

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32777
Docket No. MW-32206
98-3-94-3-637**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and 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 (Rail Systems, Inc.) to perform track maintenance work [removed and recovered track materials, i.e., spikes, approximately one hundred fifty (150) sections of rail and approximately fifteen hundred (1500) ties for the Soo Line Railroad] in the vicinity of the Mendota Bridge located near Mile Post 162.5 beginning June 21 and continuing through August 26, 1993 (System File C-78-93-C080-07/8-00141 CMP).**
- (2) The Agreement was violated on September 1 through 20, 1993 when the Carrier assigned outside forces (Rail Systems, Inc. and Brisk Construction Company) to perform track maintenance work (removed track materials, i.e., rail, ties, spikes, tie plates, angle bars and bolts) between Mile Post 163.0 and Mile Post 162.3 and hauled approximately twelve hundred (1200) of said ties to Rosemount for use by the Soo Line Section Crew #758 on their territory (System File C-90-93-C080-10/8-00154).**
- (3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out the work described in Parts (1) and (2) above, as required by the Scope Rule.**

- (4) As a consequence of the violations in Parts (1) and/or (3) above, Messrs. L. Picha and T. Friauf shall each be compensated, at their respective rates of pay, for eight (8) hours each day worked by the outside forces in the performance of the work described in Part (1) above beginning June 21, 1993 and continuing through August 26, 1993.
- (5) As a consequence of the violations in Parts (2) and/or (3) above, Foreman L. Picha, Assistant Foreman K. Klover, Section Laborers T. Friauf and J. Hesselink and Truck Driver A. Ramon shall each be compensated, at their respective rates, for an equal proportionate share of two hundred eighty-eight (288) hours' pay and Heavy Equipment Operators M. Kulish and M. Nelson shall each be compensated for forty (40) hours' pay, at their respective rates, for the total number of man-hours expended by the outside forces in the performance of the work described in Part (2) above on September 1 through 20, 1993."

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.

On the dates in question, outside contractors removed track materials in the area around the Mendota Bridge, as specified in the claims. At least some of the material was hauled to other locations for use by Carrier on its operating track.

The Organization contends that Carrier violated the Agreement by contracting out Scope covered work and by not giving the General Chairman the required notice of intent to subcontract. Carrier contends that the Organization has failed to prove that it has performed the work exclusively. However, the argument that the Organization must prove exclusivity in subcontracting cases has been rejected generally by this Board and specifically on this property. See Third Division Awards 31388 and 24280.

Carrier further contends that it did not contract out the work. Instead, Carrier maintains that the property was to be sold to the State of Minnesota, that in anticipation of the sale, an entry permit was issued to the State to enable it to begin preparation work, and that the State controlled the decision to employ an outside contractor to remove the track. However, during handling on the property, the Organization requested that Carrier furnish the relevant documentation regarding the alleged sale and entry permits. Carrier failed to do so. Furthermore, the only entry permit that the Organization was able to obtain from the State, pursuant to Freedom of Information Act requests, took effect in November 1993, months after the period that is the subject of these claims. On this record, due to Carrier's failure to provide the requested documentation, we are unable to say who controlled the decision to employ outside contractors on the dates in question. Carrier's defense that the decision to subcontract was controlled by the State must fail for lack of supporting evidence. See Third Division Awards 31754 and 31521.

Carrier further contends that the track in issue had not been used for several years and was blocked by mud slides. Consequently, in Carrier's view, the track had been abandoned and, because the track was no longer part of Carrier's operating system, the work in question was no longer Scope covered. A number of Awards have held that the dismantling of abandoned track is not Scope covered. These Awards generally involve track whose abandonment has received formal ICC approval. See, e.g., Third Division Awards 30838 and 19994. Others do not involve the retention of track material by the carrier for use on its operating system. See, e.g., Third Division Awards 31522 and 30716.¹

¹ Third Division Award 30946 is somewhat confusing. The Board stated that "formal ICC approval of the abandonment is not material," but also observed that "Carrier asserts that the abandonment was with ICC approval."

In the instant case, a petition for ICC approval to abandon the track was not filed until after the work at issue was performed. It appears that, although the track had not been operated on for several years, Carrier sought approval to abandon it only in connection with the contemplated sale to the State of Minnesota. Furthermore, it appears that some of the track material was transported back to Carrier for use on its operating system.

In Third Division Award 24280, decided on this property, Carrier sold scrap ties to an outside firm, with the purchaser collecting the ties in place on Carrier's property. The Board held that insofar as the transaction was limited to such a sale, there was no violation of the Agreement and no obligation to give the Organization notice of intent to subcontract. However, the Board sustained the claim to the extent that the purchaser dismantled and removed selected rails and ties for Carrier's retention.

In Third Division Award 29394 the carrier sold trackage on retired or abandoned property to a salvage dealer who was to remove and retain the material. However, the salvage dealer was to return some of the material to the carrier. The Board held that most of the work in dispute was not Scope covered because, "the work of dismantling and removing completely the abandoned property does not fall within the contemplation of the parties." (quoting Third Division Award 12918). However, the Board sustained the claim "to the extent that the contractor dismantled and transported materials back to the Carrier for the continual use of the Carrier."

On the authority of Awards 29394 and 24280, we find that the claim must be sustained to the extent that the contractors dismantled and transported material back to the Carrier for continual use of the Carrier. In accordance with those Awards, we will order that the Organization and Carrier meet to determine what proportion of the work involved dismantling and transporting materials back to the Carrier for further use. An appropriate payment should be made to the Claimants for that portion of the work, representing the amount of work that was lost to them by Carrier's violation of the Agreement.

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 23rd day of September 1998.