Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36093
Docket No. MW-34973
02-3-98-3-731

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.
((former Clinchfield Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Progress Rail) to perform Track Subdepartment work (picking up rail, tie plates, rail bars, spikes, bolts and scrap) between Mile Post 173 (Kona, North Carolina) and Mile Post 93 (Kingsport, Tennessee) on June 23 through August 15, 1997 and at Mile Post 01 (Elkhorn City, Kentucky) beginning on August 18, 1997 and continuing [Carrier's File 12(97-2579) CLR].

(2) The Agreement was violated when the Carrier assigned outside forces (Progress Rail) to perform Track Subdepartment work (cutting up continuous welded rail) at Mile Post 148.5 to Mile Post 93, Kingsport, Tennessee on June 30 through August 8, 1997 [Carrier's File 12(97-2580)].

(3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the work described in Parts (1) and (2) above and to make a 'good-faith' effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 48 and the December 11, 1981 Letter of Understanding.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Messrs. M. L. Thomas, C. Edwards, W. L. Lasley and R. L. Stephens shall each be compensated at their respective and applicable rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the work in question beginning June 23, 1997 and continuing until the violation ceased.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Messrs. B. R. Peterson and R. E. White shall each be allowed two hundred eighty (280) hours' pay at their respective pro rata rates."

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.

It is not unprecedented for this Division and other Board tribunals to permit the combination of separate but factually linked claims into a single contract interpretation dispute, in the interests of administrative efficiency and economy. See, First Division Awards 24530 and 25212, as well as Third Division Award 31546. In these two claims, which were consolidated on appeal to the Board, the Organization asserts Scope Rule violations during Summer 1997 when employees of Progress Rail performed track and related right-of-way maintenance work on the Appalachian Service Lane: i.e., from June 23 through August 15, 1997, four Progress Rail employees picked up rail, tie plates, rail bars, spikes, bolts and scrap between Mile Post 173 (Kona, North Carolina) and Mile Post 93 (Kingsport, Tennessee); commencing on August 18, 1997 and

continuing four Progress Rail employees picked up rail, tie plates, rail bars, spikes, bolts and scrap at Mile Post 01 (Elkhorn City, Kentucky); from June 30 through August 8, 1997, the two Progress Rail employees cut up continuous welded rail at Mile Post 148.5 to Mile Post 93, Kingsport, Tennessee.

When challenged by the Organization with these factually related claims, the Carrier responded that the work in question was no longer subject to the Scope Rule of the Agreement because Progress Rail had made an "as is, where is" purchase of the track materials as scrap and was merely picking up its own purchased property. It is well recognized in the precedent decisions of the Board that when a bona fide and properly proven "as is, where is" purchase occurs, the purchased materials pass out from under the Carrier's dominion and control and the Carrier is thus relieved of its Scope Rule obligations relative to such materials, including the notice and conference requirements of Rule 48 and the December 11, 1981 Letter Agreement. See, e.g., Third Division Award 34986. However, this line of cases also establishes that a plea of an "as is, where is sale" is an affirmative defense, which the Carrier has the burden of persuasively proving on the property if it is to prevail before the Board. See Third Division Awards 19623, 20230, 20895, 25402, 28229, 28430, 28759, 29059, 30661, 31521, 31619, 31754, 32278, 32320, 32335 and 32858. Thus, this case narrows to the question whether, in the facts and circumstances of this record, the Carrier produced during on-property handling sufficient probative evidence to persuasively establish its affirmative defense of an "as is, where is" sale of those track and related materials which Progress Rail employees dismantled and/or picked up on the dates encompassed by these claims.

When the Organization asked for evidence in support of the asserted "as is, where is" defense, the Carrier initially provided a copy of an undated and unexecuted "purchase order," which it subsequently withdrew and replaced with a different undated unexecuted purchase order much later in the claims appeal process. Throughout handling on the property, however, the Carrier adamantly refused to produce or even allow the Organization (and thus the Board) to inspect the underlying contract which it had allegedly entered into with Progress Rail Services, Corp. in April 1997, for the purchase and removal of the material in dispute. In that connection, the following statement in a letter dated October 5, 1998 from Director Employee Relations J. H. Wilson to BMWE General Chairman T. R. McCoy, Jr. is illustrative of the Carrier's position:

> "The request for a copy of the sales contract with Progress Rail is respectfully declined. We have never provided such a contract; we have only provided sales orders, yet no previous claim involving 'where is, as is' sales of scrap material to Progress Rail by CSXT has been progressed past conference denial by your Organization. Nevertheless, you now contend that failure to provide a copy of that contract is an admission that the materials were not sold as alleged, that they remained carrier property, and that the Agreement was violated.
>
> We disagree entirely. We are under no obligation to provide copies of proprietary documents to you, and our refusal to turn over the document you request is not an admission of anything. In fact, other than to prove that the terms of the sale are 'as is, where is,' the contract could not prove that the scrap involved in this claim was sold to Progress Rail. In that respect, the attached sales order is the best evidence and is certainly sufficient to prove our affirmative defense that the materials were sold 'as is, where is' to Progress Rail. As previously noted, you have accepted the sales orders as probative evidence in every previous case; obviously, you believed they were sufficient before, and your request for the contract is obviously a fishing expedition at the direction of the BMWE national office in Chicago."

That the Carrier itself relied for its affirmative defense on this underlying contract with Progress Rail, rather than unsigned, undated and non-specific "sales orders" which may or may not apply to the materials, work and locations at issue in these claims, is borne out by the following opening sentences of the Statement of Facts in the Carrier's Submission to the Board:

> "Effective April 23, 1997, the Carrier entered into a contract with Progress Rail Services, Inc. in which Progress Rail purchased retired rail and other related track materials. On the dates in question, Progress entered Carrier's right-of-way and began removal of its property."

In Third Division Award 30971, involving these same Parties, the Board sustained a virtually indistinguishable claim when another component road of the Carrier (former Seaboard Coastline Railroad Company) asserted "confidentiality" or "proprietary interest" for refusing to produce an alleged "as is, where is" contract of purchase upon

which it based its affirmative defense. The following rationale from Award 30971 applies equally in this case:

> "Belated assertions of 'confidentiality' are of no comfort to Carrier in this situation. Carrier cannot have it both ways, if it asserts an 'as is where is' defense, it must provide the Organization and this Board with sufficient information to support that assertion."

In the face of that on-property dating from July 26, 1995, the Carrier took and lost a calculated risk when it refused to provide for the record a copy of the Progress Rail Services purchase contract which was the basis of its affirmative defense in the instant case. Based upon the failure of proof on the "as is, where is" affirmative defense, Parts 1, 2, 4 and 5 of the claim must be sustained.

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 22nd day of July 2002.