Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29394
Docket No. MW-28674
92-3-89-3-26

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Duluth, Missabe and Iron Range 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 to perform track dismantling and transportation work at Fayal Stub, Coons Pacific, Frazer Yard and Proctor Yard from September 24, 1987 through October 1, 1987 (Claim No. 37-87).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of either Part (1) and/or Part (2) hereof, the senior furloughed B&B truck-drivers on the B&B truck drivers' roster and the appropriate working and furloughed track department employes shall be allowed pay for the amount of hours expended by the contractor's forces while performing the above-described work."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimants in this dispute hold seniority within their respective classes as either truck drivers or track department forces and at the time of this dispute were senior furloughed employees within their respective classes.

The dispute in this case arose when the Carrier, after it failed to give the Organization's General Chairman notice it would do so (Supplement No. 3 and Letter of Agreement dated December 11, 1981), contracted out maintenance of way work from September 24, 1987, to October 1, 1987, to an outside concern instead of utilizing the furloughed Claimants who held seniority and were skilled to perform the dismantling, picking up, and transporting of track material.

The Organization contends that the Carrier removed work accruing to the Claimants from the scope of their Agreement and deprived the Claimants of the opportunity to perform said work and obtain monetary benefits therefrom.

The Carrier contends that the Organization's claim was vague, imprecise, and untimely; that the working Agreement between the parties does not apply to retired or abandoned facilities which are no longer used in the Carrier's operation; that the work in question was neither maintenance nor new construction; that the work in question is not reserved exclusively to the Maintenance of Way employees; and that contractors have routinely done the dismantling and transportation functions associated with track retirement.

This Board has thoroughly reviewed the record in this case. It is apparent from that record that the Carrier entered into a transaction with a salvage dealer whereby the Carrier relinquished to the contractor all right and title to the trackage to be removed by the contractor. The contractor was entitled to the material to be removed.

However, part of the arrangement involved the return of some of the materials to the Carrier as "partial payment" against a credit that would be due the Carrier. Those track materials were delivered to the Carrier by the contractor on several dates in 1987.

This Board recognizes that most of the work in dispute involved property that was no longer owned by the Carrier because it had been sold. This Board recognizes that we have held in Third Division Award 12918:

> ". . . we must conclude that the work of dismantling and removing completely the abandoned property does *not fall within the contemplation of the parties.* The work cannot be considered maintenance, repair or construction."

Consequently, for the most part, we find no violation by the Carrier here.

However, this Board finds that the Carrier caused outside forces to perform work customarily and normally performed by Maintenance of Way employees to the extent that the contractor dismantled and transported materials back to the Carrier for the continual use of the Carrier. In other words, as we found in Third Division Award 24280:

". . . the dismantling and removing performed by the purchaser included work on behalf of the Carrier which appears to the Board to be considerably more than incidental to the removal of the purchaser's property."

In that case, this Board found that the portion of work involved in dismantling and retaining Carrier property was in violation of the Scope Rule in that it was assigned to forces holding no seniority. This Board, in that Award, directed the Carrier and the Organization to meet to determine what proportion of the work fell in that latter category. The claim was sustained in part, and the Claimants were to be paid for the work that they were improperly denied.

This Board, after having reviewed the extensive record and all of the authorities submitted by both parties, hereby finds that the same Rule as we followed in Award 24280 should be followed here. That portion of the work involved in the dismantling and removal of Carrier property by the outside contractor was not improper and, therefore, that portion of the claim will be denied. However, the portion of the work that was involved in dismantling and transporting Carrier property back to the Carrier was a violation of the Rules and, to that extent, the claim will be sustained.

This Board orders, as we did in Award 24280, that the Carrier and Organization meet to determine what proportion of the work fell into the latter category which we have deemed to be a violation. An appropriate payment should be made to the Claimants for the amount of work that was lost when the Carrier utilized the outside contractor to dismantle and bring materials back to the Carrier for further use. This Board agrees with the Organization's contention that economy is not a valid justification for violation of the Agreement. The Carrier did not notify or confer with the General Chairman of its intent to contract out work of the dismantling and bringing back to the Carrier of the abandoned trackage. Therefore, the Carrier must pay the appropriate furloughed Claimants for the loss of work.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of September 1992.

CARRIER MEMBERS' CONCURRENCE
AND DISSENTING OPINION
TO
AWARD 29394, DOCKET MW-28674
(Referee Meyers)

We concur in the Majority's decision that:

> "This Board has thoroughly reviewed the record in this case. It is apparent from that record that the Carrier entered into a transaction with a salvage dealer whereby the Carrier relinquished to the contractor all right and title to the trackage to be removed by the contractor. The contractor was entitled to the material to be removed....This Board recognizes that most of the work in dispute involved property that was no longer owned by the Carrier because it had been sold."

The evidence of record was that the Fayal stub, Coons Pacific and Frazer yard had been abandoned by the Carrier in 1984 and 1985. Not only were such sales of abandoned property long in duration on this Carrier, but it has been upheld by this Board in Awards 12918, cited by the Majority, and in 19994, 21933 and 28489 among others.

However, we must take issue with the Majority's conclusion that certain material was returned to the Carrier as a partial payment "on several dates in 1987."

Our objection rests on two factual provisions in this record. First, the Claim identifies four locations and seven dates in its initial claim on the property (10/27/87) and to this Board. However, as noted above, these locations were abandoned in 1984 and 1985 or more than two years prior to the Organization's initial claim. On the property, Carrier pointed out, without rebuttal, that the dismantling and/or hauling occurred long before this claim. The Majority, in finding a violation, has ignored Carrier's proper timeliness argument.

Second, as the Carrier specifically noted on the property:

> "Only dates for the transportation work were furnished but no dates or other information on the dismantling/handling work were given."

Thus, while the Organization claimed both the actual dismantling and the transportation of some second hand rail, the dates of claim involve only claimed transportation. However, the Organization has sought compensation for both, "senior furloughed B&B truck-drivers...and furloughed track department employees..." Even though it is unrefuted that the dates claimed were only alleged for the transporting of material, no claimants were ever identified. Obviously, since no track work was done on any of the seven claimed dates, no trackman has any claim.

The Majority relies upon Award 24280 involving different parties and different contract provisions in its disposition that the return of material was a violation. However, as is noted in the quote of that decision, that the action was "considerably more than incidental to the removal of the purchaser's property." (Emphasis added) No such evidence is to be found in this record. Nor was there a blatant time limit violation by the Organization in Award 24280. Therefore, that Award does not support the disposition made in this case.

Finally, we must point out that Supplement No. 3, involving the contracting of work on this property, has no connection with the December 11, 1981 side letter. Supplement No. 3 predates the provisions of Article IV of the 1968 National Agreement by more that ten years (Third Division Award 11984). Further the sid letter explicitly deals with "...the existing rule in the May 17,

1968 National Agreement..." a rule that has never governed the parties involved in this case.

We therefore Dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

E. YOST

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRENCE
AND
DISSENTING OPINION
TO
AWARD 29394, DOCKET MW-28674
(Referee Meyers)

The dissenting opinion is nothing more than a rehashing of the Carriers' position which was considered by the Board and rejected.

However, specific exception is taken to the attempted separation of Supplement No. 3 and the December 11, 1981 Letter of Agreement. Supplement No. 3 is for all practical purposes identical to Article IV of the May 17, 1968, and, therefore, the application to Supplement No. 3 is appropriate. Moreover, this Carrier is signatory to the 1981 National Agreement and consequently subject to the provisions of all its contents.

The award is correct and needs no additional comment from the parties.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRENCE AND DISSENT
TO
AWARD 29394, DOCKET MW-28674
(Referee Meyers)

1. Supplement No. 3 predates Article IV of the May 17, 1968 National Agreement by more than ten years. See Third Division Award 11984.

2. Awards 26832, 27902, 28411, 28883, 28999, 29101, 29141, 29144, 29162, 29217 and 29286, to note some of the more recent decisions involving the same parties, have consistently ruled on the basis of the application of Supplement No. 3 without other asserted encumbrances.

3. The Labor Member concedes that Supplement No. 3 is different from Article IV of the May 17, 1968 National Agreement when he says, "for all practical purposes is identical." Like being pregnant, there is no middle ground here. The provisions, by language, history and implementation, are not "identical."

4. The 1981 National Agreement, to which this Carrier is a signatory, contained no provision modifying any aspect of Article IV of the 1968 National Rule. Subjects raised in negotiations not addressed in the 1981 National Agreement, simply died.

5. The December 11, 1981 letter very specifically stated:

> "The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement..." (Emphasis added)

The letter does not contain language such as, "and other similar agreements." Further, one cannot reaffirm to something that does

not apply to him. The 1981 letter did not extend coverage to those not party to Article IV of the 1968 National Agreement.

6. In many of the Awards listed above, this Organization raised the "practically identical" argument in their Submissions. Such has been universally rejected as was stated in Award 29162:

> "...the Organization's reliance upon the December 11, 1981 National Agreement is not well-founded. We note that the Organization made a passing reference to this Agreement in its initial claim and neither party addressed the matter again until the Submissions before this Board were presented, thereby precluding us from considering the arguments and analysis which, effectively, were new arguments raised on this subject."

Further, if relevant, one would expect such to be raised and argued on the property by those most familiar with their own rules, not simply a part of a computerized, verbose exposition made a part of the Organization's Submission.

7. The inappropriate conjunction of Supplement No. 3 and the December 11, 1981 letter found at page 2 of this Award, was obviously the result of ten or more pages of NEW argument made in the Organization's Submission. Our Concurrence and Dissent, among other items, pointed out the incongruity of those separate provisions.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost