Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39305
Docket No. MW-37921
NRAB-00003-030336
(03-3-336)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (dismantle, load and remove trackage) in the South Pekin Yard between Mile Posts 93 and 94.3 on the Peoria Subdivision beginning March 4, 2002 and continuing, instead of Messrs. L. Wiseman, J. Campbell and R. Boncouri (System File 3KB-6777T/1324116 CNW).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants L. Wiseman, J. Campbell and R. Boncouri shall now each '. . . be compensated an equal and proportionate share of all man hours worked by contractors from March 4, 2002 until they have been removed from Carrier property.'"

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.

The relevant circumstances giving rise to the instant claim are as follows.

Beginning March 4, 2002, an outside contractor identified as Tompkins Trucking & Excavating Company (hereinafter referred to as "Tompkins") began the task of dismantling six track segments. It is undisputed that the contracting forces consisted of three employees, none of which held seniority or work rights under the Agreement. A number of employees represented by the Organization filed statements describing this work as including "tearing up, stacking and loading out materials from various tracks in South Pekin yards which include IC Connection, Material Track, House Track, Sand Track, Oil Track and Track 19." There is no dispute that the employees representing Tompkins used ordinary equipment to accomplish this work. It is the Organization's position that work of this nature has customarily and historically been performed by the Carrier's forces in connection with their duties maintaining the facilities and structures located on the Carrier's right-of-way. Accordingly, the Organization asserts that pursuant to Rule 1(b) the Carrier was obligated but failed to provide proper written notice to the General Chairman of its plans to assign outside forces to perform said work.

While the Carrier does not credibly deny the fact that work of the character performed by Tompkins employees is of the type regularly performed by its own forces, it defends its action by contending that said work was performed by Tomkins on an "as is-where is" basis. Accordingly, the Carrier asserts that the sale of scrap ties

and rail was not subject to any provisions of the Agreement between the Carrier and the Organization, including but not limited to Rule 1(b).

Ultimately, following requests by the General Chairman for proof of the "as is-where is" nature of the work as asserted by the Carrier, it produced a four-page sale order with an "effective date 08/15/00." This "periodic sale order" was identified as "sale and removal of scrap rail, ties, OTM and miscellaneous material 'as is where is. . . .'" A second document identified the material as "approximately 300 tons of rail" and "approximately 100 tons of OTM." The General Chairman took issue with this sale order as devoid of any specific information upon which the Carrier could conclusively establish its "as is-where is" defense. Subsequently, the General Chairman's May 20, 2003 response provided the following information, which the Board finds helpful:

> "I would also again direct your attention to the three (3) statements that were produced during conference, copies attached for your reference. These statements show that the Carrier was retaining some of the material that the contractor was dismantling for its own use."

The foregoing statements referenced by the General Chairman provide the following helpful and relevant information:

> "I witnessed from March 4th, 2002 Tomkins Trucking & Excavating tearing out many, many tracks in South Pekin Yards. There were two men cutting rail, bolts ext and 1 man stacking materials with a bobcat. If that was sold "AS IS" then why did I load approximately 30 rails on our Union Pacific Low Boys on 4 separate occasions to be re-used as re-lay on the Troy grove line which runs from DeKalb to Troy Grove which was installed by our BMWE brothers?
>
> In March 2002 contractors were at South Pekin yards removing more tracks! Some of the material from the retired tracks was [sic] hauled away by contractors. Some of the material was re-used by the Union Pacific railroad.
>
> On March 4, 2002 on separate occasions I observed Tompkins Trucking and Excavating performing track abandonment work such

> as pulling spikes, cutting bolts, knocking anchors off, and removing angle bars from tracks at South Pekin, Illinois. . . . Not all of the company property taken out by Mr. Tompkins was sold to or disposed by Mr. Tompkins. Some was loaded by me on company low-boy semi trucks to be re-used as re-lay on the Troy Grove Subdivision."

A careful review of the foregoing statements reveals a common thread consisting of the fact that while Tompkins removed and retained some of the rail, the Carrier also retained some of it. The Carrier failed to produce sufficient and credible evidence to overcome this conclusion. This, together with the fact that the Carrier did not challenge the claim that the work performed by Tompkins employees is regularly performed by employees represented by the Organization places this case square on all fours with that decided by Third Division Award 24280. In relevant part, the Board, when faced with circumstances substantially similar to those in the instant matter concluded:

> "The Board concludes, therefore, that the portion of the work involved in the sale and removal of Carrier property by the outside purchaser was not improper and required no Article IV notice. That portion of the work involved in dismantling and retaining Carrier property was in violation of the scope rule in that it was assigned to forces holding no seniority."

We find and hold that the conclusions espoused by the Board in Award 24280 are applicable in the instant matter.

As to the remedy, it is the Carrier's position that because each of the Claimants was fully employed, no remedy is warranted. In rejecting this claim, the Board adopts the conclusion reached by the Board in Award 24280 which held:

> "Further, the Board does not agree - - again in these particular circumstances - - that there should be no compensation to the Claimants since they were not available to perform the work because they were 'fully employed in the dates of claim' as stated by the Carrier. If the Carrier had determined that the portion of the work on its own behalf was to be performed by Maintenance of Way employes, they would have been made available for this purpose."

For the foregoing reasons, the Board, consistent with the holding of Award 24280, directs the Carrier and the Organization to meet to determine what proportion of the work fell within the violation determined to have occurred. A rough determination of property sold vs. property retained might be that measure. The claim should then be adjusted by payment of such proportion of straight-time hours to appropriate Claimants.

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 29th day of September 2008.