Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32327
Docket No. MW-31973
97-3-94-3-298

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (National Salvage Company) to perform right of way cleaning work (removal of rail from cross-ties) on the Ayer/Tekoa Branch on the Oregon Division (Columbia River Division) on October 9, 10, 11, 20, 21, 22, 31, November 1 and 2, 1992 and continuing (System File H-12/930177).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman a proper written notice of its intent to contract out the work involved here in accordance with Rule 52.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above:

'*** Claimant Barnett should be paid forty (4) hours at the straight time rate of pay and fifty (50) hours at the time and one-half (1 1/2) for a total of ninety (90) hours at the Class 2 REO rate of pay, Claimant Gonzales should be paid forty (40) hours at the straight time rate of pay and fifty (50) hours at the time and one-half (1 1/2) for a total of ninety (90) hours at the section foreman rate of pay, Claimants Miquelez, Bicknell, Porter, Balfe, Bagley, Sullivan, Edgerton, Perry, Harris and Cantu should each be paid forty (40) hours at the straight time rate of pay and fifty (50) hours

at the time and one-half (1 1/2) for a total of ninety (90) hours at the sectionman rate of pay for time worked by the contractor on October 9, 10, 11, 20, 21, 22, 31, November 1 and 2, 1992. This claim is to be considered continuous as the contractor is to be employed in removing more rail from the Ayer/Tekoa Branch and loading on the rail train.'"

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.

By Notice dated April 28, 1992 Carrier informed the Organization that it intended to contract out "the removal and/or purchase of approximately 52.40 miles of branch main track and 5.20 miles of side track including all appurtenances on the Tekoa Branch" and designated miles of track on the Pleasant Valley Branch line. At the June 8, 1992 conference, Carrier claimed that the track in issue was to be sold on as "as is where is" basis.

The July 13, 1992 Purchase and Removal Agreement entered into between Carrier and National Salvage Company specifies certain track to be retained by Carrier. A review of the record on the property reveals that Carrier retained over 44.5 miles out of the 57.6 miles of track which was the subject of the noted "sales contract" which was sent to its welding plant in Laramie, Wyoming for recycling and future use.

The instant claim seeks compensation for the work performed by the contractor in removing the rail retained by Carrier and loading it onto Carrier's train on the specified dates. It does not seek compensation, nor would such be appropriate, for the

portion of the track sold to the contractor on an "as is where is" basis, since such work is not covered by the Agreement. See Third Division Award 29559.

The Organization argues that this work was not covered by the Notice given since Carrier claimed that the rail in question was going to be sold, while the material was sorted and a vast majority was retained for future use. The Organization contends that this is the type of work which has been specifically retained in the classification of work rules (Rules 9 and 10), and has been found to be reserved to employees under the Agreement, citing Third Division Awards 28817, 29561, 30005. It asserts that the appropriate remedy is monetary reimbursement for the lost work opportunity involved, relying on Public Law Board 4370 Award 21; Public Law Board 2960 Award 172; Third Division Awards 24280, 29394.

Carrier argued on the property that this work was covered by a general scope rule, it had contracted it in the past, the Organization failed to prove exclusivity of performance of this work, and it complied with the notice requirements of Rule 52. While it later argued before the Board that this work was performed on abandoned property, this argument was not made on the property nor supported by the record in this case. Carrier contends that precedent established on this property denies monetary relief for fully employed Claimants for a subcontracting violation, relying on Third Division Awards 26174, 29018, 30066, 30268, 31030.

A complete review of the extensive record does not support Carrier's main contention that the work in issue was performed pursuant to a contract for sale on an "as is where is" basis. The portion of the rail subject to such a sale is not covered by the Agreement, and Carrier was within its rights to contract it out. However, as found by the Board in Third Division Awards 24280 and 29394, the portion of the work of dismantling and removing rail retained by Carrier is work "customarily" performed by Maintenance of Way forces, and falls within the Scope Rule of this Agreement.

The Board concludes that Carrier met its notice obligations under Rule 52 in this case, despite its explanation to the Organization in conference that the work in question was subject to an "as is where is" contract, and we therefore find the allegation of Part (2) of this claim is without merit.

We are of the opinion that the rationale for finding a violation of the Agreement set forth in Third Division Award 24280, and adopted in Third Division Award 29394, is equally applicable herein. That portion of the work involved in the removal and

loading of rail onto Carrier's trains for transport to its facility for welding and reuse was within the Scope Rule, and absent Carrier's demonstration that it was required or permitted to contract such work under Rule 52, its assignment to outside forces violated the Agreement.

With respect to the appropriate remedy, we are mindful of the line of cases relied upon by Carrier holding that no compensation is due to claimants who are fully employed on the dates of the claim and can demonstrate no loss of earnings. However, as noted in Third Division Award 24280, these cases primarily deal with the failure of Carrier to give appropriate notice under Article IV even though the ultimate subcontracting would not have violated the Agreement, a situation distinguishable from the instance case. The Board finds that the remedy directed in Awards 24280 and 29394 - that Carrier and the Organization meet to determine what proportion of the work falls into the category found violative herein, and that Carrier pay such proportion of straight time hours to appropriate Claimants - is similarly appropriate herein. We note that such monetary relief has been granted on this property in similar situations. See Third Division Awards 29561, 28817.

AWARD

Claim sustained in accordance with the Findings.

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 13th day of November 1997.

Carrier Members' Dissent
to Third Division Award 32327,
Docket MW - 31973
(Referee Newman)

The Majority has committed numerous errors in reaching its decision. For example, it states that the Carrier, on the property, did not raise the issue that the work had been performed on abandoned property. A review of the Carrier's letter to the Organization dated May 13, 1994, shows such statement to be in error.

Also in error is the Majority's assertion that the work contracted here is work customarily performed by Maintenance of Way forces and falling within the Scope Rule of the Agreement. It comes to such conclusion based upon Third Division Awards 24280 and 29394. Unfortunately, the Majority apparently overlooked the fact that Award 24280 involved the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Award 29394 involved the Duluth, Missabe and Iron Range Railway Company. It is not clear how a practice on those railroads became a practice on this railroad. It is even less clear why the Majority had to turn to Awards concerning other railroads when there are more than 150 Awards involving the subject of contracting out and the parties to this dispute. Among the 150 Awards, numerous have upheld the Carrier's right to contract out track work. Lastly, even assuming there were no prior Awards on this property dealing with the work involved here, the past practice on this property would be the next place to seek a resolution to the dispute, not the practice on two other railroads.

It summary, the Award here is based upon erroneous premises and cannot stand as a precedent.

Martin W. Fingerhut - Carrier Member

Michael C. Lesnik - Carrier Member

Paul V. Varga - Carrier Member