Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44218
Docket No. MW-44993
20-3-NRAB-00003-180508

The Third Division consisted of the regular members and in addition Referee Dr. Andrée Y. McKissick when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. **The Agreement was violated when, on August 19, 2016, the Carrier assigned or otherwise allowed outside forces (Progress Rail) to perform work (operating a Brandt truck switching out rail cars and pulling Maintenance of Way rail cars) beginning at Mile Post BI 84.6 in the GM Yard to the North Baltimore 'House Track' at Mile Post BI 50.6 on the Akron West Seniority District, Great Lakes Division (System File H42407916/2016-210156 CSX).**

2. **As a consequence of the violation referred to in Part (1) above, Claimants B. Deitering and J. Vanderhoeven shall now each be compensated for ten (10) hours at their respective straight time rates of pay and one-half (.5) hour at their respective overtime rates of pay."**

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.

The pertinent provision governing this dispute is the Agreement between CSX Transportation, Inc. and its Maintenance of Way employees, effective June 1, 1999 as specified within the Scope Rule as well as Section 1 of the 2012 Memorandum of Agreement (MOA-3). In addition, this dispute also involved the CSXT Labor Agreement 12-018-14, effective July 17, 2014, as well as the Brotherhood of Maintenance of Way Employes (BMWED) Agreement of: Rule 1, Rule 3, Rule 4, Rule 11, and Rule 17.

On August 23, 2016, the Organization filed a claim. It was denied on October 22, 2016. On November 22, 2017, it was appealed to the Carrier's Highest Designated Officer (HDO), but it was denied on July 19, 2017.

It is the position of the Carrier that transporting of scrap material is not scope-covered work. Still further, the Carrier points out that the operation of Brandt trucks has not been performed exclusively by BMWED forces. Moreover, the Carrier further asserts that third-party purchasers have been utilizing Brandt trucks to pick up their material since the establishment of the MOA-3, Section 1. Lastly, the Carrier maintains that this work is not reserved by the Scope Rule nor through past practice, as the Organization asserts. Thus, the Carrier concludes that this claim must be denied.

On the other hand, it is the position of the Organization that the Scope Rule is noted in the CSX Labor Agreement, 12-018-14, dated July 17, 2014, at the third paragraph, clearly covers the right of the Organization to claim this work. The Organization also cites, Attachment Nos. 1 and 3 of the Employees' Exhibit A-5, as being indicative of its work. In sum, the Organization maintains that past practice is clear as well as its reservation under the Scope Rule, as noted.

After a careful analysis of the record presented, the Board finds that the Organization's argument to be persuasive for the reasons stated.

The claim is sustained. Accordingly, Claimants B. Deitering and J. Vanderhoeven shall now each be compensated for ten (10) hours straight-rates of pay and one-half (.5) hour at their respective overtime rates of pay.

AWARD

Claim sustained.

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 30th day of September 2020.

CARRIER MEMBER'S
DISSENTING OPINION
to
THIRD DIVISION
AWARD-44218, DOCKET MW-44993

(Referee Andre McKissick)

The Carrier respectfully dissents to the Board's decision. This case involves a third party picking up sold used track, or scrap material "as is, where is." The Board sustained the claim holding that picking up sold scrap material is BMWE scope covered work. The Carrier dissents because the Board's decision could effectively rewrite the party's clear agreement language and because it defies logic.

MOA-3, Section 1(B), specifically states:

> B. ***The Carrier may assign other than BMWED-represented employees*** *to perform the following track material handling work:*
>
> 1. *Sold Material -Used track material that has been sold "as is, where is" to a third party because it will no longer be used in the Carrier's railroad operations* ***may be picked up and removed from the Carrier's property by the third party purchaser*** *or its designee. In all such cases, the Carrier shall notify the involved General Chairmen within sixty (60) days of the material being picked up. The notice shall include a copy of the sales agreement that clearly identifies the specific used material that has been sold, the location of that material, the dates it was removed from the Carrier's property, and the man-hours expended by the purchaser in retrieving the material. Upon receipt of the information to be sent via e- mail, to the involved General Chairmen, the Organization shall have sixty (60) days to file a claim or grievance, if desired. Such claim or grievance shall be filed directly with the Carrier's Highest Designated Officer. (Emphasis added).*

It is clear based on the plain language of the agreement provision above the BMWE do not have a right to perform work associated with picking up sold scrap material. Under the scope rule of the agreement in order for the BMWE to be entitled to certain work, the work must be "in connection with the loading, unloading, distribution and pick-up of track material used in the

operation of the Carrier in the performance of common carrier service on property owned by the Carrier" as defined in both the scope rule as well as section 1(A) of MOA 3. Clearly picking up scrap material no longer owned by the Carrier is not scope covered work based on the plain meaning of the agreement cited above. Further, this position is supported by the overwhelming industry precedent, including on property precedent which holds picking up of scrap material "as is, where is" is not scope covered work. See NRAB Third Division, Award 32436 (Eischen) (CSX v. BMWE) (holding pick up of sold track material as is where is by third party was not scope covered work); NRAB Third Division, Award 37104 (Wallin) ("[I]t is well settled that genuine sale of Carrier property on an 'as is, where is' basis does not constitute an impermissible contracting of reserved work."); NRAB Third Division, Award 37270 (Newman) ("Where rail and other material being removed from the Carrier's right-of-way is the subject of an 'as is, where is' sale, it is no longer the property of the Carrier and work associated with it does not fall within the Scope of the Agreement."). All of the above awards were cited by the Carrier in its submission and were not distinguished by the Board in its award.

Here, the evidence was clear the Carrier sold scrap material to a third party with a valid contract "as is, where is." Once the property was sold "as is, where is" the Carrier no longer owned the property and the BMWE forces did not have a right to the work under the scope rule or MOA 3. The Board's decision that the work in question is scope covered effectively rewrites the party's unambiguous and clear contract language which the Board cannot do. See NRAB Third Division, Award 28595 (Goldstein) (Dismissing claim and holding, "It is not within the power of the Board to rewrite Agreement Rules but merely to interpret them as they exist."); NRAB Third Division, Award 20196 (Blackwell) (sustaining claim and holding failure to apply clear contract language

that created an exception would effectively rewrite agreement which the Board had no authority to do); NRAB Third Division, Award 22780 (Roukis). The decision also ignores, without distinction the overwhelming industry precedent cited by the Carrier in its submission and argued during the hearing.

For those reasons, the Carrier emphatically dissents.

Michael Skipper
Michael Skipper

Jeanie L. Arnold
Jeanie L. Arnold

January 6, 2021