Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39139
Docket No. MW-38314
08-3-NRAB-00003-040244
(04-3-244)

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 15 and 16, 2003, instead of J. Harlow and T. Plecker [System File G31805103/12(03-0427) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants J. Harlow and T. Plecker shall now each 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 in the instant case concerns the contracting out of snow removal work by the Carrier at its Clifton Forge, Virginia, property on February 15 and 16, 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 27, 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 March 31, 2003.

The respective positions and contentions of the parties regarding the contracting out of snow removal work by the Carrier at Clifton Forge, Virginia, on February 15 and 16, 2003, are mirrored in the companion case before the Board pertaining to snow removal work at the aforementioned location on February 16 and 17, 2003 (Third Division Award 39138). The arguments of the parties have been considered by the Board in its analysis and conclusion.

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. As indicated above, 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 two 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."

For the reasons set forth in Third Division Award 39138, the Board concludes that the Organization has established a prima facie claim of a Scope Rule violation because the work of snow removal at issue in this case clearly falls within the work identified in paragraph two of the Scope Rule.

Once the Organization has established a prima facie claim of a Scope Rule violation, the burden then shifts to the Carrier to present a highly compelling reason for contracting out the snow removal work rather than assigning such work to BMWE-represented employees. As was the case in Third Division Award 39138, the Board finds that the Carrier has once again failed to present a sufficient justification to support its decision to contract out the scope covered work at issue.

The unrefuted evidence presented by the Organization establishes that Saturday, February 15 and Sunday, February 16, 2003 were assigned rest days for the Claimants. As such, the Claimants may have been available to perform the work that the Carrier assigned to an outside contractor. However, the Carrier made no attempt to contact the Claimants regarding their availability. Based upon the undisputed facts presented, the Board concludes that the Carrier clearly failed to appropriately plan for and utilize BMWE-represented employees to perform snow removal work at its Clifton Forge, Virginia, location on the dates in question.

The Board further concludes that the Carrier failed to demonstrate the existence of an emergency situation on February 15 and 16, 2003, that required the use of an outside contractor to remove snow from the property location identified in the claim. There was no showing by the Carrier of a necessity to "expedite the operation," one of the reasons stated in its notice of intent to contract out snow removal work, which would have established a highly compelling reason to justify the decision to utilize an outside contractor rather than BMWE-represented employees to perform the work. Moreover, the Carrier presented insufficient evidence that the safety of its employees or the general public would have been compromised but for its decision to contract out the snow removal work at issue.

The Board also finds that the Carrier presented insufficient evidence that employees other than those represented by the BMWE had been utilized for snow removal work on the Clifton Forge, Virginia, property in the past. The Board notes that paragraph three of the Scope Rule applies to work performed by the Carrier's employees or employees of a former component railroad, and does not offer

protection to work performed by employees of an outside contractor. If this were to be the case, the purpose of the Scope Rule would be easily abrogated. Thus, paragraph three of the Scope Rule offers the Carrier no safe harbor for the reason that the disputed work in this case was performed by an outside contractor. Finally, the Carrier failed to establish that it lacked any equipment or tools necessary to perform the work in question.

For each of the aforementioned reasons, the Board finds 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 February 15 and 16, 2003.

It is well established that full employment and/or lack of furloughed employees do not suffice as a defense to a compensatory remedy when the Organization has satisfied its burden of proof that the Carrier violated the Agreement by contracting out work reserved to BMWE-represented employees under the Scope Rule. As has been stated in other Awards, a compensatory remedy under such circumstances assists in preserving the integrity of the parties' Agreement. The Board concurs with those decisions. However, the Board notes that the Claimants in the instant case are also named Claimants in Third Division Award 39138, which claim requests a compensatory remedy for the Carrier's contractual violation on February 16, 2003. Therefore, the Board finds that to the extent Claimants J. Harlow and T. Plecker are already being compensated for the Carrier's violation of the Scope Rule on February 16, 2003, a remedy intended to compensate them for a lost work opportunity on that date has been adequately addressed.

Accordingly, the Claimants shall each be compensated for five hours of work at their respective time and one-half rates of pay as a result of the Carrier's contractual violation on February 15, 2003. The Organization failed to present sufficient, probative evidence regarding the actual number of hours worked by employee(s) of the outside contractor on the dates in question to warrant the entire remedy requested.

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