NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24280
Docket Number MW-24079

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it assigned dismantling and salvage work in the West Yard at Milwaukee, Wisconsin to outside forces on September 21, 28, October 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25 and 26, 1979 (System File C#117/D-2388).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations Truck Drivers D. Jensen, R. Jaraczewski and O. Gaedtke each be allowed an equal proportionate share of one hundred sixty-eight (168) hours; Bulldozer Operator M. Seider be allowed one hundred twenty (120) hours of pay; Crane Operators M. Seider, D. Leis and G. L. Peterson each be allowed an equal proportionate share of one hundred fifty-two (152) hours; Welders D. Bree, G. Tarasewicz, R. Lenertz and A. Ciofane each be allowed an equal proportionate share of one hundred four (104) hours and Laborers P. O'Quinn, L. Smith, A. Kloth, A. Davis, F. Harris, R. Martin, R. Jones, N. Evans, A. Hall, R. Vasquez, C. Smith, W. Neal, M. Adler, H. Horton, L. Morales, J. Bingmon, L. Vaughn, J. Gaedtke, G. Jones, C. Beamon, E. Chambers, M. Lutz, J. Hern, L. Wetzel, J. Davis, W. Lierman, P. Zehl, M. Nehls, C. Meeks and R. Lewitzke each be allowed an equal proportionate share of eighty-eight (88) hours at their respective rates."

OPINION OF BOARD: The Carrier undertook to enter into the sale of scrap track ties to an outside firm, Wiggins Landscaping. The contract sale provided that the purchaser would collect the scrap ties inplace on the Carrier's property. Insofar as the transaction consisted of this undertaking, there is no rule violation and specifically no requirement of the Carrier to follow the detailed notice procedure under Article IV, Contracting Out, of the May 17, 1968 National Agreement. As stated in Award No. 10826:

> "The Carrier has the legal right to sell its property; and, after such sale, ownership of such property is then vested in the purchaser thereof. ...
>
> We find no rule in the Agreement which, expressly or by inference, prohibits the Carrier from making a sale of its property in the complained of manner."

The claim has merit to some degree, however, in that 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.

The Organization in its claim states that the purchaser was "taking selected rails and ties and piling them for the Milwaukee Road. ... This material is and continues to be Milwaukee Road property." Such contention was not denied by the Carrier. In its correspondence, the Carrier states "The contractor may have also found it necessary to handle Milwaukee Road property to avoid damage ... while he is attempting to remove his own personal property".

Given this state of the facts, the Board finds that the Carrier caused outside forces to perform work customarily and normally performed by Maintenance of Way employes to the extent of dismantling and storing materials for continuing use of the Carrier.

In such a situation, the Organization need not meet the burden of exclusivity of work assignment (as might be appropriate in other circumstances). Since that portion of the work was performed by outside forces, it is sufficient to show that it is within the scope rule of the Agreement, which is clearly the case here. As stated in Award No. 18999:

> "Having found that the work involved is generally recognized as signal work we also find that it is covered by the Scope Rule. Accordingly, the Carrier's contention that Petitioner must prove exclusivity is inapplicable."

Further, the Board does not agree -- again in these particular circumstances -- that there should be no compensation to the Claimants since they were not available to perform the work because they were "fully employed in the dates of claim" as stated by the Carrier. If the Carrier had determined that the portion of the work on its own behalf was to be performed by Maintenance of Way employes, they would have been made available for this purpose. Award Nos. 13832, 15497 and 21678 (and others cited therein) hold in similar fashion.

In so holding, the Board is aware of Article IV cases, such as Award No. 21646, which hold that no compensation is due to claimant employes who are fully employed and can demonstrate no loss of earnings. However, in Award No. 21646 and others following the same reasoning, the primary issue appeared to be the failure of the Carrier to give appropriate notice under Article IV -- even though, given such notice, the subcontracting would have been appropriate, owing to the nature of the work involved. The dispute before the Board here may be readily distinguished from such cases. Dismantling of track and ties and stockpiling of a portion of them involves no unusual characteristics.

The Board concludes, therefore, that the portion of the work involved in the sale and removal of Carrier property by the outside purchaser was not improper and required no Article IV notice. That portion of the 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. Given these findings, the Board

directs the Carrier and the Organization to meet to determine what proportion of the work fell in the latter category. A rough determination of property sold vs. property retained might be the measure. The claim should then be adjusted by payment of such proportion of straight-time hours to appropriate Claimants.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 31st day of March 1983.