Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37270
Docket No. MW-36374
04-3-00-3-620

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and Santa Fe Railway Company
((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 utilized outside forces to perform Maintenance of Way work (cut up, load and haul rail) in the vicinity of Burnham, Montana on March 16, 1999 (System File B-M-699-L/11-99-0418 BNR).

(2) The Carrier violated the Agreement when it utilized outside forces to perform Maintenance of Way work (cut up, load and haul rail) in the vicinity of Shelby, Montana on March 30 and 31, 1999 (System File B-M-670-L/11-99-0419.

(3) The Carrier violated the Agreement when it utilized outside forces to perform Maintenance of Way work (cut up, load and haul rail) between Blackfoot, Montana and Shelby, Montana on May 3, 4, 5, 6, 7, 10, 11 and 12, 1999 (System File B-M-688-L/11-99-0488.

(4) The Carrier violated the Agreement when it utilized outside forces to perform Maintenance of Way work (cut up and load rail) in the vicinity of Blackfoot, Montana on May 7, 10, 11, 12 and 13, 1999 (System File B-M-672-L/11-99-0421.

(5) The Carrier further violated the Agreement when it failed to provide the General Chairman with an advance written notice of its plan to contract out the aforesaid work as required by the Note to Rule 55 and Appendix Y.

(6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Group 2 Machine Operator A. H. Zigan, Truck Driver S. R. Wickum and Welder S. R. Lumsden shall now each be compensated for eight (8) hours' pay at their respective time and one-half rates of pay.

(7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Group 2 Machine Operator J. E. McDonald, Truck Driver K. R. Peltier and Welder R. W. Neidigh shall now each be compensated for sixteen (16) hours' pay at their respective time and one-half rates of pay.

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Group 2 Machine Operator J. E. McDonald, Truck Driver K. R. Peltier and Welder D. E. Premo shall now each be compensated for sixty-four (64) hours' pay at their respective time and one-half rates of pay.

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Group 2 Machine Operator J. E. McDonald, Truck Driver R. G. St. Stoddard and Welder D. E. Premo shall now each be compensated for forty (40) hours' pay 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.

This case represents the consolidation of four separate claims by the Organization protesting the Carrier's contracting out of rail recovery work at different locations on the Montana Division on different dates without prior notice. While the claims are virtually identical, thereby permitting the Board to properly deal with them through consolidation, such procedure results in an extremely voluminous record that is difficult to read, and which may better be dealt with by the parties through an agreement to pursue a pilot case and hold others in abeyance pending the outcome. Consolidation of similar but not identical cases creates a lengthy and tiresome process of wading through the record to assure that each case is given thorough consideration.

The record establishes that the Carrier and Carl Weissman & Sons (herein CWS) entered into an Agreement on February 20, 1997 whereby CWS would purchase and remove miscellaneous unsorted scrap, slag, OTM, frog inserts and rail at four named locations on the Montana Division. This Agreement was extended by a supplement dated September 4, 1997 to numerous additional locations on the Montana Division. The terms of the Sale Agreement specify that it is to be on an "as is, where is" basis, authorizes CWS to enter the Carrier's property to dismantle and remove the material, and includes a provision for CWS to furnish roll-off containers to be loaded by the Carrier's forces for CWS removal according to instructions by Section Foremen at each location. There is no dispute that on the claim dates such rail was cut up and removed from the Carrier's property by other than BMWE-represented employees. Statements from two Carrier supervisors indicate that CWS removed purchased materials from the Carrier's right-of-way at the noted locations in 1997 and 1998 under these Agreements without protest from the Organization, and that the subject matter of the instant claims is also purchased

material under the Agreement sold "as is-where is" and removed by CWS in the spring of 1999.

The Organization's on-property correspondence relies upon an article in the Carrier's Engineering Newsletter dated February 25, 1999 referring to its 1999 Rail Distribution Plan as identifying "who and when all rail is to be picked up either by a Rail Pick-Up Train or disposed of by a Contractor" as evidence that the work in issue was contracted out. It also references a September 26, 1970 Agreement, which was not made a part of the record, as excluding rail from its terms allowing an outside concern to enter the right-of-way and pick up small scrap, which the Organization asserts is proof, in conjunction with the language of the Scope Rule and Rule 55, that reservation of this work was intended by the parties. The Organization takes issue with the Carrier's contention that the rail was sold "as is-where is" asserting that the 1997 Purchase Agreement with CWS does not cover all of these locations or these instances, because employees were not used to load CWS roll-off containers, as required therein. The Organization's argument focuses on both the reservation of this work to BMWE-represented employees, the fact that such employees customarily perform this type of work, and the admission that the Carrier failed to give prior notice of its intent to contract out the work as required by the Note to Rule 55 in support of its claim for monetary damages for lost work opportunities, citing numerous prior cases exemplified by Third Division Awards 19924, 20338, 20412, 20633, and 21534.

On the property and before the Board, the Carrier argues that it engaged in no contracting out transactions requiring advance notice to the Organization. It asserts that each instance of alleged contracting noted in these claims was the removal of scrap rail previously sold under its "as is, where is" Purchase Agreement with CWS and within its boundaries, consistent with the manner in which it sold and removed scrap rail in 1997 and 1998 without protest from the Organization. The Carrier contends that prior precedent establishes that removal by a third party of goods sold to it on an "as is, where is" basis does not constitute contracting under the Agreement and is not encompassed within the scope clause, citing Public Law Board No. 4768, Award 24; Third Division Awards 30224 and 30637. The Carrier notes that the Organization failed to identify the name of any contractor used to remove rail on the claim dates. It avers that the 1970 Agreement does not reference scrap rail, was not shown to be signed and applicable to this territory, and has been

overridden by Appendix K of the September 1, 1982 Agreement which fails to incorporate it within the current Agreement.

In addressing the Organization's argument that this work has been customarily performed by BMWE-represented employees and is reserved to them under the Agreement, the Carrier asserts that the Organization failed to meet its burden of proving that its employees have performed this work on a system-wide basis to the exclusion of others, the burden it must meet on this property under the language of this Agreement, citing Public Law Board No. 4104, Award 13; Public Law Board No. 3460, Award 67; Public Law Board No. 2206, Award 8; Third Division Awards 33938, 20640 and 16640. Before the Board the Carrier argues that, at best, the Organization presented an irreconcilable dispute of fact that must result in dismissal of the claims. Public Law Board No. 5405, Award 18; Public Law Board No. 3460, Award 78; Third Division Award 32942.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving that the Carrier impermissibly contracted out the disputed work in this case. It did not effectively rebut the evidence proffered to establish that the instances of rail recovery protested in these claims were a result of the "as is, where is" Sale Agreement between the Carrier and CWS that had been in effect since February 1997 and under which similar scrap rail had been removed from the Carrier's property by other than BMWE-represented employees in 1997 and 1998 without protest. Where rail and other material being removed from the Carrier's right-of-way is the subject of an "as is, where is" sale, it is no longer the property of the Carrier and work associated with it does not fall within the Scope of the Agreement. Because the removal of the scrap rail in issue in these cases by CWS does not constitute contracting out by the Carrier, there is no notice required and no violation of the provisions of the Agreement. Public Law Board No. 4768, Award 24; Third Division Award 30224. Based upon this finding, the Board need not address the Organization's reservation of work argument, the numerous cases it relies upon that do not deal with "as is, where is" purchase agreements, or the Carrier's exclusivity contention.

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 5th day of November 2004.