Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36690
Docket No. MW-35811
03-3-99-3-808

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (Rail Salvage, Inc.) to cut and load rail between Glasgow and Poplar, Montana from September 25 through 30, 1997 (System File B-M-566-F/MWB 98-02-20AB 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 Part (1) and/or (2) above, Truck Driver P.A. Teel and Welders R.J. Strokson and P.L. Vasecka shall each be allowed pay for twenty-four (24) hours at their respective straight time pay rates and twenty-eight (28) hours at their respective time and one-half rates of pay."

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 October 15, 1997, the Carrier sent the following correspondence to the Organization:

"Gentlemen:

Please consider this a courtesy letter to inform you of surplus/scrap rail pickup activity that will be occurring over the system from now until the end of the year. This letter is being provided in the spirit of keeping you informed of ongoing activities and in the event you should receive questions regarding the pickup activity.

Sales contracts were recently concluded with American States Rail Marketing, L. B. Foster Co., Railroad Material Salvage Inc., SMI Rail and Azcon Corp., for purchase of surplus and/or scrap rail in an 'as is-where is' basis. The sales contracts provide that the purchasers or their designees must remove their property from the Carrier right-of-way by no later than December 31, 1997."

Thereafter, on November 17, 1997 the Organization filed a claim on behalf of Messrs. Teel, Strokson and Vasecka alleging that the Carrier violated the Agreement when it "sublet work belonging to the Maintenance of Way to outside contractor Railroad Material Salvage, Inc." Specifically, the General Chairman maintained that when the Carrier "hired Railroad Material Salvage to cut up and pick up used ribbon rail between Glasgow and Popular, Montana," it violated Rules 1, 2,5, 6, 7, 24, 25, 29 and 55 of the Agreement, in addition to the Note to Rule 55, 78 and Appendix Y.

The Carrier denied the claim asserting that Railroad Material Salvage "purchased the rail they were cutting up and removing on an as is-where is basis" and that it was Railroad Material Salvages' responsibility to remove the same. The Carrier went on to note that: "The cutting up of rail purchased by another company is not work traditionally done by BMWE employees."

In an appeal to the Carrier's denial, the Organization argued that: "Picking up rail which has been removed from the tracks is certainly work that is incidental to the maintenance and repair of the tracks' roadway and right-of-way. It is work that is classified within Rule 55 and work which has been customarily performed by the employees and has been reserved to the Maintenance of Way employees." The Organization further asserted that the Carrier "compounded" the violation when it failed to give proper advance notice and hold a conference as required by the Note to Rule 55. Finally, the Organization noted that "no proof has been provided to support the allegation that the rail was in fact sold."

In this dispute the Organization claims that the Carrier violated numerous Rules by (1) contracting out the removal of scrap rail, and (2) by failing to serve notice of its intent to contract out the same. However, a review of the record evidence supports the Carrier's assertion that the scrap rail at issue was sold on an "as is-where is" basis, and the purchaser, Railroad Material Salvage, merely removed its own property. The dispositive fact of record is that, in handling on the property, the Carrier provided copies of "As-Is/Where-Is" Sales Agreements covering scrap material on the Montana Division and the Twin Cities Service Region (Region 4), which included the material on the territory between Glasgow and Poplar, Montana, which is the subject matter of the present claim.

Based on the foregoing, the 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 18th day of August 2003.

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 36689, DOCKET MW-35798
AND
AWARD 36690, DOCKET MW-35811

(Referee Nancy F. Eischen)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is based on erroneous information presented by one of the parties. Such is the case here.

The Majority held that the Carrier had satisfied its burden to prove its affirmative defense in this case. The affirmative defense was that the Carrier had sold the track material at issue here to the contractor on an "as is, where is" basis. From the initial instance where the Carrier raised this defense the Organization clearly and repeatedly asked for the Carrier to prove its affirmative defense. In an attempt to meet its burden, the Carrier finally presented a document that purportedly supported its position. The record is clear that the General Chairman immediately pointed out that the document presented by the Carrier did not pertain to the area where the work was performed. Moreover, the General Chairman clearly and forcefully pointed out that the document presented by the Carrier specifically stated:

> "This document and any documents attached and incorporated by reference constitute the entire agreement of the parties. Any modifications to the agreement must be in writing and signed by both parties. Should any term or provision be found to violate the law, the remainder of the agreement shall survive and be interpreted as to fulfill the parties intentions."

The record is devoid of evidence that the Carrier presented the probative evidence of a sales agreement. In fact, the Carrier was passing off misinformation as proof of a sale. Then, when faced with the fact that the document presented did not support its position, the Carrier asserted that a verbal agreement had been reached to extend the area covered by the document it attempted to pass off as proof. Clearly, as the above-quoted excerpt from the document shows, that document could only be modified in "writing and signed by both parties." Inasmuch as no written modification was presented, the alleged sales agreement did not support the Carrier's affirmative defense.

I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member