Case No. 296
Award No. 172

PUBLIC LAW BOARD NO. 2960

PARTIES TO DISPUTE Brotherhood of Maintenance of Way Employes and Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when, without prior notice to the General Chairman, it contracted with an outside concern to dismantle track commonly referred to as the Morrison, Illinois siding on May 18 and 19, 1989 (Organization File 3KB-4496T; Carrier File 81-89-102).

2. Foreman L. Olade, Assistant Foreman R. Pillars and Boom Truck Operator M. Lubbs shall be compensated an equal and proportionate share of the ninety (90) man-hours expended by the contractor."

FINDINGS: This Board, upon the whole record and all of the evidence, finds that the Employees and Carrier involved in this dispute are respectively Employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

OPINION OF THE BOARD: In its initial claim, the Organization made the following assertions:

> "On May 18 and 19, 1989 a private contractor, Rock River Carriage, dismantled the siding in Morrison, Illinois. The contractor provided six men to perform all work connected with dismantling, sorting, loading, and transporting all materials except the track ties that were stacked by them and later picked up by Carrier forces. The contractor's men used a Semi trailer, bobcat, and Front Endloader. The contractors rendered 10 hours of service on May 18, 1989 and 5 hours on May 19, 1989 performing this work.

* * *

"The Carrier failed to provide any notification to the Brotherhood regarding the intent to contract out the work described in this claim. Furthermore, the work involved did not require special skills, equipment or material."

The Carrier responded, asserting that "the dismantled track at Morrison, Illinois was purchased by an outside contractor, and all material was retained by the outside contractor. None of the material was returned to the Transportation Company, in that the material was not owned by the Transportation Company." Accordingly, there was no violation, in their opinion. Subsequently, the Union asked for a copy of the contract with the outside concern. It was not provided until roughly a year later, coincidentally on the same day the Parties advanced the case to the Board.

Before the Board, the Organization maintained that the dismantling of track is work specifically reserved to them by virtue of Rule 1 (b). The Carrier continued to argue that because the track was sold "as is, where is," the ownership left the Carrier and, therefore, left the scope of the Agreement.

The first problem with the Carrier's argument is that at the time the work in question was done, the track was owned by the Carrier. The work was performed May 18 and 19. The contract to sell this particular section of track was not consummated until June 1, 1989. There was an earlier basic contract between the Carrier and the contractor, but this merely set the general terms for future agreements over specific sections of track. Because the track was still the Carrier's at the time of the dismantling, they cannot hide behind the lack of ownership/control defense. Since the Carrier owned the track and since Rule 1 (b) specifically reserves dismantling work to BMWE forces, a violation of the Agreement was manifest.

Even if we were to get beyond the fact that the track was owned by the Carrier, there is a critical factual dispute which would have to be resolved. In its claim, the Organization asserted that the contractor piled up the ties to be removed by the Carrier. The Carrier claimed the contractor removed everything. This would be critical. Selling surplus track and ties (from the top of the rail to the bottom of the tie) is one thing. However, having the contractor dismantle and remove the entire track unit but retaining a portion of it in the ownership, control, and for the convenience of the Carrier would violate the

Agreement. See Third Division Award 24280, where it was stated in part:

> "The claim has merit to some degree, however, in that the dismantling and removing performed by the purchaser included work on behalf of the Carrier which appears to the Board to be considerably more than incidental to the removal of the purchaser's property.
>
> "The Organization in its claim states that the purchaser was 'taking selected rails and ties and piling them for the Milwaukee Road . . . . This material is and continues to be Milwaukee Road property.' Such contention was not denied by the Carrier. In its correspondence, the Carrier states 'The contractor may have also found it necessary to handle Milwaukee Road property to avoid damage . . . while he is attempting to remove his own personal property.'
>
> "Given this state of the facts, the Board finds that the Carrier caused outside forces to perform work customarily and normally performed by Maintenance of Way employes to the extent of dismantling and storing materials for continuing use of the Carrier."

While we don't have to get to this question, since the Carrier owned the track at the time of the work, such a question may have to be addressed in future cases.

AWARD

The claim is sustained.

Gil Vernon, Chairman

D. D. Bartholomay
Employee Member

Joan M. Harvieux
Carrier Member

Dated: April 5, 1993