

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36326
Docket No. MW-34798
02-3-98-3-507**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned or otherwise allowed outside forces (Heavy Railroad Excavation) to perform track dismantling, sorting and track material retrieval work on trackage near Mile Post 27 at Beaverton, Oregon beginning June 14, 1993 and continuing (System File S-P-502-W/MWA 93-09-22D BNR).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work as required in the Note to Rule 55.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman P. L. Woodward, Truck Driver G. R. White, Group 2 Machine Operators J. A. Whalen, M. P. Fordney, Sectionmen J. M. Farney, J. G. Escalante and T. K. Murphy shall each be allowed ‘ . . . eight hours pay at their respective straight time rates of pay for each day worked by contractor forces removing these tracks beginning June 14, 1993 and continuing until the work is completed or Claimants are used to complete the project.’”**

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.

Claimant P. L. Woodward established and holds seniority as a Section Foreman. Claimant G. R. White established and holds seniority as a Truck Driver. Claimants J. A. Whalen and M. P. Fordney established and hold seniority as Group 2 Machine Operators. Claimants J. M. Farney, J. G. Escalante and T. K. Murphy established and hold seniority as Sectionmen. On the dates involved in the instant case, the Claimants were regularly assigned to positions on the Salem Section Gang near Beaverton, Oregon.

The basic facts of the instant matter do not appear to be in dispute. On May 27, 1993 the Carrier sold property in Beaverton, Oregon, to Tri-County Metropolitan District of Oregon ("Tri-Met"). This agreement stipulated that the track on the purchased land continued to be owned by the Carrier. The agreement further indicated that the Carrier had until August 1, 1993 to remove its track from the property; otherwise, the track would be deemed abandoned and become property of Tri-Met. On June 11, 1993, the Carrier contracted with outside forces (Heavy Railroad Excavation) to remove the trackage.

Beginning on June 14, 1993, the Carrier assigned or otherwise allowed Heavy Railroad Excavation to perform track dismantling, sorting and track material retrieval work on double line track near Mile Post 27 at Beaverton, Oregon. The employees of the outside concern, who hold no seniority within the Maintenance of Way and Structures Department, worked eight hours per workday, Monday through Friday, beginning June 14, 1993, and continued until completion. In addition to dismantling the track structure (spikes, plates, rails, cross-ties), the outside forces transported the reusable materials to the Carrier's property where it was sorted and stacked, to be used by the Carrier to repair and maintain tracks. The outside concern utilized common equipment to perform the dismantling and loading operations.

The Organization takes the position that the Carrier demonstrated bad faith, as well as violated the Agreement when it improperly assigned the relevant work to an outside contractor. Here, as only the land was sold to Tri-Met and the tracks remained the property of the Carrier until August 1, 1993, any work done on these tracks prior to August 1, 1993 remained the work of the Organization. Because the work in question

traditionally is performed by the members of the Organization, Organization members should have been assigned to complete this work. Further, the Organization claims that the Carrier did not provide the Organization proper notice of the work to its General Chairman. Finally, the Organization argues that the Carrier did not engage in good faith discussions regarding the contracting out of the work. The Organization asks that the Claimants be made whole for all time lost.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that once it sold the relevant property to an outside firm, the work performed on the property was no longer on the right-of-way of the Carrier and the track was no longer used in common carrier service. Thus, pursuant to the Note to Rule 55, the work performed by Heavy Railroad Excavation was not scope covered work and it was not inappropriate to have a contractor complete this task. Finally, according to the Carrier, controlling precedent has upheld the Carrier's position. Thus, the Carrier asks that the claims be denied in their entirety.

First, we have reviewed the Contract of Sale between the Carrier and Tri-Met. Specifically, paragraph 5 of the agreement provides:

"Tracks, Buildings and Other Improvements

5. This offer relates only to land. Unless otherwise herein provided, any conveyance shall exclude Seller's railroad tracks and appurtenances thereto, Seller's buildings and any other improvements on the premises, all of which may be removed by Seller by August 1, 1993, and if not removed by said date shall be deemed abandoned by the Seller without obligation on the Seller's part and shall thereafter be and become the property of the Buyer in place."

The issue raised is whether this paragraph of the agreement deobligates the Carrier from its contractual requirements to the Organization after the sale of the land, but not the tracks, buildings and other improvements. We note that the agreement between the Carrier and Tri-Met was completed as of May 27, 1993. At that point, while the land was sold to Tri-Met, the Carrier retained the tracks and appurtenances to the land until August 1, 1993 at which time, if not removed by the Carrier, it would be deemed to be abandoned and Tri-Met would then own it. Heavy Railroad Excavation came onto the property on June 14, 1993 and began to remove the trackage. This work was presumably completed by August 1, 1993.

The Note to Rule 55 indicates that contracting is limited as follows:

“NOTE to Rule 55: The following is agreed to, with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way and Structures Department:

Employees included within the scope of this Agreement - in the Maintenance of Way and Structures Department . . . perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employees of named Repair Shops. . . .
(Emphasis added)

Here, the Carrier argued that once the relevant property was sold, it no longer was used in “the operation of the Company in the performance of common carrier service.” This position was upheld in Award 48 of Public Law Board No. 4768 in which the Board indicated:

“The Organization contends that the ‘bridge dismantling work and recovery of materials’ of the bridges properly falls under the notice requirements and contracting restrictions of the Note to Rule 55 and other provisions of the Agreement. The argument is that, under the sales agreement, the materials salvaged on behalf of and returned to the Carrier remained the Carrier’s property. The Carrier, on the other hand, emphasizes the sale of all the material from the abandoned line to the contractor, contending that it then simply ‘repurchased’ certain materials for its use. . . .

Whether the materials actually remained under the Carrier’s control or were repurchased is not, in the Board’s view, the decisive point. The Note to Rule 55 refers, in specific fashion, to work ‘in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in performance of common carrier service.’ Here, the line had been abandoned and was obviously no longer ‘used in the operation of’ the Carrier.”

See also Third Division Award 35634.

Here, because the property was sold to Tri-Met, it was no longer used in the "operation of the Company in the performance of common carrier service"; therefore, the dismantling of trackage was no longer scope covered work and thus no notice to the Organization was required.

We remind the parties that the burden of proof in this matter falls to the Organization. We cannot find that there has been sufficient evidence presented to prove that the work completed by Heavy Railroad Excavation was within the "operation of the Company in performance of common carrier service." Thus, pursuant to the Note to Rule 55, such work was no longer scope covered work and the Organization has been unable to prove that the work done by the contractor belonged to the Organization's members.

Thus, having determined that the work was not scope covered work, we find that the Organization has not met its burden of proof and the claim is therefore 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 26th day of December 2002.