Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30716
Docket No. MW-30367
95-3-92-3-117

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

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

STATEMENT OF CLAIM:

"Track Foreman R.B. Elliott, ID #187795, Machine Operator M.E. Summers, ID# 188077, Machine Operator B.A. Cuevas, ID#187490, Track Repairmen W. McCain, ID# 188103, C.J. Dison, ID# 188098, R.T. Lizana, ID# 188336, C.J. Lizana, ID# 188335, E.G. Williams, ID# 188098, J.L. Ulrich, ID# 187889 and L.R. Hawkins, ID# 188189 are entitled to 8 hours pay each at time and one-half rate for each date of January 7, 8, 9, 10, 11, 12, 14, 15 and 16, 1991, plus 3½ hours pay at time and one-half rate for January 7 and 8, 1991, plus 2 hours pay each at time and one-half rate for January 9 and 10, 1991, plus 10 hours pay each at time and one-half rate for January 12, 1991, plus 3 hours pay each at time and one-half rate for January 14, 1991 and 5 hours pay each at time and one-half rate for January 15, 1991." Carrier's file 12 (91-445), Organization's file 14-2-91.

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 Organization alleged that on the dates recited above in the Statement of Claim, the Carrier hired an outside contractor (Steel Processing Services) to perform Track Subdepartment work at Gulfport, Mississippi. The track work performed was "taking up of the side track and moving the main-line over, at the above location." No mention was made concerning alleged "reclaiming of track material," as raised in the Organization's Submission to the Board.

The Organization complained that the Carrier did not notify the Organization of its intent to contract the above work, thereby violating the May 17, 1968 National Agreement.

The Organization further contended that the Carrier violated the December 11, 1981 National Agreement, Appendix J, "...since the carrier made no attempt to use Maintenance of Way Employes, nor to rent or lease the equipment used."

The Organization asserted that the Claimants are qualified Track Subdepartment employees who have performed the same type of work in the past, have complied with Rules 21(g) and 30(b), and were available to perform the above work. However, no attempt was made by the Carrier to contact the Claimants.

The Division Engineer responded to the Organization in his letter dated March 25, 1991, stating that his investigation had revealed that:

> "[T]his track was cut from the main line and therefore no longer bound by the agreement. A bulldozer, front end loader, and trackhoe was used to push the main-line over, however none of the claimants are qualified to operate this machinery and the carrier did not have it available for use without an operator. In the process of moving the main-line over, only qualified employees were allowed to work on any segment of track or switch which was in service."

In his June 7, 1991 declination of the claim, the Director of Employee Relations stated this conclusion:

> "Our investigation of this matter reveals that the section of track made subject of your claim was severed from carrier's operating line, and was no longer part of this operating facility. As such, the work claimed did not fall within the scope of the MofW Agreement and therefore does not accrue to MofW employees."

Article IV of the May 17, 1968 National Agreement provides that when the Carrier plans to contract out work within the scope of the Agreement, it first must notify the General Chairman, in writing, of its plan:

"ARTICLE IV - CONTRACTING OUT:

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto. [Emphasis added.]

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this Agreement."

The December 11, 1981 Letter of Agreement reads, in relevant part, as follows:

"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

It is undisputed that the Carrier did not notify the General Chairman, in writing, of its plan to contract out the work involved herein.

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 12918, the Board stated:

"Since the agreements pertain to work of carrying on carrier's business as a common carrier, we must conclude that the work of dismantling and removing completely the abandoned property does not fall within the contemplation of the parties. This work cannot be considered maintenance, repair, or construction."

In Third Division Award 19994, the Board stated:

"We are not persuaded by Petitioner's argument with respect to the continued ownership by Carrier of the salvaged rails and other material. The critical question is not the continued ownership of the salvaged rails and real property, but the purpose for which the work was intended; was the work performed related to the operation and/or maintenance of the railroad or not.... We must conclude that work on abandoned facilities, even though Carrier retains ownership of the property, is not work contemplated by the parties to the Agreement and such work is not within the scope of the applicable schedule Agreement."

In its handling of the case on the property, the Organization did not contradict the Carrier's assertion that the side track had been cut off from the main line and completely removed, thus constituting abandoned track.

Based upon the record established on the property, it is impossible to determine if the contractor's employees were used on the main line track work at all. In order for the Board to grant the requested relief, the record must be sufficiently developed during handling on the property so that the Board can make such factual determinations from the record. The Organization has the burden of ensuring that the record is thus developed, and has failed to meet that burden in this case.

AWARD

Claim denied.

O R D E R

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 31st day of January 1995.