Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41104
Docket No. MW-40913
11-3-NRAB-00003-090172

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and 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 (Adam Pilot) to perform Maintenance of Way and Structures Department work (dismantle tracks and a crossing, remove track material and related work) between Mile Posts 109.8 and 110.1, at Mile Post 111.4, at the Stock Yard Switch 750 and at Mile Post 112.0 on the Geneva Subdivision beginning on September 4, 5, 6, 7 and 8, 2007 (System File S-0701C-364/1489512 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance 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 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Coy, K. Spooner, D. Fredericks, T. Glenn and H. Johnson shall now each '*** be compensated at the applicable overtime rate of pay an equal share of the (160) one hundred sixty hours worked by the Contractor on September 4, 5, 6, 7, and 8, 2007.'"

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 Organization claims the Carrier contracted out work of dismantling track without providing any notice of the contracting. The Carrier asserts the affirmative defense that it sold the track on an "as is, where is" basis and, consequently, no notice was required.

Rule 1 - Scope governs the determination of this dispute. Specifically, Rule 1reads, in pertinent part, as follows:

> "B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the . . . dismantling of tracks . . . used in the operation of the Company in the performance of common Carrier service on the operating property."

The work of dismantling tracks is reserved work. The Carrier is obligated to notify the Organization of its intent to contract out this work. However, it need not do so when it sells its property, and the new owner is the party that removes it. Under Board precedent, the principle that the Carrier may dispose of its property is well established. (See Third Division Award 29599.) When the Carrier sells track on an "as is where is" basis the purchaser's dismantling, removal and cartage of the track is not considered "contracting out" subject to the Carrier's contractual obligation under Rule 1.

During the on property processing of the claim, the Organization requested a copy of the contract of sale for this track as proof that a bona fide sale had occurred. In response, the Carrier presented the following statement from Manager of Track Maintenance (MTM) Stewart:

> "All employees were offered overtime to help in this removal. There were no volunteers for this work, so the tracks were sold to the contractor on an 'as is' basis and he was responsible for its removal."

In response to MTM Stewart's statement, the Organization presented a handwritten statement from Claimant T. Glenn, which reads as follows:

> "This is in regard to our claim on Sept. 4, 5, 6, 7, 8 of 2007 for contractors removing track on the Geneva sub between m.p. 109.6 to m.p. 110.2. MTM Stewart told us the track was sold and did not mention overtime if anyone was interested in working to remove it. This is work we have done in the past."

The Carrier argues that because there are conflicting statements in the record, the Board must dismiss the claim, citing Third Division Award 35855. The Board routinely dismisses claims when on-property processing produces irreconcilably conflicting statements over a material fact.

The Board finds that the determination of this dispute turns on whether the Carrier established that it sold the track that was removed. The assertion that the track was sold on an "as is where is" basis is an affirmative defense (Third Division Award 39305). Moreover, the Carrier bears the burden of proof to establish its affirmative defense (Third Division Award 30661).

The Carrier argues it met its burden through MTM Stewart's statement quoted above. Throughout the processing of the claim, the Organization requested a copy of the sales contract. The Carrier did not produce it at any time. If there is any conflict in the statements presented by MTM Stewart and Claimant Glenn, it is over whether overtime was offered to BMWE-represented employees. Overtime is not a material fact in this case.

The Board concludes that the Carrier failed to establish that is sold the track in question prior to its removal through the Manager's statement. The statement does not establish when the track was sold and the nature of the sale. The documentation of a sale that the Carrier utilizes in the regular course of business is the documentation that would establish a sale. It is such documentation that is recognized in other Awards in which the affirmative defense of a sale on an "as is where is" basis was successfully asserted by the Carrier (Third Division Awards 28229, 31521, and 32858).

The Board concludes that the Carrier has not met its burden of proof. Because it failed to establish the sale, it follows that the dismantling, removal and cartage of the track was subject to the obligations contained in Rule 1. It violated Rule 1, when it failed to provide the Organization with advance notice of the contracting out.

What remains for the Board to determine is the appropriate remedy. The Carrier argues that the Claimants were fully employed on September 4, 5, 6, 7, and 8 and, therefore, no monetary remedy should be awarded by the Board.

The failure to provide notice deprived the Organization of any opportunity to dissuade the Carrier from contracting out the contested work. The failure to provide notice requires a sustaining award (Third Division Awards 31260 and 32878). In Third Division Award 32862 , the Board observed:

> "Complete uniformity of decision did not exist as this Board developed its approach to the hundreds of cases presented to this Board arising from the parties' contracting disputes. Review of those decisions shows some inconsistencies - by this Board and sometimes even by individual referees sitting with the Board. But one very clear concept arose through that overall decisional process - the position taken by this Board discussed in Award 32338 that the Carrier's failure to give notice to the Organization after the 1991 admonitions by this Board that it had to do so would result in relief beyond compensation only for those employees in furlough status.
>
> We recognize that the result in these cases where no notice is given may be anomalous. . . . However, in failure to give notice cases, even though the Carrier may have ultimately been able to contract the

> work, even employees who were working could be compensated only because notice was not given. . . . Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion."

The Organization argued in its presentation at the Referee Hearing that the Carrier acted in bad faith. The Board concludes that it is unnecessary to reach that question. In the Awards cited above, where the Carrier failed to establish that it sold property prior to its removal and cartage, the Board issued sustaining awards, as we do in this case. The Carrier shall pay each Claimant the proportionate share of the 160 hours, as claimed.

AWARD

Claim sustained.

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 18th day of October 2011.