Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39138
Docket No. MW-38313
08-3-NRAB-00003-040243
(04-3-243)

The Third Division consisted of the regular members and in addition Referee Jonathan I. Klein 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 the Carrier assigned outside forces (Charles Downey) to perform Maintenance of Way work (snow removal) at the Fueling Facility, parking lot around the Yard Office and the Amtrak platform in Clifton Forge, Virginia on February 16 and 17, 2003, instead of R. Harlow, G. Brooks, J. Harlow, T. Plecker, A. Boyd and E. Downey [System File G31805403/12(03-0430) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants R. Harlow, G. Brooks, J. Harlow, T. Plecker, A. Boyd and E. Downey shall each now be compensated for twenty (20) hours' pay 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.

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 and Public Law Board No. 6510, Award 1. The aforementioned decisions of Public Law Board Nos. 6508 and 6510 were subsequently addressed and discussed in Third Division Award 37830.

As stated in Third Division Award 37985, 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 hereby incorporated herein by reference.

The dispute concerns the contracting out of snow removal work by the Carrier at its Clifton Forge, Virginia, property on February 16 and 17, 2003. Specifically, the work involved the removal of snow at the fueling facility, the parking lot around the yard office and the Amtrak platform at Clifton Forge. The Carrier had previously issued a notice to the Organization on November 21, 2001, which provides, in pertinent part, as follows:

> "As a matter of information, the Carrier intends to contract for snow removal throughout the CSX System during the winter of 2002 and 2003. During this period, Contractors and other craft employees will be used to supplement track forces to remove snow and ice during emergencies, and other situations deemed necessary by the Carrier.
>
> The Carrier takes the position, historically various crafts and classes of employees and contractors have performed this type of work. As

we have done in the past, the Carrier will assign snow removal work to expedite the operation. These actions are necessary to ensure the maximum safety of our employees and the general public."

A conference regarding the Carrier's notice of intent to contract the work was held by the parties on December 11, 2001. Thereafter, the Carrier utilized the services of an outside contractor to perform the snow removal work which resulted in the filing of a claim in this matter by the Organization on April 1, 2003.

The Organization maintains that snow removal from the tracks and the right-of-way is an essential element of track maintenance which has historically and customarily been performed by local gangs. The Organization's position in this case is grounded in the clear and unambiguous language of the Scope Rule which stipulates that all work in connection with the maintenance of tracks and other facilities on the Carrier's property, specifically including snow removal and the operation of equipment to perform such work, is "reserved to BMWE members." The work at issue in the instant case was clearly connected with the maintenance of the right-of-way. The Organization points out that numerous Awards have held that the work of snow removal from the right-of-way is work that is reserved to BMWE-represented employes. Furthermore, even in the event that such work was not specifically identified in the Scope Rule, it is nevertheless reserved to BMWE members because it is "work customarily or traditionally performed by BMWE-represented employees" as contemplated by the Scope Rule. The Organization argues that managerial prerogative is not an exception set forth in the Scope Rule.

The Organization also contends that even in the event of an emergency or other circumstances, the Carrier is contractually obligated to assign snow removal work to its Maintenance of Way employees in preference to assigning such work to outside contractors. Furthermore, it is undisputed that the Carrier did not lack either the necessary equipment or available and qualified employees with which to perform the work in question. There are no exceptions set forth in the Scope Rule which permit the Carrier to contract out work which is otherwise reserved to BMWE members simply because it is deemed necessary. The Carrier's argument that it has the unilateral right to contract out any work so long as the Organization is notified and a conference is held with the General Chairman is without merit.

According to the Organization, Referee Douglas' interpretation in Public Law Board No. 6508 of the notice and conference provisions contained in Article IV of the 1968 National Agreement which were incorporated in the Scope Rule, is clearly wrong. The Organization points out that numerous referees have recognized that the notice and conference provisions do not trump the work reservation provisions of the Scope Rule and thereby affect the parties' substantive contracting out rights. However, even if the Awards by Referee Douglas are determined to be controlling in the instant case, the Organization should nonetheless prevail because Referee Douglas set a "very, very high bar" for the Carrier in contracting out disputes. Specifically, 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 should by performed by BMWE-represented employees.

The Organization contends that the Carrier's argument concerning the use of special equipment is irrelevant under the June 1, 1999 Agreement. It argues that in the absence of explicit exceptions concerning the adequacy of the Carrier's equipment, it has generally been held that the lack of equipment does not excuse a contractual violation because the Agreement is for work and not equipment. Moreover, there is no evidence that any special equipment identified by the Carrier was necessary to perform the work in question, or that such equipment was utilized by the outside contractor. Furthermore, irrespective of either the equipment that was required for the snow removal work at issue or the equipment that was owned by the Carrier at that time, the Organization asserts that the Carrier is obligated to make a good faith effort to rent or lease any necessary equipment.

The Organization maintains that the appropriate remedy in this case is to allow each of the Claimants pay at their respective time and one-half rates for the number of hours expended by the contractor in performing the snow removal work. The Organization asserts that protecting the integrity of the Agreement and the bargaining unit is particularly vital in the instant case. Additionally, it is clear that the Claimants suffered a loss of work opportunity because they could have performed the work in question by working daily overtime, weekend overtime, or by deferring other work to which they were assigned by the Carrier. According to the Organization, there is overwhelming precedent which supports the remedy requested herein.

The Carrier contends that it did not violate the System Agreement and the claim should be denied for the following reasons. In support of its position, the Carrier points out that Referee Douglas held in Public Law Board No. 6508 that it retained the right to contract out Scope covered work without the approval of the Organization. Furthermore, Douglas specifically rejected the Organization's argument that the 1999 System Agreement created a bar on contracting out Scope covered work without the Organization's consent. However, the Organization continues to press such an argument in the instant case. Referee Douglas concluded that the traditional justifications for contracting out work such as lack of adequate and qualified manpower and lack of available equipment continue to be valid reasons for contracting out Scope covered work.

As it did before Referee Douglas, the Carrier once again asserts that the 1999 System Agreement does not prohibit it from justifying its decision to contract out certain Scope covered work due to a lack of available and qualified manpower, a lack of available equipment or other traditional reasons which it and other carriers have relied on in the past to support decisions to contract out work. According to the Carrier, it may also contract out work in the following situations, among others: when there are safety issues or environmental concerns; time pressures; the work is part of a turn-key project; and the work constitutes a "de minimis" amount of scope covered work and it would be "unduly burdensome and impractical" to assign such work to its employees. The Carrier notes that Referee Douglas held that it must simply provide the Organization with a sufficient explanation regarding its need to contract out work in each circumstance.

Notwithstanding the ruling by Referee Douglas, the Carrier contends that the work at issue in the instant case is not covered under the Scope Rule. The Carrier admits that the Scope Rule mentions "snow removal," however, the task of snow removal must be considered in the context of the entire Scope Rule. The Carrier asserts that Scope Rule coverage for snow removal only extends to track structures and right-of-way and does not include fueling facilities, parking lots, and passenger platforms. Furthermore, the mere listing of equipment in the Agreement does not bestow Scope Rule coverage since the weight of precedent dictates that it is not the tool that governs the classification of employees who utilize said implement. Rather, it is the nature of the work that is being performed. It also points out that snow removal is a task that has historically been shared among various craft employees, supervisors and contractors. Paragraph three of the Scope Rule preserves the

performance of work by other than BMWE-represented employees at locations where the work was performed prior to the effective date of the System Agreement. Clearly, the shared work environment continues in the new age of the System Agreement. Accordingly, the Carrier is free to contract out work under the circumstances presented in this case following notification to the Organization that it intends to do so.

The Carrier contends that it satisfied the notice and conference requirements concerning its intention to contract out the work at issue, and further, it demonstrated a highly compelling reason to proceed with said contracting out. According to the Carrier, the appropriate time for the Organization to take exception to the nature and extent of the November 27, 2001, informational notice was at the conference held on December 11, 2001. However, the Organization failed to do so. It is well settled that the Organization is precluded from raising an objection at a later date. The Carrier also notes that the propriety of a "blanket notice" has previously been upheld by the Third Division.

The Carrier maintains that the burden of proof in contracting out cases is upon the Organization. Although the Organization retains the burden of proof, the Carrier must produce a sufficient explanation in each circumstance to demonstrate that it had a highly compelling reason to justify its decision to contract out the work in question once the Organization shows that the challenged work is covered by the Scope Rule. In the instant case, the Carrier demonstrated a highly compelling reason to contract out the work in question. Specifically, a snowstorm occurred which created a "dangerous and an emergency situation." Furthermore, the Carrier needed to expedite the removal of snow for public safety reasons and the necessary machinery at Clifton Forge was not available. The Organization never challenged the Carrier's position that an emergency existed which prompted the use of a contractor on the claim dates at issue. Rather, the Organization merely stated that "snow fall . . . does not constitute an emergency." The Carrier asserts that it is afforded wider latitude in accomplishing necessary work performed under emergency circumstances. Additionally, the Carrier is not obligated to purchase or rent equipment when there are no skilled employees available to operate said equipment.

Finally, the remedy sought by the Organization is unwarranted and inappropriate due to the fact that there was no violation of the System Agreement

by the Carrier. The Carrier also notes that the subject dispute also covers the same date, February 16, 2003, which is included in the claim that comprises Third Division Award 39139, particularly for Claimants J. Harlow and T. Plecker. The Carrier argues that duplicate payment is not required although two distinct instances of an alleged contract violation may have occurred on the same date.

The Scope Rule contained in the 1999 System Agreement between the parties clearly indicates that only BMWE members have a right to perform the work enumerated in paragraph two. The work at issue in the instant case pertains to the removal of snow on the Carrier's property in Clifton Forge, Virginia, on February 16 and 17, 2003. Paragraph 2 of the Scope Rule provides, in pertinent part, as follows:

> "The following work is reserved to BMWE 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 . . . snow removal (track structures and right of way) . . . and any other work customarily or traditionally performed by BMWE 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."

A careful examination of the aforementioned language contained in paragraph two of the Scope Rule reveals that the parties specifically limited snow removal work reserved to BMWE members to that work pertaining to the removal of snow from "track structures and right of way." While the Board determines that the fueling facility and the Amtrak platform at Clifton Forge are "track structure(s)" the parking lot around the yard office is clearly not a "track structure," nor is it a right of way. However, the record clearly establishes that BMWE members assigned to the Carrier's Clifton Forge location have customarily or traditionally removed snow and ice from the yard office, the Amtrak station, and the fueling facility for a significant period of time. Accordingly, the Organization has established a prima facie claim of a Scope Rule violation because the work at

issue falls within the work identified in paragraph two of the Scope Rule under the facts and circumstances presented in this case.

As past awards concerning this issue have concluded, there is no absolute bar to contracting out scope covered work. The Scope Rule permits an exception for contracting out scope covered work for highly compelling reasons that will satisfy a strict scrutiny standard of review. The Board must determine, on a case-by-case basis, whether the Carrier has demonstrated a highly compelling reason to rebut the very strong presumption that the work covered by paragraph two of the Scope Rule will be performed by BMWE members. The Carrier has failed to do so in this case.

There is no probative evidence that the Carrier planned for performing the work at issue with BMWE-represented employees. The Board notes that the snow removal work was performed on the Claimants' assigned rest day and an observed national holiday. However, the Carrier made no attempt to contact any of the Claimants regarding their availability to perform the snow removal work. The Board further finds that there was an insufficient showing of an emergency situation at Clifton Forge, Virginia, on February 16 and 17, 2003, which necessitated the Carrier contracting out the work of snow removal. A snowstorm in and of itself does not necessarily constitute an emergency or create a dangerous situation. It is quite possible that the snow which accumulated on the dates in question could have been efficiently removed by BMWE-represented employees in a timely manner just as it had been done numerous times in the past. Additionally, the Board determines that the Carrier's intention to contract out snow removal work in "other situations deemed necessary by the Carrier" as stated in its notice of intent to contract out said work is clearly a generalized, boilerplate reason, rather than a highly compelling reason based upon the specific facts presented on a case-by-case basis.

There is no evidence in the record that the Carrier lacked the necessary equipment or machines to perform the work. Based upon the evidence of record, the Board determines that the Carrier failed to demonstrate that it had a highly compelling reason to justify its decision to contract out the snow removal work at its Clifton Forge, Virginia, location on the dates in question.

As it pertains to the remedy in this case, full employment and/or lack of furloughed employees do not suffice as a defense to a compensatory remedy. (Third

Division Award 37830). Moreover, Third Division Award 10229 provides, in pertinent part, as follows:

> "Carrier contends that the claim should be disallowed because none of the Claimants involved lost any time as a result of the contractor doing the work. This claim is primarily to enforce the scope of the Agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the Agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the Carrier is concerned for if the Agreement is violated, it must pay the penalty therefor in any event."

Therefore, as a result of the Carrier's violation of the Scope Rule in this case, the Claimants shall each be compensated with a pro rata share of 20 hours of pay at their respective time and one-half rates of pay for the two, ten-hour work days on February 16 and 17, 2003, during which time an outside contractor performed snow removal work on the Carrier's property at Clifton Forge, Virginia. The Board finds that the aforementioned remedy is appropriate due to the fact that the Organization has failed to present sufficient evidence regarding the actual number of man hours worked by employee(s) of the outside contractor on the dates in question.

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 7th day of July 2008.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARDS
39138 (Docket MW-38318)
39139 (Docket MW-38314)

(Referee Jonathan I. Klein)

Third Division Awards 39138 and 39139 involving disputes arising in February 2003 are clearly anomalies.

Snow removal from other than track structures and right-of-way (e.g., parking lots, roads, walkways to buildings in yards, etc.) has never been considered work exclusively reserved to BMWE-represented employees. The litany of on-property Awards that were attached to the Carrier's Submission, all dealing with similar occurrences and claims initiated by the Organization prior to the June 1, 1999 enactment of the single, BMWE/CSXT Agreement at bar here, clearly determined there was no customary and traditional performance of the work at issue by BMWE-represented employees. Rather, contractors and other contract craftsmen routinely performed the work, as well. See Third Division Awards 28820 [BMWE v. CSXT (C&O) McAllister, 06/25/91] 28822 [BMWE v. CSXT (C&O) McAllister, 06/25/91] and 30674 [BMWE v. CSXT (C&O) Goldstein, 01/31/95].

The June 1, 1999 Agreement, unlike the previous property Agreements it replaced, contains a comprehensive Scope Rule. The Scope Rule reads, in part, *"The following work is reserved to BMWE members . . . snow removal (track structures and right of way) . . . ."* During the September 26, 2005 Referee Hearing, the Board's attention was called to on-property Public Law Board No. 6510, Award 6 [BMWE v. CSXT, Goldstein, 01/18/05] – a case involving similar circumstances - which confirmed that the work of removing snow from other than track structures and right-of-way was not exclusively reserved to BMWE-represented employees. Referee Goldstein concluded,

> *". . . the Organization has failed in its higher burden of showing that snow removal for parking lots, roadways or areas adjacent to buildings in yards is the precise types of work covered by the express term 'snow removal (track structures and right of way)'. As the Carrier has argued, the Organization reads the two words 'snow removal' as if the parenthetical phrase '(track structures and right of way)' does not exist in this Scope Rule, or at least as if this phrase is not intended to be read as a limitation on the type of snow removal intended to be reserved to the employees represented by it*

> *under Paragraph 2. Such a reading makes no sense. The normal reading of this entire phrase must be that the only snow removal expressly reserved by paragraph 2 to BMWE represented employees is snow removal from track structures and right of way, the majority holds. It certainly can be inferred that not all snow removal, then, is scope-covered, unless the Organization successfully shoulders its burden of proving that other parts of paragraph 2 place the disputed work within the Scope Rule, the majority also specifically holds."*

See also, Third Division Award 37271 [BMWE v. CSXT, Newman, 11/05/04] which interpreted the parties' June 1, 1999 Agreement.

Awards 39138 and 39139 are patently erroneous and offer no precedent setting value.

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July 7, 2008