Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31622
Docket No. MW-31186
96-3-93-3-209

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside contracting forces to perform dismantling, recovery and removal of track materials at Sherwood, Virginia, McKinley, Biwabik, Aurora, Brimson, Steelton and Proctor on the Missabe Division beginning in July, 1991 and continuing (Claim No. 19-91).

2. As a consequence of the violation referred to in Part (1) above, the five (5) oldest furloughed track employes on the Missabe Division shall each be allowed an equal proportionate share of the total number of man-hours expended by the employes of the outside concerns while performing the track dismantling, recovery and removal of track materials work."

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.

On July 2, 1991, Carrier gave the Organization, through its General Chairman, notice of its plans to sell approximately 11.3 miles of track. The purchaser was responsible for dismantling the track. Approximately 8 percent of the track material was retained by Carrier. On September 25, 1991, the Organization filed the instant claim.

While the claim was being processed on the property, this Board decided Third Division Award No. 29394 which also involved Carrier's sale of track to an outside party and its retention of some track material for itself. The Board held that the buyer's dismantling and removal of track sold to it was not subject to the Agreement. However, the portion of the material retained by Carrier was subject to the Agreement. The Board held that Carrier violated the Agreement to the extent of the proportion of material retained by the Carrier and ordered the parties to meet to determine what portion of the work fell into that category and calculate an appropriate payment.

The Organization contends that this case is governed by Award No. 29394. During handling on the property and in its submission, Carrier has maintained that there are material differences between the instant case and Award No. 29394. We have considered Carrier's arguments and, for the reasons set forth below, do not find them persuasive.

Carrier points to what it terms strong evidence of past practice on this property of dismantling of track materials by salvage firm purchasers and the return of certain materials to the Carrier. Carrier contends that the Board overlooked this practice in Award No. 29394. As impliedly conceded in Carrier's argument, this issue was presented to the Board in Award No. 29394. We see no reason to allow Carrier to relitigate it here and no reason to deviate from our prior precedent.

Carrier contends that a crucial factor in Award No. 29394 was its failure to give notice to the General Chairman of its intent to contract out the work. Supplement 3 requires such notice. Carrier argues that in the instant case it gave appropriate notice and held a conference with the General Chairman. Thus, in Carrier's view, the only remaining issue is whether Carrier complied with Supplement 3's requirement that it make "every reasonable effort" to use its own forces.

Carrier contends that it made every reasonable effort to use its own forces. Carrier argues that the amount of material it maintained was less than 8 percent of the total. It argues that, to the extent that the buyer removed material that was returned to Carrier, such action was incidental to the removal of buyer's property. Because ties and other track material that Carrier retained may have been fastened together with material that the buyer took, Carrier urges, it would have been unduly costly and therefore unreasonable to divide the work between Carrier's forces and the buyer. Carrier argues that it was more efficient for the buyer to conduct the removal and then sort the materials for retention.

The Board recognizes that in Award 29394 Carrier failed to give the General Chairman notice of its intent to contract out work. However, our review of the award discloses that the failure to provide notice was not the sole basis for the Board's decision.

The fact that the material retained by Carrier amounted to approximately 8 percent of the total track sold does not distinguish the instant claim from Award No. 29394. Although the percentage of material retained by Carrier was not specified in Award No. 29394, it appears that the percentage was relatively small. The award stated that "most of the work in dispute involved property no longer owned by Carrier" and referred to the return of "some" of the material to Carrier. The Carrier Members' Concurrence and Dissenting Opinion in Award No. 29394 maintained that there was no evidence in that case that the work performed by the buyer was "considerably more than incidental to the removal of the purchaser's property." Furthermore, there is no evidence in the record of the instant case that the amount of material retained by Carrier was less than the amount retained in Award No. 29394.

Carrier's contention that it was more efficient to have the buyer remove and sort the material for retention may be accurate. However, in Award No. 29394, the Board recognized that, "economy is not a valid justification for violation of the Agreement."

Accordingly, we conclude that this case is governed by Award No. 29394. [1] It appears that the removal of some of the material and the transportation of the material retained by Carrier was performed by Carrier's forces. However, with respect to the other work, the remedy in this case shall be as was ordered in Award No. 29394; the parties shall meet to determine the work involved that was performed by the buyer's forces with respect to the 8 percent of material retained by Carrier and an appropriate payment shall be made to the Claimants for the lost work.

AWARD

Claim sustained in accordance with the Findings.

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[1] Carrier also argued that "[t]he preponderance of the sale was on the Iron Range Division." This observation was given very little attention during handling on the property and in the parties' submissions. It does not merit substantial comment here. Carrier did not quantify the amount of work performed on the Iron Range, as opposed to the Missabe Division. The term "preponderance" is capable of being interpreted to mean anything from a bare majority to almost all. Furthermore, as pointed out by the Organization, it appears that Rule 2(D) allows employees to cross divisional boundaries in appropriate circumstances.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.