

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39279
Docket No. MW-38655
08-3-NRAB-00003-050043
(05-3-43)

The Third Division consisted of the regular members and in addition Referee Jonathan I. Klein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 (H&W Trucking) to perform Maintenance of Way work (operate equipment and vehicles) in moving SPG Force C4 trucks and bus from Harlan, Kentucky to Evergreen, Alabama over the weekend of March 12, 2004, instead of Vehicle Operators T. Adkins, J. Miller and E. Lucas [System File D21360804/12(04-0314) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Adkins, J. Miller and E. Lucas shall now each be compensated for ten and one-half (10.5) hours at their respective time and one-half 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.

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This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This case concerns the Carrier's use of outside contractors to perform work purportedly covered by the Scope Rule set forth in the June 1, 1999 Agreement between the parties. An extensive analysis of the issue of contracting out work is contained in the decisions of Public Law Board No. 6508, Awards 1-8 (Douglas) and Public Law Board No. 6510, Award 1 (Goldstein). The aforementioned decisions of Public Law Board Nos. 6508 and 6510 were subsequently addressed and discussed in Third Division Award 37830 (Wallin).

As stated in Third Division Award 37985 (Klein) there is no basis to overturn the rationale and conclusions reached by Public Law Board Nos. 6508 and 6510, and Third Division Award 37830. The essential principles to be applied in reviewing a claim of subcontracting under the Scope Rule contained in the June 1, 1999 Agreement, as pronounced by the decisions of Public Law Board Nos. 6508 and 6510, and Third Division Award 37830, were extensively detailed in Third Division Award 37985, and are incorporated herein by reference.

The Carrier used an outside contractor to operate its motor vehicles from one work location to another. Specifically, the Carrier utilized several employees of H&W Trucking to operate a fuel truck, bus and six-man "crew cab" pickup truck assigned to System Production Gang (SPG) C-4 from Harlan, Kentucky, to Evergreen, Alabama, on March 12-14, 2004. The aforementioned dates were on the Claimants' weekend rest days. The Carrier provided no notice to the Organization that it would be utilizing an outside contractor to transport its vehicles from one work location to another.

On March 23, 2004, the Organization filed a claim on behalf of each of the Claimants to protest the Carrier's violation of the Scope Rule and Rule 1 of the Agreement. The claim provides, in pertinent part, as follows:

“On March 12, 13, and 14, 2004, the claimants were denied work and overtime opportunity when the Carrier contracted the moving of the SPG Trucks with H&W Trucking to different work locations. Mr. Lucas is the Crew Cab Driver, Mr. Adkins is the Bus Driver, and Mr. Miller is the Fuel Truck Driver. They work on SPG force C4 and the claimants had performed this work in the past, but at the beginning of this year they were told that they would not be performing the work. The claimants were available but were not allowed to perform this work. Enclosed is a statement as to the locations where the Truck was moved and the time for the movement as well as the dates.”

The Carrier denied the claim on April 26, 2004, and each subsequent appeal submitted by the Organization thereafter was also denied. On January 20, 2005, the Organization advised the Carrier of its intent to file a Submission of the combined claims with the Board for final resolution.

The Organization contends that all work in connection with the maintenance and repair of tracks, and work which was being performed as of the effective date of the June 1, 1999 Agreement by employees of the classifications therein set forth, is reserved to BMW-represented employees. Said work includes the operation of all vehicles used in connection with track construction, maintenance, and repairs and any other work traditionally performed by BMW-represented employees. The work at issue in this case was clearly an overtime work opportunity reserved to BMW members. Furthermore, the work of operating vehicles, including their transportation from one work location to another, has traditionally been performed by BMW-represented employees. Therefore, the clear and unambiguous language of the Scope Rule fully supports the Organization’s position in this case.

The Organization relies upon several Awards in support of its position that the work in question is reserved to BMW-represented employees under both the Scope Rule and Rule 1 of the Agreement. Additionally, those Awards have also determined that said work has customarily and traditionally been assigned to and performed by BMW-represented employees.

The Carrier compounded its violation of the Scope Rule in this case as a result of its failure to provide advance notice to the Organization of its intention to use an outside contractor to perform the work at issue. The Organization asserts that hundreds of Awards have sustained claims involving the Carrier's failure to comply with the advance notice and meeting requirements of the applicable Rules.

The Organization maintains that Arbitrator Douglas correctly concluded that the second paragraph of the Scope Rule clearly and plainly provides that only BMW members have the right to perform the work enumerated therein. It notes that Arbitrator Douglas also held that the Carrier must demonstrate a highly compelling reason to rebut the very strong presumption that the work covered by the second paragraph of the Scope Rule will be performed by BMW members. In the instant case, the Carrier essentially had no reason, much less a highly compelling reason, to assign the work in question to an outside contractor.

According to the Organization, there are four compelling reasons for awarding the requested remedy. First, protecting the integrity of the Agreement and the bargaining unit is particularly vital in contracting out work cases. Second, each of the Claimants clearly suffered a loss of overtime work opportunity. Third, the overwhelming precedent on this property and the formerly independent properties that merged to form the Carrier supports precisely the type of remedy requested in this case. Finally, the Organization notes that the Board in numerous Third Division Awards has ordered monetary awards to claimants at their respective time and one-half rates.

The Carrier's statement of the issue is, as follows: "Whether the Scope Rule of the System Agreement bars the Carrier from using a contractor to move its equipment and vehicles from one worksite to another worksite when the language contained in the Scope Rule does not reserve such work to members of the Organization."

The Carrier contends that the Scope Rule does not restrict its right and/or ability to contract with drivers to move its vehicles from one worksite to another worksite. The Carrier acknowledges that the Scope Rule provides that the work of "operating machines, equipment, and vehicles, transporting maintenance of way

employees” is reserved to members of the Organization. However, that is not the work at issue in this case. According to the Carrier, driving or transporting its vehicles over the road in this manner is not contemplated as scope protected work. The Organization failed to present any evidence in support of its position that the Carrier violated the Scope Rule when it utilized drivers from H&W Trucking on March 12, 2004, to transport vehicles from Harlan, Kentucky to Evergreen, Alabama.

According to the Carrier, this is not a new dispute between the parties and the decisions in previous cases involving similar circumstances have supported its right to utilize contractors to transport its vehicles and other equipment. The parties could have easily added language to the Scope Rule in the event that they desired to make over-the-road transportation of the Carrier’s equipment and vehicles work reserved to BMW members. However, they chose not to do so.

Furthermore, the Carrier contends that there is no provision contained in the Scope Rule which requires it to give prior notice to the Organization before it utilizes contractors to transport its equipment and/or vehicles over-the-road to another work site. The Scope Rule applies to contracting out work concerning the Carrier’s operations on its right-of-way, and it does not apply to transporting its equipment over highways. The Carrier cited Special Board of Adjustment No. 1110, Award 55 in support of its position that it may utilize outside forces to transport its equipment without notifying the General Chairman.

The Carrier asserts that Rule 1 of the Agreement is merely a guide and it is not a Rule that conveys an exclusive right to perform specific work to a particular craft. It points out that various Awards have held that a primary function of a Classification Rule is to denote duties for setting rates of pay. A work classification Rule is not a grant of a right to perform enumerated duties. The Carrier also argues that the statements submitted by the Organization prove nothing in regard to the instant case. Additionally, statements provided by the Claimants can only be viewed as self-serving and cannot be considered probative evidence in any event. Furthermore, the statements in question lack testimony that the Claimants have exclusively performed the service of transporting vehicles and equipment over the highway. The Organization failed to refute the fact that the Carrier has a

documented history of using contractors to haul its vehicles and equipment over long distances.

For the following reasons, the Board finds that the Organization failed to satisfy its burden of proof that the Carrier violated the parties' Agreement under the facts and circumstances presented in this case when it assigned an outside contractor to operate three motor vehicles from one work location to another.

Paragraph 2 of the Scope Rule contained in the parties' June 1, 1999 System Agreement provides, in pertinent part, as follows:

"The following work is reserved to BMW members: 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. This work will include . . . operate machines, equipment, and vehicles; . . . and any other work customarily or traditionally performed by BMW represented employees. In the application of this Rule, it is understood that such provisions are not intended to infringe upon the work rights of another craft as established. It is also understood that this list is not exhaustive."

Paragraphs 4 and 5 of the Scope Rule provide the following provisions regarding the Carrier's obligation to notify the Organization of its intent to contract out scope-covered work and a subsequent meeting regarding the matter if requested by the Organization:

"In the event the carrier plans to contract out work within the scope of this Agreement, except in emergencies, the carrier shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances."

If the General Chairmen, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and Organization Representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith."

As previously held by the Board, Paragraph 2 of the Scope Rule unequivocally provides that specific work is reserved to BMW members. While the Organization correctly points out that the Scope Rule states that the work of operating machines, equipment and vehicles is reserved to BMW members, the Board notes that the Scope Rule also requires that said work must be performed 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. In the instant case, the work that was contracted out by the Carrier was the transportation of three vehicles from one work location to another over the course of a weekend and on the Claimants' rest days. The Board finds that such work is not contemplated as scope covered work which is expressly and specifically reserved to BMW members. There is no provision of the Scope Rule that prohibits the Carrier from utilizing the services of an outside contractor to operate or transport vehicles or equipment over the road from one work location to the next where they will then be operated by the Carrier's BMW forces in connection with their work assignment at that location.

In circumstances where the work in question is not explicitly granted to BMW-represented employees under the Scope Rule, the Organization must present sufficient evidence that said work was customarily or traditionally performed by those employees. Based upon the evidence of record presented in this case, the Board finds that the Organization failed to do so. The Board notes that although the Carrier may have assigned BMW members to perform the task of transporting vehicles from one work location to another on certain occasions, there

has also been a long-standing practice of using outside contractors to perform such work. Thus, the Board finds insufficient proof that the work in question has been “customarily or traditionally” performed by BMW members to the extent contemplated under the Scope Rule so as to reserve such work for BMW-represented employees only.

The Board further concludes that the Carrier violated neither paragraph four nor paragraph five of the Scope Rule due to the fact that no notice was required regarding its intent to utilize an outside contractor to transport vehicles from one work location to another under these facts and circumstances. Accordingly, the claim is denied in its entirety.

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 21st day of July 2008.

LABOR MEMBER'S DISSENT
TO
AWARD 39279 Docket MW-38655
(Referee Jonathon Klein)

The able Neutral in this case became entwined in a specious argument raised by the Carrier and erred in his findings. The basis for the Majority's findings was the misconception that the work involved here was not in connection the construction, maintenance, repair, inspection or dismantling of tracks, bridges, buildings, and other structures or facilities used in the operation of the carrier. The Scope Rule reads in pertinent part:

"The following work is reserved to BMW members: 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. This work will include rail, guard rail, switch stand, switch point, frog, tie, plate, spike, anchor, joint, gauge rod, derail and bolt installation and removal; erection and maintenance of signs, such as mile posts, speed restriction signs, resume speed signs, crossing and station signs, warning signs, and signs attached to buildings or other structures (except billboards); construction of track panels; welding, grinding, burning, and cutting; ballast unloading, regulating, equalizing, and stabilizing; track and switch undercutting; cribbing between ties; track surfacing and lining; snow removal (track structures and right of way); road crossing installation and renewal work; asphaltting of road crossings (unless required by outside agencies), culvert installation, repairs, cleaning and removal; yard cleaning; security and ornamental fences; distribution and collection of new and used track, bridge and building material; operate machines, equipment, and vehicles; transporting maintenance of way employees; mowing; installation, maintenance, and repairs of turntables, platforms, walkways, and handrails; head wall and retaining wall erection; cleaning, sandblasting, and painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities; rough and finish carpentry work; concrete and masonry work; grouting, plumbing, and drainage system installation, maintenance, and repair work; cooling and heating system installation, maintenance, and repair work; fuel and water service work; roof installation, repairs, and removal; drawbridge operation and maintenance and any other work customarily or traditionally performed by BMW represented employees. In the application of this Rule, it is understood that such provisions are not intended to infringe upon the work rights of another craft as established. It is also understood that this list is not exhaustive."

RULE 1D. reads:

"D. Vehicle Operator Roster:

Vehicle Operator

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Vehicle Operator operates all highway or rail-highway vehicles:

*Boom Trucks
Dump Trucks
Log Loaders
Grapple Trucks
Semi-LowBoy
Buses
Fuel Trucks
Six Man Pick-up Trucks" (Italics in original)*

Apparently, the Majority is unfamiliar with the operation of traveling gangs and the Organization failed to make those operations sufficiently clear. Once a gang is finished at one location the machines are loaded onto railroad flat cars for transportation to the new location. Historically, the vehicles were driven to the new location by the vehicle operators. Evidence presented by the Organization during the handling of this dispute on the property clearly showed that such was the case. The gang would have been unable to perform the next weeks Scope covered work without the vehicles, which included the gang bus to transport the employees to the job site as well as the truck with all of the gangs tools loaded thereon. To say that the movement of the vehicles "**** from one work location to another on certain occasions, there has also been a long-standing practice of using outside contractors to perform such work. Thus, the Board finds insufficient proof that the work in question has been 'customarily or traditionally' performed by BMW members to the extent contemplated under the Scope Rule so as to reserve such work for BMW-represented employees only." is straining credulity.

The Organization was convinced that the language of the Scope Rule and Rule 1 was sufficiently clear to prove our case, however, it is apparent that we failed to convince the Board. In future cases, we shall inundate the Board with clear and convincing evidence of past practice of Maintenance of Way Employees performing such work.

Respectfully submitted,



Roy C. Robinson
Labor Member