

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 48

Carrier File No. 4MWB 90-06-26A

Organization File No. T-M-714-B

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned and/or otherwise allowed outside forces (Taylor Contractors) to perform bridge dismantling work and recovery of materials of Bridges 19.6 and 28.8 on the 8th Subdivision on the Lakes Division beginning on February 19 through March 30, 1990.

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, B&B Foremen M. J. Hoy, J. C. Peterson, K. A. Paulson, D. L. Tollers, V. Lundquist, B&B Truck Driver B. L. Frisk and Group 2 Machine Operator L. A. Hagadorn shall each be allowed, at their respective straight time rates, an equal proportionate share of the eight hundred (800) man-hours expended by the outside forces performing the above-mentioned work.

F I N D I N G S

At issue here are the consequences of the Carrier's ICC-approved abandonment of 17.22 miles of railroad track located between Forest Lake and North Branch, Minnesota and in particular the disposition of two bridges on this line. Following the abandonment and therefore after Carrier use of the line was completed, the Carrier sold all ties, rail, ballast and other track material on an "as is, where is" basis to the C. L. Merritt Company. Merritt in turn contracted with Taylor Contractors to take up and remove the purchased line material. The sales contract included the following:

Included with the sale of ballast removal is the removal of Bridge 28.8 at Wyoming, Minnesota and Bridge 19, C. L. Merritt will return to [the Carrier] all timbers as designated in the field and deliver to Rush City or other designated location as agreed upon by both parties.

The Organization contends that the "bridge dismantling work and recovery of materials" of the bridges properly falls under the notice requirements and contracting restrictions of the Note to Rule 55 and other provisions of the Agreement. The argument is that, under the sales agreement, the materials salvaged on behalf of and returned to the Carrier remained the Carrier's property. The Carrier, on the other hand, emphasizes the sale of all the material from the abandoned line to the contractor, contending that it then simply "repurchased" certain materials for its use. Beyond

the excerpt quoted above, however, there are no cited provisions in the sale agreement concerning actual repurchase.

Whether the materials actually remained under the Carrier's control or were repurchased is not, in the Board's view, the decisive point. The Note to Rule 55 refers, in specific fashion, to work "in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in performance of common carrier service". Here, the line had been abandoned and was obviously no longer "used in the operation of" the Carrier.

The Board finds the Carrier's citation of Third Division Award No. 19994 in point here. As noted by the Carrier, that Award concerned Article IV of the May 1968 National Agreement, but the conclusion reached is properly applicable to the language of the Note to Rule 55 as well. Award No. 19994 quotes Award No. 12918, as follows:

Since the Agreements pertain to work of carrying on Carrier's business as a common carrier, we must conclude that the work of dismantling and removing completely the abandoned property does not fall within the contemplation of the parties. This work cannot be considered maintenance, repair or construction.

Award No. 19994 then concludes as follows:

We are not persuaded by Petitioner's argument with respect to the continued ownership by Carrier of the salvaged rails and other material. The critical question is not continued ownership of the salvaged rails and real property, but the purpose for which the work was intended; was the work performed related to the operation and/or maintenance of the railroad or not. . . . We think not. We must conclude that work on abandoned facilities,

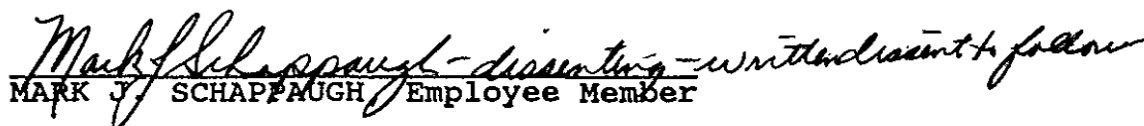
even though Carrier retains ownership of the property, is not work contemplated by the parties to the Agreement and such work is not within the scope of the applicable schedule Agreement.


In support of its position, the Organization cites Third Division Award No. 24280. The occurrence reviewed in that Award concerned a Carrier's sale of ties to an outside concern, with the understanding that certain portions of the material would be retained for the Carrier's use. The Award sustained the claim as to the contractor's work on the retained ties. The Board does not find Award No. 24280 of guidance here. In that Award, the work was performed for the Carrier's benefit in connection with its ongoing activities; the ties were taken from tracks under the control of and for the continued use of the Carrier; and there was no issue of abandonment of the right of way.

A W A R D

Claim denied.


HERBERT L. MARX, Jr, Chairman and Neutral Member

 - dissenting - written dissent to follow
MARK J. SCHAPPAUGH, Employee Member


D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: *April 29, 1994*


EMPLOYEE MEMBER DISSENT TO AWARD 48
PUBLIC LAW BOARD No. 4768
(Referee H. L. Marx, Jr.)

This claim involved the contracting out of bridge dismantling and recovery work on Bridges 19.6 and 28.8 which were located on trackage that had been abandoned by the Carrier. Certain portions of the dismantled bridges were recovered for later use by the Carrier in maintenance projects. In denying the claim the Board stated:

"Whether the materials actually remained under the Carrier's control or were repurchased is not, in the Board's view, the decisive point. The Note to Rule 55 refers, in specific fashion, to work 'in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in performance of common carrier service.' Here the line had been abandoned and was obviously no longer 'used in the operation of' the Carrier."

The Organization takes exception to the Board's determination that the Agreement was not violated since it occurred on trackage which had been abandoned by the Carrier. We submit that the work involved here clearly fell within the realm of work accruing to Maintenance of Way forces under this Agreement. In this connection, the record established that the Carrier assigned or otherwise allowed outside forces to dismantle and recover materials from bridges and that certain materials remained in the Carrier's possession for reuse in other Maintenance of Way projects. As an example, Item 4 of the "sales agreement" specifically stipulated that "Included with the sale of ballast removal is the removal of Bridge 28.8 at Wyoming, Minnesota and Bridge 19. C. L. Merritt will return to BN all timbers as designated in the field and deliver to Rush City or other designated location as agreed upon by both parties." The MW materials were dismantled and retained for no other purpose than for reuse by the Carrier. Obviously, such retained materials were to be "used in the operation of the Company in the performance of common carrier service". As such the work was clearly encompassed within the scope of this Agreement and the findings of Third Division Award 24280 were directly applicable.

For the above reasons this decision is erroneous and is of no precedential value. Therefore, I respectfully dissent.


Mark J. Schappaugh
Employee Member - PLB 4768