CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40820
Docket No. MW-40826
10-3-NRAB-00003-090092

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier utilized outside forces (RCMP) to perform Maintenance of Way and Structures Department work of removing Track 17, Track 18, IC Connector Track, Rip Track and House Track at South Pekin, Illinois and cut up reusable track material in the South Pekin Yard and removed track from Mile Posts 93.45 to 92.8 and dismantled switch and track panels at Sommer, beginning on July 17, 2007 and continuing (System File S-0701C-362/1486069 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(B).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Wiseman, J. Goodin and R.

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Boncouri shall now each be compensated at their applicable time and one-half rates of pay for an equal share of all hours expended by the outside forces in the performance of the aforesaid work beginning July 17, 2007 and continuing."

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.

A thorough review of the record reveals evidence supplied by the Manager of Track Maintenance to break the deadlock of competing assertions. According to his statement, the work in question was performed by RCMP Recycle pursuant to a sale of the involved scrap material on an "As Is, Where Is" basis.

It is well settled that sales of material on an "As Is, Where Is" basis transforms the recovery and removal work into work of the purchaser; it is not work of the Carrier. As a result, the work of the purchaser falls outside of the coverage of the applicable Scope Rule of the Agreement. Accordingly, because the work is not scope-covered, the Carrier was not required to provide notice to the Organization. See, for example, Third Division Awards 37104 and 37119, as well as the Awards cited therein.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40820, DOCKET MW-40826
(Referee Wallin)

Award 40820 is an anomalous outlier that departs from the well-reasoned standard of proof that this Board has applied with uniform consistency to contracting out cases that turn upon an asserted "as, where is" sale as an affirmative defense. Indeed, without explanation or reason, the Referee ignored decades of consistent arbitral precedent, including precedent on the property and his own prior awards on this very issue. This departure from the norm without reason or explanation is as baffling as it is stunning. Nevertheless, inasmuch as the precedential value of awards is directly proportionate to the quality of reasoning in the award and this award is devoid of reasoning to support its anomalous finding, Award 40820 should be afforded no precedential value.

This case involved contracting out the routine Scope covered work of dismantling and recovering used track material. At the initial level, the Carrier disingenuously denied the claim based on the assertion that the Organization had not proved that contractors performed the work in question. After the Organization presented documentary evidence to establish that contractors had indeed performed the work, the Carrier changed course at the highest level of appeal, and for the first time in the history of the dispute, asserted that the track material was sold, "as is" (Employes' Exhibit "A-5"). The very next step in the claim process was the July 29, 2008 conference where the Organization directly challenged the Carrier's new found "as is" sale defense. Inasmuch as the Carrier had previously dissembled about whether the contractor had even been on the property, the Organization demanded that the Carrier present documentation to prove its affirmative defense. That demand was memorialized in a post conference letter dated August 5, 2008 which, in pertinent part, stated:

> "Mr. Ring's denial contained a lotus note statement from MTM Stewart which indicated the material in question was sold to RMCO Recycling on a 'as is' basis. **The Brotherhood rejects the lotus note as a genuine document showing the material was in fact sold to RMCO Recycling. As in the past, the Carrier must provide a bona fide Sale Document to prove their position.**" (Emphasis added) (Employes' Exhibit "A-6")

Apparently, the Carrier recognized that it was obligated to prove its affirmative defense because it committed to furnishing a copy of the sales agreement to BMWED and memorialized that commitment in its conference confirmation sheet where it commented:

> "'As is' – get BMWE purchase Agreement" (Carrier's Exhibit "C" - Page 16)

In sum, the Organization challenged the Carrier to prove its belated "as is, where is" sale affirmative defense and the Carrier knew perfectly well that it was obligated to present a copy of the purported sales agreement if it wanted to rely on that defense as is evidenced by its promise to "... get BMWE purchase agreement". Hence, the Carrier's ultimate failure to present a copy of that sales agreement should have resulted in a sustaining award in accordance with the well-established precedent of this Board. In addition to Awards 30971, 35978, 36093 and 37572 which

were presented in the Organization's submission (Employes' Exhibit "G"), we also invite attention to Award 31521 which was cited in the Carrier's Submission and held:

> "*** Having failed to produce the very contract upon which it bases its defense (and having failed to produce that contract notwithstanding its representation that it would do so), the Carrier is precluded from relying upon the substantive terms of the contract as an affirmative defense to the claim. Third Division Award 30661:
>
> > 'It is well established by precedent decisions of this Board that 'as is, where is purchasers' may remove their purchased property from Carrier's facility without running afoul of the Scope Rule. However, bare assertions by Carrier are not sufficient when the Organization challenges the validity of such a transaction. **In this case, Carrier asserted the existence of a Scrap Sale Contract with Metals of Texas Inc. (METEX) for approximately 830 net tons of mixed scrap rail. In subsequent correspondence, the Organization requested that Carrier provide a copy of the sale ticket for the materials at issue, but Carrier failed to provide the documentation which might have defeated this claim. The Organization put Carrier to its proof but, for reasons not apparent on this record, Carrier failed to meet its burden of proof in handling on the property. Evidence submitted for the first time at the Board level comes too late for our consideration.**'
>
> Award 30661 is on all fours with this case. See also, Third Division Awards 28229, 28430, 28475, 29016, 29059 and Awards cited in those cases.
>
> Under the circumstances, we have no choice but to sustain the claim. Because the failure to assign the work to Claimants resulted in loss of work opportunities, the requested monetary remedy is appropriate." (Emphasis added) (Carrier Sub. at P.7)

The Referee's failure to follow the precedent set by Awards 30971, 35978, 36093, 37572 and 31521 and the numerous awards cited therein is particularly baffling given the fact that this Referee had endorsed such precedent himself in Award 35774 where he held:

> "The Organization also contended the Carrier's 'As Is Where Is' sale was a subterfuge to deny the claims. Accordingly, it requested a copy of the sales contract. This request was made in the Organization's September 9, 1997 letter. The record on the property stayed open for the Carrier's response for nearly three months thereafter until December 8, 1997, when the Organization served its Notice of Intent to file an ex parte submission. The Carrier never responded to the Organization's request.
>
> **Although the Board has upheld successfully proven 'As Is Where Is' sales, it has also rejected the purported affirmative defense when carriers have refused or failed to provide documentation to establish the legitimacy of the defense when properly requested by the affected organization**.

> "Because the instant record establishes neither a legitimate 'As Is Where Is' sale nor a past practice that rebuts scope coverage, we are compelled to find that the Carrier violated the Agreement when it contracted the work in the manner it did. ***"

The requirement that Carriers must prove an affirmative "as is, where is" sales defense is not simply a matter of legalistic form. To the contrary, the simple fact is that Carriers specifically, including the Carrier involved in this case, have asserted "as is, where is" sales when in fact no such sale has occurred. See the afore-cited Award 37572, which held:

> "Furthermore, the 'Description of Work,' contained in the 'Schedule of Billable Services Form,' confirms that the Shade Railroad Services was to 'provid(e) labor and equipment for pickup and disposal of used (second hand) wood railroad ties at or near various locations.' **Thus, it is clear that the 'as is, where is' contract purportedly at the heart of this claim <u>was not</u> the typical sales contract. Rather, it appears to have been an agreement reflecting the Carrier's intention to pay the contractor to perform the clean-up and removal of the used railroad ties, work which the Claimants have performed in the past, we are convinced, given the available precedent.** See, for example, Third Division Awards 30063 and Award 14 of Public Law Board No. 5546.
>
> The terms of the above agreement between the Carrier and Shade Railroad Services thus fail to support the Carrier's affirmative defense regarding the existence of a bona fide 'as is, where is' sales agreement, we conclude. ***" (Emphasis in bold added)

Award 37572 makes it clear that this Carrier has asserted an "as is, where is" sale when no such sale has occurred. When Award 37572 (which was presented in the Organization's Submission) is considered in light of the long and consistent precedent requiring Carrier's to present copies of sales agreements to support purported "as is, where is" sales, there can be no question that the instant claim should have been sustained because the Carrier failed to prove its affirmative defense by presenting the purported "as is" sales agreement. The Referee's reason for failure to adhere to the dominate standard of proof consistently applied to "as is, where is" sales cases, including his own prior awards, remains a baffling mystery. But what can not be questioned is that Award 40820 is an anomalous outlier that departs from the well-reasoned standard of proof that has been consistently applied to such cases by this Board. Consequently, I emphatically dissent and submit that this award should be afforded no precedential value.

Respectfully submitted,

Timothy W. Kreke

Timothy W. Kreke
Labor Member