Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35978
Docket No. MW-33805
02-3-97-3-286

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard
(Coast Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when without a conference being held between the Chief Engineer and the General Chairman, as required by Rule 2, the Carrier assigned outside forces (Progressive Rail Service) to perform Maintenance of Way work (dismantle track and pick up scrap rail) between Mile Post AF 209.5 and Mile Post AF 216.5 on the Vander Spur, Southend Subdivision beginning January 4, 1996 and continuing [System File 22(6)(96)/12(96-0459) SSY].

(2) As a consequence of the violation referred to in Part (1) above, Messrs. R. R. Lockamy, J. L. Morang, J. J. Powell, Jr., L. L. Davis and B. M. Warren shall each be compensated at their respective straight time and time and one-half rates, for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question beginning January 4, 1996 and continuing until the violation ceased."

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.

This is a dispute over certain alleged scope covered work claimed by the Organization to have been improperly contracted out to Progress Rail Service ("PRS") by the Carrier. The work in dispute was the dismantling of track and pick up of scrap rail between Mile Post AF 209.5 and Mile Post AF 216.5 on the Vander Spur, Southend Subdivision beginning January 4, 1996.

No prior notice was given by the Carrier to the Organization for the performance of this work by PRS.

The sole issue before the Board as developed on the property is the validity of the Carrier's affirmative defense that PRS purchased the material as scrap on an "as is, where is" basis. Specifically, according to the Carrier on the property in a letter from Division Engineer J. C. Tomkins:

* * *

"Progress Rail Services, Inc., purchased all scrap material released on this project. They purchased the material under standing blanket Purchase Order 925017, dated 10/16/92. I am attaching a copy of said purchase order for your review. The applicable portion states:

> 'The purchaser or his agent has the permission of the CSX Purchases and Materials Department to be on CSX Property for the purpose of picking up material listed.'

All Material is sold: 'AS IS WHERE IS.'"

* * *

The Carrier is correct that its Agreement obligations concerning contracting out are not applicable when the material is sold to an outside concern on an "as is, where is basis." See e.g. Third Division Award 32857 between the parties to this dispute and Awards cited therein:

"Based on what is before us, we are satisfied that the Carrier entered into an arrangement whereby TIFP removed the ties on an 'as is, where is' basis. As such, no violation of the Agreement has been shown. See Third Division Award 30637:

> 'The ties were sold on an 'as is, where is' basis. Accordingly, the removal by the outside concern did not violate the Agreement since the ties were no longer owned by the Carrier.'

See also, Third Division Awards 30080, 30224, 30231, 30901, 31716 and Awards cited therein."

Because the Carrier's position in this case is an affirmative defense, the Carrier has the burden of demonstrating the validity of that defense. The Carrier has not done so.

First, the sales order relied upon by the Carrier which sells material "as is, where is" to PRS is dated February 10, 1992 and, by its terms, states that "[t]his permit . . . expires sixty (60) days from date of execution unless otherwise indicated in this contract." We closely examined the document and can find nothing which extends that sales order to cover this disputed work performed almost four years later in 1996. There is a reference to an extension with language stating "[i]ncrease sale order to 100 per DG Hartley 8/27/92." But again, in light of the expiration language and the fact that the disputed work was performed well over three years after that extension, that purported extension is insufficient for us to find that the document relied upon by the Carrier covered this specific work.

Second, we cannot tell where the 1992 document relied upon by the Carrier applied. In that document there is no discernible reference to specific or even general locations for the work to be performed, much less to the location of the work involved in this case.

This document constitutes the Carrier's affirmative defense. We cannot find that a four year old sales order which apparently expired 60 days after its execution or may have been extended for an undisclosed period three years prior to the performance of the disputed work which further makes no reference to where the work was to be performed is sufficient to demonstrate that the work in dispute in this case was the collection of scrap materials sold to an outside concern on an "as is, where is" basis so as to permit the Carrier to avoid its obligations under the Agreement. Perhaps the material was sold on an "as is, where is" basis. But the Carrier's obligation in this case was to substantiate its asserted defense with something more than the type of document provided in this matter (e.g., a more relevant document, statements, etc.). However, on the basis of this record, we cannot speculate. The Carrier's affirmative defense is insufficient.

This was scope covered work. Rule 2 provides that ". . . all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier" and "[i]n such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed." Nothing in the record shows that those exceptions apply or that understandings were reached concerning conditions for the performance of the work. Nor was prior notice of the use of outside forces given. On the merits, the claim must be sustained.

As a remedy, the Claimants were deprived of work opportunities when the Carrier used outside forces to perform the work. The Claimants shall be made whole at the applicable Agreement rate. The matter is remanded to the parties to determine the number of hours of work performed by the outside forces on this particular project. The Claimants shall be compensated accordingly.

AWARD

Claim sustained in accordance with the Findings.

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 19th day of March, 2002.