Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30839
Docket No. MW-30455
95-3-92-3-200

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard
(System Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Railroad Construction and Maintenance Corp.) to perform Maintenance of Way work (dismantling track) between Milepost AN 647.4 and Milepost 649.0 on the Thomasville Subdivision of the Atlantic Division from June 4, 1990 up to and including June 22, 1990 [System File 90-88/12(90-968) SSY].

(2) The Carrier also violated Rule 2, Section 1 when it failed to confer with the General Chairman and reach an understanding prior to contracting out the work in question.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators V.E. Tinsley, J.O. Sloan, Jr. and C. Handley shall each be allowed an equal proportionate share of the four hundred eighty (480) man-hours, at their respective straight time rate, and an equal proportionate share of the one hundred twenty (120) man-hours, at their respective time and one-half rates of pay, for the time expended by the contractor's forces in the performance of the subject 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 employee or employees involved in this dispute are respectively carrier and employee 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.

Claimants hold seniority in the Maintenance of Way General Subdepartment, Group A, on the Atlanta-Waycross Seniority District and are assigned to Machine Operator positions with workweeks of Monday through Thursday, ten hours each day, with rest days of Friday, Saturday and Sunday.

The Organization claims that the Carrier violated the Agreement when it allowed or otherwise permitted a contractor, Railroad Construction and Maintenance Corporation, to perform the work of dismantling the Carrier's track. Beginning on Monday, June 4, 1990 and continuing every Monday through Friday, up to and including Friday, June 22, 1990, four contractor's employees performed the work of dismantling the Carrier's track located near Valdosta, Georgia, between Milepost AN 647.4 and Milepost AN 649.0 on the Thomasville Subdivision of the Atlantic Division. The work performed by the contractor's employees included, but was not limited to removing and loading in gondolas rail, joint bars and bolts, anchors, tie plates and ties. The contractor's employees worked ten hours on each of the above enumerated days, expending a total of 600 man-hours in the performance of this work.

The Carrier did not deny that the work was done by contractor's employees as asserted by the Organization. In his response dated August 31, 1990, the Division Engineer declined the claim on the grounds that the dismantling of the old disconnected main track in Valdosta, Georgia, was located on City of Valdosta property and was not part of the Carrier's property or material. When the Carrier connected to the new location of the main track through Valdosta, the isolated old main track and property became the City of Valdosta's. The contractor required gondolas to ship the material from the site.

In his letter dated February 6, 1991, the Director of Labor Relations declined the claim and reiterated the Carrier's position that dismantling of abandoned track does not fall within the scope of the schedule Agreement, the Claimants suffered no loss in earnings, and the work was not reserved by Agreement to the Claimants.

The Organization challenged the assertions made by the Carrier and requested documentation from the Carrier to support its position that the track in question was located on the City of Valdosta property and not part of Carrier property or material. No such documentation was produced during the handling of the dispute on the property, or before this Board.

The Organization urges this Board to find that the Carrier violated Rules 1, 2, 3, 4, 5, 27 and 28 of the Agreement. The critical language appears in Rules 1 and 2:

"RULE 1
SCOPE

These Rules cover the hours of service, wages and working conditions for all employees of the Maintenance of Way and Structures Department as listed by Subdepartments in Rule 5 - Seniority Groups and Ranks, and other employees who may subsequently be employed in said Department, represented by Brotherhood of Maintenance of Way Employes....

RULE 2
CONTRACTING

This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

In such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces."

The Organization established a prima facie case that the work in question was covered by the Agreement. The Carrier did not confer and reach an understanding with the General Chairman. The Carrier raised the affirmative defense that the work involved was performed on right-of-way which had become the property of the City of Valdosta. The Carrier asserted that the track had been disconnected from the Carrier's operating track, that the Carrier had abandoned the track, and that as abandoned track, it does not fall within the Scope of the Agreement. The Carrier has the burden of supporting its affirmative defense with proof in the record. In Third Division Award 29059, involving the parties to this dispute, the Board considered facts very similar to the instant case:

"The Division Manager in his April 15, 1987 reply asserted the track in question was disconnected by Carrier forces before being removed by the contractor, who, he also asserted, had purchased the track.

The Board notes that by letter dated February 11, 1988, the Organization requested a copy of the contract conveying ownership of the track to the contractor. Additional time was granted to the Carrier, upon its request, to provide the requested documentation. There was ample time to do this, and the alleged contract was not produced. The Board also finds that the Carrier never successfully established that the track was 'abandoned' in the sense which would in any way remove it from the scope of the Agreement.

In view of the foregoing, the Board must conclude that the Carrier failed to support its affirmative defense. Given the state of the record, we must conclude that the Carrier retained ownership and control over the track in question. As such, the work involved, as being historically performed by the bargaining unit, could not be contracted except as set forth in Rule 2. The contracting out was not justified under the criteria set forth therein. We also note the Carrier never made its full employment argument on the property. Accordingly, the claim must be sustained as presented."

The Board finds that the Carrier in the instant case failed to support its affirmative defense, and an award must be issued in favor of the Claimants. With respect to the remedy, however, the record shows that the Claimants were fully employed and suffered no pecuniary loss as a result of the violation. Third Division Award 18305 is relevant on this point:

> "We are only saying that since the work in question came within the scope of the Maintenance of Way Agreement, Carrier was obligated to give said advance notice. Failing to do so, Carrier violated the terms of Article IV of the May 17, 1968 National Agreement governing the parties to dispute.
>
> In regard to damages, we adhere to the principle that damages shall be limited to Claimants' actual monetary loss arising out of the Agreement violation and that this Board is not authorized to use sanctions or assess penalties unless provided for in the controlling Agreement. Since Claimants suffered no pecuniary loss in this instance, we will deny paragraph 2 of the Statement of Claim."

See also Third Division Awards 28919 and 28936.

Because the Claimants in the instant case were fully employed and suffered no pecuniary loss, we will deny paragraph 3 of the Statement of Claim and no pecuniary award of damages will be made.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.