

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 24

Carrier File No. 3MWB 89-02-02E

Organization File No. T-D-413

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned outside forces (Phillips Iron and Metal) to perform right of way cleaning work from Mile Post 25.9 to Mile Post 55, between Fargo and Hillsboro, North Dakota from September 6 through October 27, 1988.

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work as required in the Note to Rule 55.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D. M. Jagol, Group 1 Machine Operator A. D. Fortier and Sectionmen J. A. Boe and A. L. Gilbertson shall each be allowed pay at their respective rates for an equal proportionate share of the one thousand five hundred twenty (1520) straight time hours and three hundred eighty (380) overtime hours expended by the outside forces performing the work involved here.

F I N D I N G S

The Organization contends that the Carrier "assigned forces of an outside concern (Phillips Iron and Metal) to perform track and

roadbed maintenance work, i.e., clearing the right of way of discarded scrap rails, angle bars, spikes, plates and other track material" and that such work is "customarily, historically and traditionally" performed by Maintenance of Way employees and is work "contractually reserved" to them. The Organization thus argues that the Carrier improperly failed to give notice of such undertaking and violated the Agreement to assigning such work to outside forces.

The Carrier states that the scrap material was sold to the outside concern on an "as is, where is" basis and that it retained none of the material for its own use. While the Carrier did not do so at the outset of the claim handling procedure, it eventually provided the Organization with the standard contract under which such type of sale is conducted.

The Board finds no prohibition to the Carrier's disposing of material while such material is in place on Carrier right of way. Supportive of this conclusion is Third Division Award No. 28488 (McAllister), which stated:

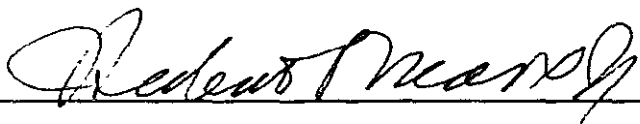
The basic issue in this case is whether or not the picking up and removing of scrap rail and other track material which had been sold "as is and where is" is within the Scope of the Agreement and subject to the Rules regarding subcontracting. . . . In this case, though, the work was done for the benefit of Benson-Quinn and involved the removal of material which belonged to them. The rail and other material were no longer the property of the Carrier.

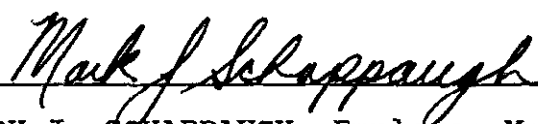
In a similar case, this Board held in Third Division Award 24280 that such a sale and removal by the outside purchaser was not improper and required no notice under Article IV, Contracting Out, of the May 17, 1968 National

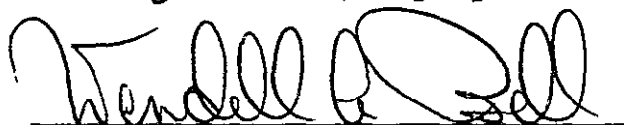
Agreement. . . . Accordingly, we hold here, as we did in Award 24280, that the work was not contracted out, and the Agreement was not violated.

A W A R D

Claim denied.

  
HERBERT L. MARX, Jr, Chairman and Neutral Member

  
MARK J. SCHAPPAUGH, Employee Member

  
WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: Feb 29, 1992.