NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY
(Former Fort Worth and Denver Railway Company)

AWARD NO. 21
Case No. 25

STATEMENT OF CLAIM

(1) That the Carrier violated the provisions of the current Agreement when on March 9, 10, 1988 the Carrier contracted with Jerry Smith Dozer Service to remove and dismantle track and loading rail near Herald, Texas without first according the General Chairman the mandatory fifteen (15) day notice of the Carriers intent to contract Maintenance of Way work.

(2) The Carrier further violated said Agreement when the Carrier's authorized officer pursuant to Article V of Agreement of August 21, 1954, Division Superintendent G.W. Williams failed to respond to the claim within the specified sixty (60) day limitation and instead authorized staff member Mr. E. Wilson to respond to the claim.

(3) Because of the violations outlined above the Carrier will now be required to allow the claim as presented, i.e., that Claimants now be compensated 8 hours each day at their respective straight time rate of pay for service performed Monday through Friday (regular assigned work days) and at the time and one-half rate of pay for service performed outside of the regular assigned work hours each day. The claim was to commence 60 days retroactive from the date filed and continue until violation ceased.

F I N D I N G S

The Carrier entered into an agreement with Childress Dozer Service to "purchase, dismantle and remove" scrap material from the Carrier's right of way at the Turnout Relay, Harrold, Texas. The Organizaton argues that this is work customarily assigned to Maintenance of Way employees and that the contract with Childress was in violation of Rule 4, Contracting, (b), both as to the work itself and the Carrier's failure to provide the stipulated 15-day advance notice to the General Chairman.

As to the purchase and removal aspect of the Childress contract, the Board finds no Rule violation. It is well established that a carrier may undertake to sell its property on an as-is basis, with the purchaser having the right to remove such purchased material from the Carrier's property.

In this instance, however, the contract also specified as follows:

> Any useable material to be stacked on [right of way] as directed by Roadmaster.

Such placement of materials retained in the Carrier's ownership is clearly work which is properly assigned to Carrier employees. As provided below, the Award will be sustained as

to this portion of the work.

The Organization raises a procedural matter, noting that a Carrier response in the claims handling procedure was not made by the Carrier officer designated to receive such claims. On this basis, the Organization argues that the claim must be sustained as provided in Rule 27. The Referee has reviewed this identical point previously and here reaches the same conclusion. Award No. 15 stated as follows:

> The Organization also makes a procedural objection in that the reply to the Organization's appeal was not signed by the Division Superintendent. The reply was, however, signed "for" the Division Superintendent by a member of his staff, and the Referee finds this was sufficient.

As to the merits of the matter, such is virtually identical to the claim considered in Third Division Award No. 24280 (Marx), cited by the Organization. This Award also addresses the question of compensation to the Claimants, who were otherwise fully employed at the time. This Award reads in part as follows:

> The Carrier undertook to enter into the sale of scrap track ties to an outside firm, Wiggins Landscaping. The contract sale provided that the purchaser would collect the scrap ties in place on the Carrier's property. Insofar as the transaction consisted of this undertaking, there is no rule violation and specifically no requirement of the Carrier to follow the detailed notice procedure under Article IV, Contracting Out, of the May 17, 1968 National Agreement. As stated in Award No. 10826:

"The Carrier has the legal right to sell its property; and, after such sale, ownership of such property is then vested in the purchaser thereof. . . .

We find no rule in the Agreement which, expressly or by inference, prohibits the Carrier from making a sale of its property in the complained of manner."

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 considerable 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.

In such a situation, the Organization need not meet the burden of exclusivity of work assignment (as might be appropriate in other circumstances). Since that portion of the work was performed by outside forces, it is sufficient to show that it is within the scope rule of the Agreement, which is clearly the case here. As stated in Award No. 18999:

"Having found that the work involved is generally recognized as signal work, we also find that it is covered by the Scope Rule. Accordingly, the Carrier's contention that Petitioner must prove exclusivity is inapplicable."

> 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. Award Nos. 13832, 15497 and 21678 (and others cited therein) hold in similar fashion.
>
> 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. Given these findings, the Board directs the Carrier and the Organization to meet to determine what proportion of the work fell in the latter category. A rough determination of property sold vs. property retained might be the measure. The claim should then be adjusted by payment of such proportion of straight-time hours to appropriate Claimants.

In the dispute here under review, the Referee will also direct the parties to meet and determine what approximate proportion of the work consisted of stacking "useable material" which remained under the control and under the ownership of the Carrier. The appropriate hours at straight-time rate should then be paid to the Claimants.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.

HERBERT L. MARX, JR., Neutral Referee

NEW YORK, NY

DATED: October 19, 1990