PUBLIC LAW BOARD NO. 6399

CASE NO. 62
AWARD NO. 62

Brotherhood of Maintenance of Way Employes
Division - IBT Rail Conference

and

Norfolk Southern Railway Company (former
Norfolk & Western Railway Company)

Claimants: C. Horton and W. Warren

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way and Structures Department work of loading on-track material (OTM) and rail into Carrier owned rail cars/gondolas (material handling), between Mile Post N 360.0 and Mile Post N 430.0 on the Pocahontas Division (Eastern Region) beginning on July 30, 2020 and continuing until the matter is resolved (Carrier's File MW-BLUE-20-120-LM-760 NWR).

2. The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, in advance of its plans to contract out the work referred to in Part 1 above and when it failed to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces or reach an understanding concerning such contracting as required by Appendix 'F' of the Agreement and the December 11, 1981 National Letter of Agreement.

3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimants C. Horton and W. Warren shall now be compensated for any and all hours expended by the outside forces while performing the work involved."

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that the Board has jurisdiction over the dispute involved herein and that the parties were given due notice of hearing thereon.

The Claimants have established and maintain seniority in the Carrier's Maintenance of Way and Structures Department.

Beginning on July 30, 2020, outside contractor National Salvage loaded rail scrap and on-track material (OTM) left behind by the rail gang into trucks, rail cars, and gondolas, between Mile Post N 360.0 and Mile Post N 430.0 on the Pocahontas Division.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the claimed work is reserved to the Carrier's Maintenance of Way ("MOW") forces under the controlling Agreement and should have been assigned to them in lieu of outside contractors. The Organization contends that there is no dispute that the Carrier's MOW forces have customarily, historically, and traditionally performed the work of material handling, such as loading OTM and rail into Carrier-owned rail cars and gondolas, for decades.

The Organization further contends that there is no dispute that the Carrier failed to notify the General Chairman in advance of its plans to assign outside forces to perform this work. The Organization contends that the Carrier has failed to show that the claimed work belongs to the alleged "as is, where is" sale, because the Salvage Contract offered by the Carrier expired two years before the claimed work was performed. Additionally, the Organization contends that the Salvage Contract does not establish that the relevant rail and OTM was sold on an "as is, where is" basis.

The Organization contends that Claimants are entitled to the claimed remedy. The Claimants suffered a lost work opportunity, and a monetary remedy would protect the integrity of the Agreement.

The Carrier does not dispute that the Organization's members customarily, historically, and traditionally perform material handling. The Carrier contends that the OTM and scrap rail that was retained by the Carrier remained the property of the Carrier and was collected from the right of way by Carrier craft employees and loaded by them for transport to the Carrier's Roanoke Material Yard. The Carrier also does not dispute that no contracting notice was sent to the Organization regarding the claimed work.

However, the Carrier denies that the claimed work was contracted to outside forces, as it was performed as part of an "as is, where is" sale of scrap to a third party. The Carrier provided a Salvage Contract showing that National Salvage was on the Carrier's property retrieving only material that belonged to them. The Carrier also provided a statement from a manager purporting to establish the continued validity of the Contract and that ownership of the materials transferred to National Salvage prior to them retrieving it.

Between July 30, 2020 and August 14, 2020, National Salvage followed a rail gang, picking up rail scrap and OTM. The Carrier presented a Salvage Contract that provided for the purchase and removal of salvage track material "at Purchaser's own cost and expense." The contract defines that the material is to be sold "as is, where is" along the right of way. The Carrier also presented an

unrefuted manager's statement that the sale contracts "automatically renew" unless one party terminates them. The Carrier contends that the Organization's assertions to the contrary are nothing more than speculation.

The Carrier's point is well-taken. The manager's clarification that the salvage contract was renewable is not contradicted on this record. Accordingly, the Carrier has demonstrated a sale of this material to a third party on an "as is, where is" basis.

The Carrier had no say in how National Salvage removed the scrap and OTM. Since the work was not done at the direction of the Carrier, the Organization's members have no claim to the disputed work. Numerous Boards have considered this type of arrangement. *See*, Third Division Awards 35772, 32436, 30637, 30224, 28615 and Public Law Board No. 4768, Award 24. As explained in Third Division Award 36209, "[T]he removal of material under the terms of an 'as is, where is' contract does not violate the Agreement and requires no advance notice because the material is no longer owned by the Carrier."

The Carrier presented sufficient evidence in this case that the material had been sold to National Salvage prior to the work being performed. The Organization presented insufficient evidence to the contrary. The Board does not intend this award to be precedential for any other dispute with the exception of this dispute, these facts, and the similar claims held in abeyance by the parties pending the outcome of this matter.

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.

Kathryn A. VanDagens,
Chairman

Scott M. Goodspeed, Carrier Member

Adam Gilmour, Employe Member

Dated: April 8, 2024

EMPLOYE MEMBER'S DISSENT
TO
AWARD 62 OF PUBLIC LAW BOARD NO. 6399
(Referee Kathryn VanDagens)

In this case, I must dissent to the Majority's findings. Here, the Majority ruled that the Carrier was permitted to contract the disputed work to outside forces based on an erroneous and unproven assertion that the "as-is/where-is" scrap sale contract provided by the Carrier renewed automatically and that this established that the scrap had been sold to the contractor and that the contractor forces were therefore merely picking up materials which it had purchased.

It must be noted that the sales contract the Carrier provided contained explicitly defined term limits which expired on December 31, 2018. It remains undisputed that the sales contract contained no language whatsoever which stated, referenced, or even implied that the contract could or would be automatically renewed in any way. Instead, the claim was denied based on an unproven statement from a Carrier manager which asserted that all "as-is/where-is" contracts automatically renew.

The manager's statement did not reference a sales contract, did not reference contractor National Salvage, and did not reference the disputed work involved in the instant claim. Instead, the manager issued a blanket statement vaguely asserting that all contracts have the option to automatically renew unless cancelled by either party. There is no documentation to support this assertion whatsoever.

As repeatedly noted by the Organization throughout the handling of the instant claim, it is a longstanding principle of arbitration that affirmative defenses must be supported with evidence in order to prevail. Specifically, NRAB Third Division Awards 30975, 37572, 41104, 42220 and Award 6 of PLB No. 7099 (Employes' Exhibit "I") upheld this principle in cases of alleged "as-is/where-is" sales by the Carrier. Unfortunately, this longstanding principle was overlooked in the instant case and the claim was ultimately denied based on a manager's unsupported conjecture.

For these reasons, I must respectfully dissent.

Adam Gilmour
Employe Member