Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36209
Docket No. MW-35666
02-3-99-3-603

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (Herzog, Inc.) to perform routine Maintenance of Way work (load and haul ties) in the vicinity of Pasco, Washington between the SP&S Junction and Plymouth, Washington beginning April 7, 1997 and continuing (System File S-P-587-O/MWB 97-08-06AS BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator K. E. Winn and Laborer D. C. Ellis shall now each be compensated for pay at their respective straight time rates of pay and at their respective time and one-half rates of pay for all hours that were expended by the outside contractor in performing said work beginning April 7, 1997 and continuing.'"

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 were given due notice of hearing thereon.

On April 15, 1997, the Organization filed a continuing claim alleging that the Carrier, beginning on April 7, 1997, improperly contracted out work reserved to Maintenance of Way employees. Specifically, the Organization alleged that Herzog, Inc. was hired to pick up used ties behind System Region Tie Gang TP-09 in the vicinity of Pasco, Washington. This work, the Organization contended, is reserved to its forces by contract and longstanding practice. The Organization further asserted that the Carrier's failure to give the General Chairman a 15-day advance notice of its intent to contract out this work violated the Note to Rule 55.

The Carrier denied the claim, stating that the used ties had been purchased, not by Herzog, Inc., but by a party identified as Heavy Railroad Excavation (HRE). Under the terms of the purchase, HRE had a longstanding arrangement with the Carrier whereby it retrieved and removed the ties from the Carrier's property at its own expense. A Scrap Tie Sales Agreement dated February 14, 1996 and two supplemental agreements dated May 31 and December 30, 1996 were furnished to the Organization during the handling of the claim on the property in support thereof. During conference it was noted that the time frame and the work locations set forth in the Agreements did not correspond to the claimed work in question. Correspondence indicates that the claim was to be re-conferenced, but before that occurred the Organization filed the instant claim with the Board. The Carrier thereafter submitted the updated contract with the purchaser which covers the period and location at issue.

Under the circumstances, the Board is satisfied that the material was sold "as is, where is" to HRE, thereby obviating any claim that the work was reserved to members of the Organization. This type of arrangement has been the subject of numerous prior decisions. See, Third Division Awards 35772, 32436, 30637, 30224, 28615 and Public Law Board No. 4768, Award 24. It is well established that the removal of material under the terms of an "as is, where is" contract does not violate the Agreement and

requires no advance notice because the material is no longer owned by the Carrier. In Third Division Award 30224, a case involving similar facts, the Board stated:

> "While the Carrier offers other defenses to its action, its principal explanation is that it had an agreement with Texas International Forest Products to purchase used ties from the Carrier, with the condition that the purchaser would retrieve and remove the ties from the Carrier's property at its own expense.
>
> Assuming that this arrangement is factually supported, this becomes a case of the purchase of material in an 'as is, where is' condition. The conclusion that this is not contracting of work as defined in the Agreement has been well established in many Awards. Typical of such are Third Division Awards 28489 and 24280. Award 24280 sustained the claim as to portions of the work involving 'dismantling and retaining Carrier property,' but concluded:
>
> > '[T]he portion of the work involved in the sale and removal of Carrier property [ties and rails] was not improper and required no Article IV notice.'"

We find the foregoing discussion applies with equal force to the instant case as well. Accordingly, the claim is denied in its entirety.

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 24th day of September 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 36209, DOCKET MW-35666
(Referee Kenis)

A Dissent is required because the findings of the Majority were not based on the record as it was developed on the property.

The initial claim was filed on April 15, 1997. The claim was denied on June 2, 1997 wherein the Carrier alleged it had sold the material in question on an "as is where is" basis. From the date of the appeal, the Organization repeatedly requested that the Carrier produce the evidence the Carrier alleged supported its affirmative defense. Finally, on March 19, 1999 some twenty (20) months after it raised its affirmative defense it provided a document which it purported to be the proof that it had sold the material in question.

The problem here is that the documentation presented by the Carrier, during the on-property handling of this dispute pertained to work that was performed on another portion of the Carrier's property during the calendar year 1996. The General Chairman took issue with the Carrier's alleged proof as not supporting its position in his April 22, 1999 appeal. The letter of intent to list this case with the National Railroad Adjustment Board was filed on August 10, 1999 more than two (2) years and four (4) months after the initial letter of claim was filed. Furthermore, more than four (4) months elapsed after the General Chairman pointed out that the documentation did not support the Carrier's submission.

Brazenly and inexplicably, when the Carrier filed its submission to the Board it presented a completely different document in alleged support of its position. The record is devoid of any evidence that the Carrier exchanged that alleged sales agreement with the Organization during the on-property handling. As it has been consistently held by innumerable awards of the National Railroad Adjustment Board, the record remains open until a notice of intent is filed with the appropriate Board. The record in this case reveals that the Organization made repeated requests for the Carrier to prove its affirmative defense while the case was still pending on the property. Although the Carrier presented some alleged evidence, it clearly did not support its position in the instant case. The Majority's acceptance of the late production of alleged evidence violated the clear and unambiguous provisions of the rules of the Board and Section 3 of the Railway Labor Act.

The evidence upon which the Majority arrived at its decision to deny this case was never produced by the Carrier during the handling of this dispute on the property. Award 36209 is palpably erroneous and I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member