Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37985
Docket No. MW-38281
06-3-04-3-213

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 Employes
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(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 to perform Maintenance of Way work (track, bridge and structure dismantling and construction work) between Mile Posts 4 and 4.75 on the Freemont Industrial Track at Queens, New York beginning on February 3, 2003 and continuing, instead of Albany Service Lane employes C. Spike, J. A. Dewe, J. Behm, G. Olin, A. Bostwick, M. Kosmowski, W. Henderson, R. Eichstadt, F. Kovits, W. Mihuka, T. Preston, R. Sheridan, F. Hoyt, S. LaCavera, D. Santiago, P. Winter, J. Keener, F. Milliman, W. Berry, W. Flint, R. Wolfanger, G. Walsworth, P. Florczykowski, R. Walsh, J. J. Dewe, D. Near, E. Dewolf, D. Cook, W. Moak, K. Martyniuk, K. Champa, R. Zinni, P. Shea, G. Pongonis, S. Farucci, D. Ostrum, F. Root, J. Neary and R. Marade [Carrier's File 12(03-0461) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants C. Spike, J. A. Dewe, J. Behm, G. Olin, A. Bostwick, M. Kosmowski, W. Henderson, R. Eichstadt, F. Kovits, W. Mihuka, T. Preston, R. Sheridan, F. Hoyt, S. LaCavera, D. Santiago, P. Winter, J. Keener, F. Milliman, W. Berry, W. Flint, R. Wolfanger, G. Walsworth, P. Florczykowski, R. Walsh, J. J. Dewe, D. Near, E. Dewolf, D. Cook, W. Moak, K. Martyniuk, K. Champa, R. Zinni, P. Shea, G. Pongonis, S. Farucci, D. Ostrum,

F. Root, J. Neary and R. Marade shall now each be compensated at their respective rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning February 3, 2003 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.

Background of Arbitral Decisions on Contracting Out

The Board has before it a docket of ten cases which concern the Carrier's use of outside contractors to perform work purportedly covered by the Scope Rule of the June 1, 1999 Agreement between the parties.[1] A brief overview of the arbitral precedent is warranted. However, the Board does not intend to repeat the exhaustive analysis contained in the three, most significant Awards addressing the issue of contracting out, nor to repeat the Scope Rule in its entirety in this decision.

The long and tortured history of disputes and negotiated agreements over the contracting out of work is detailed in the decisions of two Public Law Boards established between the Carrier and the Organization: Public Law Board No. 6508, Awards 1-8 (Douglas) and Public Law Board No. 6510, Award 1 (Goldstein). These decisions are concisely and accurately discussed in Third Division Award 37830 (Wallin). A close review of the arguments and evidence presented at the Referee

1. For ease of reference, the same numbering of the Scope Rule paragraphs applied by the parties will be used by the Board.

Hearing in the instant case, and others on the docket, demonstrate no basis to overturn the rationale and conclusions reached by Public Law Board Nos. 6508 and 6510, and Third Division Award 37830.

Succinctly stated, the essential principles to be applied in reviewing a claim of subcontracting under the "new" Scope Rule contained in the June 1, 1999 Agreement, as pronounced by these three prior decisions, consist of the following:

1. The inclusion of the phrase, "[t]he following work is reserved to BMWE members" clearly and plainly indicates that only BMWE members have a right to perform the enumerated work. (PLB No. 6508).

2. The "notice" and "meet and confer" language contained in paragraphs 4 and 5 of the Scope Rule do not grant an Organization's General Chairman sole authority to bar the contracting out of work if an agreement cannot be reached. (PLB No. 6508).

3. The juxtaposition of the second, fourth and fifth paragraphs of the Scope Rule creates an internal ambiguity in the Rule. (PLB No. 6508).

4. If the Carrier has complied with the notice and conference provisions of the Scope Rule, it must demonstrate "a highly compelling reason" to rebut the very strong presumption that the work covered by paragraph 2 of the Scope Rule "will be performed by BMWE members." (PLB No. 6508).

5. The determination to be made in paragraph 4, above, must be performed on a case-by-case basis after "strict scrutiny" of the justification offered by the Carrier to support the need for contracting out scope covered work. (PLB No. 6508).

6. The wording of paragraph 2 of the current Scope Rule provides that only BMWE members have a right to perform the enumerated work. (PLB No. 6510).

7. The impact of paragraphs 4 and 5 of the Scope Rule is to preclude a finding that the current Scope Rule represents an absolute bar to contracting out scope covered work. (PLB No. 6510).

8. The burden placed upon the Organization to establish a prima facie claim of a Scope Rule violation is simply to show that the specific work falls within the work identified in paragraph 2 as reserved to members of the Organization. (PLB No. 6510).

9. The Carrier must provide the Organization with the business justifications for contracting out at the conference and in handling of the disputes on the property, the reasons why management has done so in the specific instance and those reasons cannot be "merely boilerplate or generalized reasons." (PLB No. 6510).

10. Past practices may not trump the right of bargaining unit employees to perform the work reserved to the BMWE-represented employees by paragraph 2 under the current Scope Rule.

11. The Carrier must use due diligence to inspect its property to detect project work covered by the new Scope Rule, and where the need is or should have been identified, the Carrier must plan for performing the work with the bargaining unit employees, including hiring, training, equipping and scheduling those work forces. (Third Division Award 37830).

12. Full employment and/or lack of furloughed employees do not suffice as a defense to a compensatory remedy if a violation of the Scope Rule is determined. (Third Division Award 37830).

13. The new Scope Rule permits, by implication, an exception for contracting out scope covered work for compelling reasons that will satisfy a "strict scrutiny" standard of review. (Third Division Award 37830).

The Merits

This dispute centers on the contracting out of track, bridge and structure dismantling and construction work. More specifically, the work involved the construction of 2,734 linear feet of temporary track; the removal of 3,000 feet of existing track and construction of a similar length of new track, the removal of the temporary track, and dismantling and construction of a bridge, abutment, head and retaining wall on the Oakpoint Subdivision of the Albany Service Lane. The work was performed in conjunction with the reconstruction of the Brooklyn-Queens Expressway in Bronx County, New York.

The Carrier issued notice of its intent to contract the work on May 4, 2001. It asserted contracting out was necessary due the work project being done in conjunction with the State of New York and its Brooklyn-Queens Expressway project. The Carrier stated in its notice that it did not have the equipment or manpower necessary to perform a project of such magnitude, there were no furloughed employees on the Mohawk Hudson Seniority District, and all other active forces were working other equally important projects, or performing routine maintenance work.

The Organization reasons that the work involved represents an essential element of the Carrier's operations as a common carrier. While the work is not routine maintenance, the BMWE-represented employees have performed such work whenever it has been needed. Not only has such work been historically performed by the employees in question, it is expressly spelled out in the Scope Rule. No emergency conditions were demonstrated to have existed. The very equipment that the contractor was to provide is the same equipment which the class of employees covered by the Agreement, in particular "A" Machine Operators and Vehicle Operators, must operate.

A copy of the Agreements between the contractor and the Carrier, and between the Carrier and the Department of Transportation of the State of New York were requested of the Carrier by the Organization, but never produced.

The work covered by the notice did not commence until February 3, 2003. The Carrier reasons that the Organization did not challenge the nature and extent of the notice dated May 4, 2001, and, therefore, the work falls outside of the Agreement's Scope Rule. The Organization, according to the Carrier, simply took no exception that the notice failed to cover the work at issue, and it never disputed that the work

involved was precipitated by the expressway reconstruction project. The Carrier did not choose to realign its track or benefit from doing so. In any event, the New York State Department of Transportation and the Carrier entered into an agreement on March 17, 2000, which provided that the state's Department of Transportation would maintain the structures and retaining wall at the specified location.

Moreover, the Carrier insists that while the Organization requested a copy of the contracts between the Carrier, the contractor and the State of New York, the former did not exist when the advance notice of intent to contract work issued and was discussed in conference, and no request was made for the latter agreement at the advance notice conference.

In any event, the Carrier submits that it demonstrated "a highly compelling reason(s)" to contract out the work, including the magnitude of the project and the lack of equipment and adequate forces. The work force was fully employed and occupied elsewhere. Finally, five of the Claimants are represented in another claim filed by the Organization which runs concurrent with the claim under consideration in this case.

From a careful examination of the extensive record and the Scope Rule, it is readily apparent that the work in question is expressly reserved to the Organization's members, including "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 . . . ." The Organization established without question a prima facie claim of a Scope Rule violation because the specific work falls within the work identified in paragraph 2 of the current Scope Rule.

There is no probative evidence that the Carrier planned for performing the contested work with BMWE-represented employees. It simply offered "generalized reasons" that it possessed neither the equipment nor forces necessary to perform the project in the time frame required. There is no evidence of any effort by the Carrier to assign its work force to perform the work – a work assignment ultimately performed by 39 of the contractor's employees. In fact, the contract between the Carrier and the New York Department of Transportation was executed on March 17, 2000. (May 30, 2003, letter from the Carrier's Chief Regional Engineer for the Northeast Region). This is approximately one year prior to the notice of intent to subcontract, and almost three years before the actual work by the contractor began.

Needless to say, there was no showing of emergent circumstances in performing the contested work in coordination with the state's Department of Transportation.

The Board finds insufficient evidence, after employing a "strict scrutiny" standard of review, which would establish any compelling reason(s) to justify the Carrier's decision to employ a contractor in these circumstances. There is no showing with specificity of the equipment the Carrier did not possess or could not have acquired by lease or rental. (Public Law Board No. 6510, Award 1). The Carrier never produced the contracts documenting its agreement with the third party contractor, nor the agreement with the State of New York. It is incumbent upon the Carrier to comply with such requests for documentation in its possession, custody and control and such requests must be considered ongoing. It is not sufficient to raise as a defense that no such agreement with the contractor existed at the time of the notice of intent to contract, and maintain non-production was fully justified two years later after the contractor had commenced work. Nor is the duty to produce excused by the fact that the agreement to which the Carrier is a party may be available elsewhere in the public domain.

In sum, the Board finds a lack of evidence to support a finding that the Carrier could not have staffed, trained, equipped, and scheduled its own forces to perform the reserved work under the current Scope Rule. (Third Division Award 37835.) Finally, as to the appropriate remedy, Award 37835 at Page 13 states, as follows:

> "Although the Carrier asserted full employment and the absence of any employees on furlough in this case, as it has in the other cases within this block of cases, such circumstances are once again found to be invalid defenses. Both PLB Nos. 6508 and 6510 rejected such defenses. They both awarded compensatory remedies to preserve the integrity of the Agreement. Nothing in this record persuades us to depart from that view."

The Board concurs with the finding in Award 37835. However, with respect to five of the named Claimants in this case, C. Spike, F. Kovits, R. Wolfanger, G. Walsworth, and D. Cook, the Carrier asserts that a contracting out claim for the same time period was pending for these employees. The Board notes that recently issued Third Division Award 37954 sustained a claim for each of these B&B employees covering work contracted out in Buffalo, New York, commencing February 3, 2003, and continuing for the man-hours expended by the outside forces. The Board agrees

that to the extent these five named Claimants are already being compensated for contracting out in violation of the Scope Rule for the same time frame, a remedy intended to compensate the five named Claimants for a lost work opportunity has already been satisfied. Moreover, the Board's compensation award to the remaining Claimants is more than sufficient to preserve the integrity of the Agreement.

Therefore, C. Spike, F. Kovits, R. Wolfanger, G. Walsworth, and D. Cook are entitled only to that amount by which their proportionate share of the total man-hours expended by the outside forces in the instant case may exceed the hours of their proportionate share of the total man-hours awarded to them in Third Division Award 37954.

AWARD

Claim sustained in accordance with the Findings.

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 25th day of October 2006.