Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39140
Docket No. MW-38315
08-3-NRAB-00003-040245
(04-3-245)

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 (Cranemasters) to perform Maintenance of Way work (snow and ice removal) at switches in Acca Yard in Richmond, Virginia on December 6 and 7, 2002, instead of J. Wilder, J. Cockrell and S. Ketchum [System File B17400403/12 (03-0339) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants J. Wilder, J. Cockrell and S. Ketchum shall now each be compensated for ten (10) hours at their respective straight time rates of pay, six (6) hours at their respective time and one-half rates of pay and six (6) hours at their respective double time 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 No. 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 and ice removal work by the Carrier at the Acca Yard in Richmond, Virginia, on December 6 and 7, 2002. Specifically, the work involved the removal of snow and ice from the switches in the Acca yard by employees of Cranemasters, an outside contractor. 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 contact 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 this claim by the Organization on January 9, 2003.

The Carrier's initial denial of the claim on March 7, 2003, provides, in pertinent part, as follows:

> "Our investigation of your Claim reveals that a severe snow storm did impact the Richmond, VA area the first week of December, 2002. All track department employees, along with any available Bridge Department employees were utilized to keep switches operational and clear out snow where necessary. The three claimants worked December 5 and 6, 2002. Roadmaster Phelps contacted them on Thursday, December 5, 2002 at quitting time, all three said they were tired and needed rest. Mr. Phelps offered to send them to a motel for rest and they could return to work. All three told Mr. Phelps they would rather just go home.
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> The contractor, Cranemasters were called to supplement company forces. They did not replace any employees. All company forces worked as much time as they could safely do so, and got rest, then returned. The three claimants were offered the opportunity to go to the motel and return when they were rested. They made the decision to leave, go home and not return, even though they were given the opportunity to work."

The parties were unable to resolve the instant claim on the property, and the matter is now before the Board for final resolution. The respective positions and arguments of the parties regarding the Carrier's contracting out of snow removal work in the instant case are substantially identical to those which were raised in

both Third Division Awards 39138 and 39139 are fully set forth by the Board in Award 39138. Additionally, the Carrier asserts that the Claimants in this case were offered the opportunity to perform snow removal work on the dates in question. However, each of the Claimants declined said work, and as a result, voluntarily made themselves unavailable. In contrast to the Carrier's position, the Organization maintains that the Claimants were never afforded the opportunity to perform the snow removal work that was contracted out by the Carrier. For the following reasons, the Board determines that the Organization has satisfied its burden of proof that the Carrier violated the Scope Rule contained in the June 1, 1999 Agreement when it contracted out the snow removal work instead of assigning such work to the Claimants.

The Scope Rule contained in the June 1, 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 in the instant case pertains to the removal of snow and ice from the switches located at the Acca Yard in Richmond, Virginia, on December 6 and 7, 2002. 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."

Based upon the evidence of record, the Board finds that the Organization presented a prima facie case that the work of removing snow and ice from track switches is Scope covered work. The Board notes that the Claimants performed such work on the date previous to the dates at issue in this claim, and several other BMWE-represented employees from the Claimants' gang were assigned by the Carrier to remove snow and ice from the switches in Acca Yard in Richmond,

Virginia, on the dates covered by the claim. The Organization presented sufficient evidence that the work in question is customarily performed by BMWE-represented employees. Furthermore, numerous Boards have previously held that snow removal work such as that described in the instant claim is, in fact, work covered under the Scope Rule.

The Carrier asserts that the Claimants voluntarily made themselves unavailable for the snow removal work in question as a result of declining the offer of Roadmaster Phelps to perform said work after they had rested. However, the Organization presented written statements submitted by the Claimants which directly refuted the Carrier's position that they refused the opportunity to perform the snow removal work which was ultimately contracted out and performed by employees of Cranemaster. The Carrier presented no evidence from any individuals with direct and personal knowledge of the facts to substantiate its claim that the Claimants had refused the opportunity to perform the aforementioned work. As such, the only evidence before the Board regarding this issue is the unrefuted, signed statements by the Claimants that they were never afforded the opportunity to perform the snow removal work in question. The assertions of the Carrier's officials to the contrary, unsupported by probative evidence, cannot create a conflict in the facts. (Third Division Award 32712.) Accordingly, the Board concludes that the Claimants did not voluntarily make themselves unavailable for the contested snow removal work under the facts and circumstances presented in this case.

As the Board has previously held, there is no absolute bar to contracting out scope covered work. The Scope Rule permits an exception for contracting out scope covered work for compelling reasons that will satisfy a strict scrutiny standard of review. Therefore, the Board must determine based upon the specific facts and circumstances presented in this case whether the Carrier has demonstrated a highly compelling reason to rebut the very strong presumption that the snow removal work described herein should have been performed by BMWE members. For the following reasons, the Board concludes that the Carrier failed to do so.

Initially, the Board finds that the Carrier presented insufficient evidence that an emergency situation existed on December 6 and 7, 2002, which made it necessary to contract out a portion of the snow removal work to Cranemasters instead of assigning such work to the Claimants, BMWE-represented employees, who were

available to perform the work. The mere fact that a snowstorm adversely impacted the Richmond, Virginia, area during the period at issue as argued by the Carrier does not necessarily establish the existence of an emergency.

The evidence of record establishes that the Carrier properly identified the snow removal work in question as scope covered work and assigned some BMWE-represented employees to perform such work. However, the Carrier failed to properly plan for the performance of the snow removal work as a result of its failure to schedule the Claimants for duty on December 6 and 7, 2002. There was no showing by the Carrier that the snow and ice in Acca Yard could not have been removed in an efficient, safe and timely manner exclusively by BMWE-represented employees, rather than a combination of those employees and an outside contractor.

Additionally, the Carrier presented no evidence that it lacked the necessary equipment to perform the work in question. Furthermore, the Carrier failed to establish that other craft employees performed the disputed work at Acca Yard as a result of past practice or agreement of the parties as of the effective date of the Scope Rule. 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 issue in this case.

In regard to the requested remedy, the Board determines that the Claimants are each entitled to an equally proportionate share of 22 hours of work at their respective time and one-half rates of pay as a result of the Carrier's use of an outside contractor over the course of 22 hours on December 6 and 7, 2002 at Acca Yard in Richmond, Virginia. The Board finds that the Organization failed to present sufficient evidence regarding the actual number of hours worked by employees of the outside contractor on the dates in question. As such, the Claimants' remedy is specifically limited as set forth above. Finally, the Board notes that the remedy in this case is consistent with prior Third Division Awards which have held that full employment and/or lack of furloughed employees do not suffice as a defense to a compensatory remedy.

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.