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

Award No. 45427
Docket No. MW-47961
25-3-NRAB-00003-220214

The Third Division consisted of the regular members and in addition Referee Jeanne Charles 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 Carrier violated the Agreement when it assigned outside forces (Midstates Rail) to perform Maintenance of Way Department work (dismantling track and removing track material) between the vicinity of Mile Posts CH 20.2 and CH 22.9 at the yard in Livonia, Michigan on the Detroit Seniority District on February 24, 25, 26, 27, 28 and 29, 2020 and on March 1, 2, 3, 4, 5, 6, 7 and 8, 2020 (System File GLN801920/20-19155 CSX).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the above-referenced contracting transactions as was practicable and in any event not less than fifteen (15) days prior thereto and failed to provide an opportunity for conference.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Pniewski, D. Button, T. Dooley, M. McClain, P. Inman, M. Wilkewits, T. Townsend and A. Patterson '... shall now each be paid an equal portion of the manhours expended by the Contractor's employees at their respective overtime rate of pay and that all time be credited towards vacation and retirement for the Claimants. Please advise when this claim will be allowed, and as to which pay period such payment will be made.'"

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.

Claimants T. Pniewski, D. Button, T. Dooley, M. McClain, P. Inman, M. Wilkewits, T. Townsend and A. Patterson ("Claimants") have established and held seniority within the Carrier's Maintenance of Way Department. The Claimants were assigned in various classifications within the Maintenance of Way and Structures Department at the time of this dispute.

This claim is based on the proper application of the June 1, 1999 Scope of Work agreement ("Agreement") between the parties. At issue is whether the Carrier violated the Agreement when it allowed outside forces (Mid-States Rail) to dismantle and remove rail, other track materials (OTM) and miscellaneous metal parts between February 24, 2020 and March 20, 2020. The Carrier had sold the materials to Mid-States Rail "as is, where is."

The Organization contends that the subject work is reserved by the first and second paragraphs of the Scope Rule contained in the Agreement; it is work customarily or traditionally performed by the Organization's covered members; the Carrier failed to comply with the advance notification and conference provisions for the claimed work prior to contracting out such work; and the defenses raised by the Carrier do not defeat the claim.

Conversely, the Carrier maintains that because the track was abandoned, the work in question was not Scope covered work under the prevailing precedent. The only

work performed by contractors was work necessary to recover the material they had purchased which is specifically permitted by MOA 3 Section 1, B (1) which states:

> **Used track material that has been sold "as is where is" to a third party…may be picked up and removed from the Carrier's property by the third party…In all such cases, the Carrier shall notify the involved General Chairman within sixty (60) days of the material being picked up.**

Further, the October 15, 2019 Memorandum of Agreement (CSXT Agreement No. 12-011-19) which states, in part, "it is understood that the Carrier is not required to provide any notice to the BMWE, either before or after the material is sold or picked up," subsequently eliminated the need for the Carrier to provide any advanced notice to the BMWE either before or after sold material is picked up.

By letter dated March 17, 2020, the Organization filed a timely claim on behalf of the Claimants. The claim was properly handled by the Parties at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for final adjudication.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. As the moving party, it was the Organization's responsibility to meet its burden to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). After careful review of the record, the Board finds the Organization has met its burden.

The Scope of Work Agreement requires, in part, that "all work in connection with the construction, maintenance, repair, inspection or dismantling of tracks, bridges, buildings, and other structures or facilities *used in the operation of the carrier in the performance of common carrier service* on property owned by the carrier" be assigned to BMWE employees. (Emphasis added). Here, the tracks were not yet abandoned. The Carrier only represents that the track had not been used "for a substantial period of time" without defining what that means. The crew was in the process of retiring the tracks per Claimant Pniewski's statement. In fact, his crew was in the process of dismantling the tracks and told to stop. Additionally, the sales contract was for the purchaser to remove "*loose* rail, OTM and misc metal parts." (Emphasis added). There is no competent evidence that rebuts these crucial facts. The cases cited by the Carrier reflect that its position would be successful if the tracks were indeed abandoned. In those

cases, the tracks had been out of use for a number of years and there were filings with rail authorities. No such evidence exists here. Accordingly, there is sufficient evidence to establish a violation by the Carrier.

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 13th day of February 2025.

CARRIER MEMBER'S DISSENT

To

Third Division Award 45427; Docket 47961
Third Division Award 45435; Docket 48038

(Referee Jeanne Charles)

A review of the Award issued by the Board indicates, without doubt, the Board erred in its decision when it asserted, incorrectly, that there was a violation by the Carrier of the Agreement when it contracted with an outside party to remove track and other material no longer in service by the Carrier.

By long-standing practice and written agreement between the parties, MOA 3 Section1(B)(1), the Carrier is permitted to the sale and removal of used track material by contractors, which provides: *Used track material that has been sold "as is where is" to a third party…may be picked up and removed from the Carrier's property by the third party…In all such cases, the Carrier shall notify the involved General Chairman within sixty (60) days of the material being picked up.*

The facts of the instant cases are essentially without dispute. An outside contractor purchased and removed track material from the carrier's property which was no longer used in common carrier service.

The Organization asserted, without basis, that Claimants' had a right under the agreement to the work performed to dismantle and remove the track and other track materials. The Carrier asserted, supported by past practice and arbitral awards, that the language of MOA 3 permitted the actions here.

The Board erred in its decision to sustain the claim by holding that because the material in issue had not been unused in a substantial period of time, that Claimants had the right to work to remove and dismantle the tracks. However, neither the Board nor the Organization can produce language which establishes the exact length of time a track must be out of service before sale and removal to an outside party would be permissible.

The principle of 'where-is, as-is" is applicable here where the purchaser of unused rail and OTM (other track material) is long established on this property, and industry wide, and is supported by the Awards cited in the Carrier Submission. These tracks were no longer used in common Carrier Service. The material in question was sold "*as is, where is*". An "*as is, where is*" sale was defined in Third Division, Award 37104, as follows: *"It is well settled that a genuine sale of Carrier property on an `as is, where is' basis does not constitute an impermissible contracting of reserved work . . . . Because such*

sales do not involve work performed for the Carrier, the notice requirements pertaining to contracting of reserved work are not applicable." Therefore, the scrap in question became the purchaser's property and its removal is not considered work reserved for Claimants.

With incorporation by reference to the Carrier submissions in these cases, it must be noted Claimants received a windfall for service not performed and to which, by practice and language of the agreement, they have no right to. A plain language reading of the Agreement in relation to past-practice would produce a declination of the instant claim, which would be consistent with previous practice. The rationale by the Board for the result produced here is not supported by the information in the record.

To produce such a contrary and unfounded Award, the Board has created a negative reliance on precedent and produced an inconsistent result. Both the Carrier and the Organization rely on consistent awards in the industry and the Carrier in this circumstance relied on Board decisions to make managerial decisions. To produce such a contrary conclusion creates the expectation that further disputes will ensue. The Carrier will implement the decision of this Board even though it is in contradiction of prior decisions and past practice on this issue.

The Board is limited to determine issues authorized by the RLA, including the requirement that the Organization establish a violation of the Agreement actually occurred, which the Carrier maintains the Organization has failed to do. As the Board has clearly erred in its analysis and conclusion, the Carrier dissents and asserts this Award should carry no weight in future disputes of like kind.

John K. Ingoldsby

John K. Ingoldsby
Carrier Member