Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35328
Docket No. MW-33261
01-3-96-3-737

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (R&R Construction) to perform Maintenance of Way work (peddle rail and track material, upgrade mainline track by replacing existing rail and other related track material) between Mile Posts 498 and 503 on the New Town Subdivision beginning June 5, 1995 and continuing (System File R1. 037 / 8-00238 / 0-0043-105).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Rule 1.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman D. Ness, Truck Operator N. Nelson, Section Laborer D. Gullickson, Laborer J. Jensen and Tractor Operator A. Speten shall each be allowed four hundred twenty-four (424) hours' pay at their respective straight time rates and all overtime expended by the outside forces in the performance of the above-described work and they shall each be credited for vacation and fringe benefits lost as a result thereof."

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 May 1, 1995, the Carrier notified the Organization that:

"As a matter of information, this will serve to confirm the sale to Plaza-Makoti Equity Elevator of approximately four (4) miles of main track which extends from Prairie Junction to Plaza, North Dakota.

Based on The Elevator's desire to expand and the continual pressure from the Burlington Northern and trucks to secure this business, Carrier has agreed to sell the portion of line involved.

Completion of this sale will allow The Elevator to own, rehab and maintain the line in the future, however, allowing the Carrier to continue operating thereon.

Should the Organization desire further details related to this sale, a member of my staff will be available to you at your request."

At the May 4 conference it was the Organization's position that the sale of the track required ICC approval, and without said approval the sale would not be "properly processed." The General Chairman further maintained that, by virtue of the Agreement, any work performed on the four-mile section of Plaza track accrues exclusively to BMWE members. For its part, the Carrier asserted that the track in question was a spur track that serviced the elevator. The Carrier further advised that it would maintain a certain portion of the track "at industry expense." Finally, the Carrier reiterated that is was not leasing back trackage rights, but merely retaining an easement to meet "common Carrier obligations."

On August 17, 1995, the Organization submitted a claim alleging the Carrier had violated Rules 1, 2, 3, 4, 5, 6, 10 and 14 of the Agreement when it assigned outside forces (R&R Construction) to perform work that belongs to employees represented by the Organization. Additionally, the Organization asserted that said work was performed sans proper notification to the General Chairman. According to the Organization, the Claimants were willing and available to perform the work in dispute, and as remedy, should be compensated for a total of 424 hours at the pro-rata rate. Finally, the General Chairman contended that the track in dispute is railroad track and not spur track as the Carrier alleged, thereby rendering it subject to ICC jurisdiction.

The Organization's position was premised primarily upon its assertion that the portion of track in dispute could not have been properly sold sans ICC approval. Additionally, the General Chairman asserted that the work that R&R performed on the four-mile portion of track accrues to members of the BMWE. From the outset, the Carrier maintained and the Organization failed to effectively refute that the track in

dispute was sold, and that it no longer was subject to the Carrier's dominion and control. A review of the record reveals that the trackage in question was sold on April 10, the Carrier received the funds affiliated with that sale on May 1, 1995, and thereafter the track was the property of another. Inasmuch as the Carrier no longer had any control over the land or trackage, it had no control or contractual obligation concerning who performed the improvements. Although the Organization asserted that the work accrued to its members, there is no evidence on this record that supports that assertion. Finally, whether the Carrier needed ICC approval in these circumstances is an issue over which this Board has no jurisdiction and, therefore, we decline comment. Based on the foregoing, this claim is denied.

AWARD

Claim denied.

ORDER

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 16th day of February, 2001.