Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31438
Docket No. MW-31358
96-3-93-3-359

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation Inc. (former Western
(Maryland Railway Company)

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

(1) The Agreement was violated when the Carrier assigned outside forces to dismantle and remove abandoned track and bridge materials at Elkins Yard, Elkins, West Virginia beginning on April 20, 1992 and on a continuing daily basis thereafter [Carrier's File 12 (92-757) WMR].

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to assign such work to outside forces.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foremen J. Arbogast, D. F. Simmons, Chauffeur G. Vandevender, Trackmen R. D. McDonald, P. I. McGee, D. J. White, D. V. Hedrick, G. B. Woods and Welder B. A. Carr shall each be allowed ten (10) hours' pay at their respective rates of pay for each workday the outside forces performed such work beginning on April 20, 1992 and continuing. In addition, each Claimant shall receive the appropriate vacation credit."

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.

The Carrier, without notice to the Organization, sold, in place, track material located on property at Elkins, West Virginia.

The Organization filed claim contending this was work within the Scope of its Agreement and that, in addition, Carrier was obligated to serve notice of intent to contract, which it did not.

Carrier responded by stating this was track material located on abandoned property and, as it had done in the past, it sold same to a Contractor on an as is, where is basis.

The Organization did not rebut the on-the-property past practice, did not challenge the sale, nor did it in any way rebut the specifics of Carrier's denial, but it did contend that the Contractor dismantled and stacked for Carrier's use some of the track material salvaged. The Carrier argued the retained material was minimal. The Organization contends it was much more than minimal.

As to be expected, each side furnished this Board with a number of Awards alleged to be precedent setting.

Before reviewing the Awards, the Board determined from the facts before it that:

(1) The property upon which the track was located was on abandoned property, and

(2) Carrier hired Contractors in the past to dismantle track on abandoned property.

The Organization furnished only two on-property Awards involving track dismantling (Third Division Awards 29059 and 30975) neither of which involved abandoned track, nor retention of some salvaged material.

The Carrier, on the other hand, presented six Third Division Awards involving track dismantling on abandoned property (30948, 30946, 30838, 30716, 30614 and 30080).

In Third Division Award 30948, the Board held:

"The fact that some materials were returned to the Carrier raises questions, but ultimately, on this property, that fact does not change the result. As set forth above, Award 30716 quotes at length from Award 19994 which finds that factor to be nondeterminative. We are obligated to follow Award 30716."

In Third Division Award 30946, the Board held:

"We do not find Award 30716 and the authority it follows to be palpably erroneous. Under the rationale of that line of authority, formal ICC approval of the abandonment is not material. In this case, there is no dispute that the track involved was abandoned."

In Third Division Award 30838, the Board held:

"The mere fact that the Carrier continues to own the subject property does not bring the dismantling of abandoned track within the scope of the Agreement. See Third Division Award 4783."

In Third Division Award 30716, the Board held:

"The threshold issue which must first be resolved in this case, and which was properly raised in the handling of this case on the property, is whether the work in question falls within the scope of the Agreement. The Board has held in a long line of Awards that work on facilities owned by a Carrier, but used for purposes other than the operation or maintenance of the railroad, do not come under the Scope Rule of the Agreement (See e.g. Third Division Awards 19994, 19639, 19253, 9602, and 4783)."

In Third Division Award 30614, the Board held:

"Carrier's assertion that it had the 'privilege of utilizing non-contract forces' to perform the work at issue, and had done so 'many times in the past' remained unrefuted."

In Third Division Award 30080, the Board held:

"The retired track was sold on an 'as is, where is' basis, and the Carrier simply allowed the contractor who purchased the track to retrieve its own property. See Third Division Awards 29959, 29016, 28615, 28489, 28488, 20851 and 10826."

The Carrier did no violence to the Agreement when it sold, without notice to the Organization, trackage on abandoned property on an as is, where is basis.

Based upon the facts established in this case as supported by at least six precedential Awards of this Board, we will deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of April 1996.