008

Buffalo, New York