

**PUBLIC LAW BOARD NO. 7101
CASE NO. 18**

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 (RTI Rail Services) to perform routine Maintenance of Way and Structures Department work (cleaning right of way) between Mile Posts 36.0 and 108.0 on the Spokane Subdivision within the Oregon division beginning on May 17, 2004, and continuing, instead of Messrs. R. Porter, D. Hoffman, B. Lamb and C. Anderson (System File C-0452-114/1402909).
- (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 or 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, Claimants R. Porter, D. Hoffman, B. Lamb and C. Anderson shall now each be compensated at their respective applicable rates of pay for all hours for an equal proportionate share of the total man-hours, straight time and overtime, expended by the outside forces in the performance of the aforesaid work beginning May 17, 2004 and continuing.

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.

Claimant R. E. Porter has established and holds seniority on the Northwest District as a Group 19 Roadway Equipment Operator. Claimant D. A. Hoffman has established and holds seniority on the Oregon Division as a Group 8 Foreman. Claimant B. J. Lamb has established and holds seniority on the Oregon Division as a Group 15 Truck Operator. Claimant C. L. Anderson has established and holds seniority on the Oregon Division as a Group 18 Extra Gang Laborer. Claimants were assigned and working their respective positions on the dates involved in this dispute.

Beginning on May 17, 2004 and continuing, the Carrier allegedly assigned RTI Rail Services to perform right of way cleaning of scrap, used ties and wood debris between Mile Posts 36.0 and 108.0 on the Spokane Subdivision of the Oregon Division. Four employees of the contractor working eleven hours per day used a truck and trackhoe to load scrap, ties and debris.

This case involves the Carrier's sale of its property to an outside party. According to the Carrier, it sold the ties on an "as is, where is", basis to a third party. According to the Carrier, the "as is, where is" Agreement mandates that the purchaser had the right to contract out the work of loading and transporting its purchased property, taking it from the Carrier's right-of-way.

The Organization contends that the Agreement was violated when the Carrier allegedly assigned RTI to perform said Maintenance of Way work. First, it claims that the Carrier did not provide adequate Notice to the Organization. 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 ties and wood debris were sold to a third party on an "as is, where is" basis, which historically has been allowed and all work performed consequent to the sale is not the province of the Organization. Because the work was performed pursuant to said sale, Notice to the Organization was not required.

In order for the Carrier to be successful, it must prove the existence of an “as is, where is” contract. In the instant case, a review of the evidence shows that no such contract has been presented, in spite of a request from the Organization. Absent a contract to substantiate the Carrier’s contention, the Claim must be sustained. As indicated in Third Division Award 37470 issued by Referee Goldstein:

... As countless Awards of the Third Division have held, we also hold that when the ‘as is, where is’ affirmative defense is raised by the Carrier, it is incumbent upon the Carrier to furnish persuasive evidence in support of that defense while the claim is still in on-property handling. See Third Division Awards 30661, 31521, 32320, 32858, and 36093. From the record before us, the Carrier did not tender any evidence of probative value. Therefore, it unsuccessfully carried its burden of proof in this critical defense, we hold.

In the instant case, we have reviewed the record and find that the “as is, where is” contract of sale is not present. Thus, because the Carrier has not proven this significant aspect of its affirmative defense, the Claim must be sustained.

As to the remedy in this case, we find that Claimants should be made whole. The instant case involved a situation in which the Carrier was to provide the Organization with a copy of the contract to allow the Organization to properly determine its position regarding the validity of the “as is, where is” sale. It did not do so. This Board adopts Referee Benn’s reasoning in a notice case in Third Division Award 32862:

... The Carrier’s course of action now is a straight forward one – simply give notice where the work arguably falls “within the scope of the applicable schedule agreement.” If it does so, the Carrier will not be faced with the kind of remedy imposed in this case because it failed to give notice.

This claim shall be sustained in its entirety. We shall remand this case to the parties to determine the number of hours worked by the contractor’s forces on the dates set forth in the claim. Claimants shall be compensated accordingly.

The Claim is sustained.

AWARD

Claim sustained.

Steven
Bierig

Digitally signed by Steven Bierig

Steven M. Bierig
Chairperson and Neutral Member

DA RZ
Dominic Ring
Carrier Member
6-5-09

Roy Robinson
Roy Robinson
Organization Member

Dated at Chicago, Illinois this 5th day of June 2009.