Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36689
Docket No. MW-35798
03-3-99-3-786

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen 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 Carrier violated the Agreement when it assigned or otherwise allowed outside forces (Rail Salvage, Inc.) to cut and load rail in the Great Falls and Conrad, Montana areas between November 3 through 19, 1997 (System File B-M-577-F/MWB 98-03-11AH BNR).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work as required in the Note to Rule 55.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Truck Driver H. R. Czifro and Welders P. L. St. George and P. H. Oleary shall each be allowed pay for eighty (80) hours at their respective straight time rates and forty-nine (49) hours at their respective time and one-half rates of pay."

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.

In a letter dated December 17, 1997, the Organization filed a claim on behalf of the above noted Claimants alleging the Carrier violated the Agreement when it "sublet work of the Maintenance of Way to an outside contractor." Specifically, the General Chairman asserted that the Carrier violated Rules 1, 2, 5, 6, 7, 24, 25, 29, 55, and the Note to Rule 55, when, on various dates in November 1997, Rail Salvage was "hired by the company" to cut up and pick up used rail.

In its denial the Carrier maintained that Rail Salvage, Inc. purchased the rail its personnel were cutting up and removing. According to the Carrier, Railroad Material Salvage purchased the material "as is-where is," and it was, therefore, its responsibility to remove same. The Carrier went on to maintain that: "The cutting up of rail purchased by another company is not work traditionally done by BMWE employees."

In its March 11, 1998 appeal the Organization restated its position that BMWE-represented employees traditionally did the work at issue, and again asserted that the Carrier had violated the Note to Rule 55 by failing to provide a contracting notice.

In a letter dated April 29, 1998, the Carrier issued its final denial, premised upon the following "points":

1. The Carrier did not contract out the cutting up and removal of Carrier owned rail. The rail was sold to Railroad Material Salvage 'as is-where is.'

2. As a result of the ownership condition of the scrap rail, Carrier was not obligated to provide the Organization with notice.

3. The Organization failed to carry its burden of proof in support of its claim.

When the issue remained unresolved, it was placed before the Board for adjudication.

Except for the times and dates, the issues set forth in this dispute are essentially identical to those contained in Third Division Award 36690, which was denied by the Board because the Carrier demonstrated persuasively that the scrap material in question had been picked up by the salvage company to which it had been sold on an "as is, where is" basis. For reasons set forth more fully in that Award this claim also is denied.

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 18th day of August 2003.

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 36689, DOCKET MW-35798
AND
AWARD 36690, DOCKET MW-35811

(Referee Nancy F. Eischen)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is based on erroneous information presented by one of the parties. Such is the case here.

The Majority held that the Carrier had satisfied its burden to prove its affirmative defense in this case. The affirmative defense was that the Carrier had sold the track material at issue here to the contractor on an "as is, where is" basis. From the initial instance where the Carrier raised this defense the Organization clearly and repeatedly asked for the Carrier to prove its affirmative defense. In an attempt to meet its burden, the Carrier finally presented a document that purportedly supported its position. The record is clear that the General Chairman immediately pointed out that the document presented by the Carrier did not pertain to the area where the work was performed. Moreover, the General Chairman clearly and forcefully pointed out that the document presented by the Carrier specifically stated:

> "This document and any documents attached and incorporated by reference constitute the entire agreement of the parties. Any modifications to the agreement must be in writing and signed by both parties. Should any term or provision be found to violate the law, the remainder of the agreement shall survive and be interpreted as to fulfill the parties intentions."

The record is devoid of evidence that the Carrier presented the probative evidence of a sales agreement. In fact, the Carrier was passing off misinformation as proof of a sale. Then, when faced with the fact that the document presented did not support its position, the Carrier asserted that a verbal agreement had been reached to extend the area covered by the document it attempted to pass off as proof. Clearly, as the above-quoted excerpt from the document shows, that document could only be modified in "writing and signed by both parties." Inasmuch as no written modification was presented, the alleged sales agreement did not support the Carrier's affirmative defense.

I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member