Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39141
Docket No. MW-38621
08-3-NRAB-00003-040636
(04-3-636)

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 Carrier violated the Agreement when it assigned outside forces (Bast Hatfird) to perform Maintenance of Way work (excavation and building construction related work) at Mile Post QC 15.0 in Selkirk, New York beginning on July 10, 2003 and continuing, instead of Albany Service Lane employes F. Kovits, W. Moak, W. Mihuka, D. Cook, E. Dewolf and W. Henderson [Carrier's File 12(03-0903) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants F. Kovits, W. Moak, W. Mihuka, D. Cook, E. Dewolf and W. Henderson shall now be each be compensated at their respective rates of pay for all hours (straight time and overtime) worked by the outside forces in the performance of the aforesaid work beginning July 10, 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.

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.

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 disputed work at issue in this case is the construction of a consolidated office building at the Carrier's Selkirk, New York property. The construction work consisted of site preparation, grading, and all phases of construction and finishing work, including, but not limited to, permitting, phase scheduling, pipefitting, plumbing, sheet metal and electrical work. On May 19, 2003, the Carrier issued the following notice to the Organization regarding the aforementioned project:

> "This letter will serve as notification of the Carrier's intent to contract for the Design and build of a Consolidated Office Building to be located at milepost QC 15.0, Selkirk, New York. Design to include site work, grading, drainage, utilities, complete with all HVAC, plumbing, electrical and finishes, ready for occupancy. All design, permitting required. This is a split face masonry office building with metal roof including air compressor systems for hump air.

Contracting is necessary by fact; Carrier forces are not available in force to complete a project of this magnitude in a timely manner. All CSX forces are committed to other programmed work and daily maintenance of equal importance. The Carrier anticipates man-hours to be, carpenters 3200, plumbers 1270, electricians 2120 and masons 1600. There are no employees furloughed from the Seniority District."

The Organization submitted a letter to the Carrier dated May 27, 2003, which indicated that the construction project in question consisted of work reserved for BMWE-represented employees. Nonetheless, the Carrier utilized the services of an outside contractor, Bast Hatfird, to construct the office building on its Selkirk, New York, property which resulted in the filing of a claim in this matter by the Organization on September 1, 2003.

The Organization contends that the language of the Scope Rule plainly stipulates that all work in connection with the construction, maintenance, repair, inspection or dismantling of buildings and other structures on property owned by the Carrier is reserved to BMWE members. Thus, the work in this case was clearly reserved to BMWE members. Moreover, even if the work in question was not specifically identified in the Scope Rule, it would nevertheless be reserved to BMWE members because it is work customarily or traditionally performed by those employees. The Organization notes that no fewer than 15 Awards have held that BMWE-represented employees have traditionally performed concrete and building construction work. Additionally, the Organization relies on the Carrier's job description for the mechanic - carpenter position in support of its position that the work at issue in this case was covered by the Scope Rule.

The Organization points out that the Carrier's primary defense in this case is that it lacked the manpower to complete the work within an arbitrary and self-imposed "allotted time." However, there are no exceptions in the Scope Rule or elsewhere which permit the Carrier to contract out work otherwise reserved to BMWE members simply because it did not or could not make available a sufficient number of skilled employees to do the work within its self-imposed time constraints. Moreover, the Carrier failed to demonstrate that it could not have made its skilled employees available to perform the work if it so desired. Specifically, the Carrier

made no attempt to offer the work at issue to any available Albany Service Lane forces, and it failed to bulletin new positions on the Albany Service Lane to perform the work covered in the May 19, 2003 notice to contract out the work in question.

The Organization further asserts that it is the Carrier's obligation to equip its forces to perform scope covered work and ensure that it has sufficient employees in the bargaining unit to perform such work. Additionally, NRAB Awards have consistently held that a carrier's failure to adequately staff its forces is no excuse for violating the Agreement and assigning work to outside contractors. The Carrier may not validly rely on its own malfeasance to justify its violation of the Agreement. The Organization contends that the Carrier has been systematically disabling itself from performing scope covered work with its employees by making dramatic reductions in its Maintenance of Way work forces.

According to the Organization, Appendices "M" and "U" also support its position, rather than the Carrier's position. With respect to Appendix "M," it simply provides that the umbrella protections of the 1968, 1981, and 1996 National Agreements apply on CSXT in addition to the local protections of the Scope Rule. It is also clear that Section 7 of Appendix "U" fully supports the Organization's interpretation of the Scope Rule and Article IV of the 1968 National Agreement.

The Organization maintains that there are three key points for the Board to consider in connection with the Awards rendered by Referee Douglas in Public Law Board No. 6508. First, Referee Douglas correctly determined that the second paragraph of the Scope Rule clearly and plainly indicates that only BMWE members have a right to perform the work enumerated therein. Second, Referee Douglas incorrectly concluded that the notice and conference provisions contained in Article IV of the 1968 National Agreement that were incorporated in the Scope Rule affected the parties' substantive contracting out rights. Finally, even if the Award by Referee Douglas is controlling in the instant case, the Organization should prevail in this case because a very high bar was set for the Carrier in regard to contracting out work. Specifically, Referee Douglas 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 BMWE employees.

As a result of the Carrier's violation of the Scope Rule, the Organization contends that the appropriate remedy in this case is to allow each of the Claimants pay at their respective straight time and overtime rates for the claimed straight time and overtime hours expended by the contractor in performing the designated work. The Organization asserts that protecting the integrity of the Agreement and the bargaining unit is particularly vital in this case because the Carrier has persisted in contracting out construction work in violation of the Agreement. Additionally, it is clear that the Claimants suffered a loss of a 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, none of which was demonstrated on the record to be of a pressing or emergency nature. Although the Carrier knew approximately two months in advance that the work in question would need to be performed, it made no effort to assign said work to the Claimants in their existing positions or to bulletin new positions to offer the work opportunity to the hundreds of qualified Maintenance of Way employees on the Albany Service Lane. The Organization asserts that there is overwhelming precedent which supports the type of remedy requested in this case for so-called "fully employed" Claimants.

The Carrier presents the following statement of issue in this case: "Whether CSXT's use of a contractor to accomplish the extensive, turnkey construction project to design and construct a Consolidated Office Building at Selkirk, New York, violated the Agreement between CSXT Transportation, Inc. (CSXT) and employees represented by the Brotherhood of Maintenance of Way Employes (BMWE), effective June 1, 1999." The Carrier asserts that the Organization refused to acknowledge the holding of Referee Douglas in Public Law Board No. 6508, and continues to advance the unsupportable argument that the Carrier surrendered its right to contract out work under any and all circumstances after the System Agreement became effective June 1, 1999. According to the Carrier, Referee Douglas explicitly rejected the Organization's "ironclad bar argument" regarding the Carrier's ability to contract out work.

Furthermore, Referee Douglas also recognized that the Carrier's traditional justifications for contracting out scope covered work were still valid reasons to contract out such work under the 1999 System Agreement provided that it presented a sufficient explanation of the circumstances on a case-by-case basis. As it argued to Referee Douglas, the Carrier once again maintains 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 upon which it and other carriers have relied to support decisions to contract out work such as safety concerns, environmental issues, time pressures, or that the work is "de minimis" or part of a turn-key project. The Carrier points out that even in cases where Referee Douglas sustained the Organization's claims, he still recognized that justifications such as a lack of available manpower or equipment may be valid justifications for contracting out work.

The Carrier notes that the instant claim seeks all of the hours anticipated in the project while the work appears, and in most cases is outside the Scope Rule of the System Agreement. The expenditure of time sought by the claim based on the scope provision represents a portion of the total project work that also included design, project management, pipefitting, plumbing, sheet metal work and electrical work. The Carrier asserts that the Scope Rule is debatably definitive, but clearly does not include all the work involved in the turnkey project. Specifically, the Scope Rule does not mention metal work, machinist work, design work or project management. Additionally, the authors of the Scope Rule guaranteed that work listed in said Rule would not infringe upon the rights of other craftsmen who engaged in such work by Agreement or traditional past practice. According to the Carrier, the Organization never challenged the declared turnkey nature of the project. Rather, it fully understood that not all work included in the project accrued to BMWE-represented employees and the Carrier was not required to piecemeal the portion of the project that the Organization alleged involved scope covered work. The System Agreement and arbitral history do not support the *Organization's position that the Carrier is required to accommodate the interests of* the Organization by making employees available at the discretion of the contractor.

The Carrier argues that the magnitude of the project at issue was beyond the capacity of its employees and their skills. Furthermore, the project required multi-faceted time lines. It also points out that the Organization has the burden to prove its case by a preponderance of the evidence. The Carrier notes that although the Organization retains the burden of proof, Referee Douglas concluded that once the Organization demonstrates that the challenged work is covered by the Scope Rule, 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 the instant case, the Carrier contends that it has demonstrated a highly compelling reason to contract out the work in question. It points out that the notice of intent to contract out the work and deliberations of this claim on the property demonstrate that the project, particularly in view of its magnitude, could not be met in a timely manner with existing forces that were committed to other work. According to the Carrier, the Organization did not refute its assertions anywhere in the record. Rather, the Organization merely referred to unrelated issues of force levels and the Carrier's alleged failure to properly utilize its forces. The Carrier points out that it has long been held that lack of skilled manpower sufficient in number is a convincing justification to support a decision to contract out work.

The Carrier maintains that the challenged project involved other craft work, as well as design and project management, that demanded integration with various crafts involved at different times during the project. The Organization was made aware through payroll records that the Claimants were fully employed and engaged in other important projects and day-to-day maintenance. Even if it could be demonstrated that the Carrier was required to obtain equipment that it did not have available, the skilled employees needed to operate such equipment at the required times during the progression of the project were not available.

Due to the fact that the Claimants were fully employed, some of whom were on floating positions at other locations throughout the District, the Claimants were clearly unavailable to perform the contested work. The Carrier did not violate the Agreement in this case, and there is no basis for the requested remedy. Accordingly, the claim should be denied for each of the aforementioned reasons.

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 construction of an office building at the Carrier's property in Selkirk, New York. 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 . . . 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 . . . bridge and building material; operate machines, equipment and vehicles; . . . painting of . . . buildings and other structures or facilities; rough and finish carpentry work; concrete and masonry work; grouting; plumbing, and drainage system installation, . . . cooling and heating system installation, . . . roof installation, . . . 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 in not exhaustive."

The aforementioned provision clearly establishes that the "construction . . . of . . . buildings" is work reserved for BMWE members. The Board also notes that the express and implied primary duties for several positions in the Bridge & Building Department such as Foreman, Carpenter, Painter, Mason and Machine Operator include various tasks that are performed as part of building construction. Furthermore, the job description for the mechanic-carpenter position specifically details numerous tasks that are also required to be performed during the construction of a building. As such, the Board finds that the Organization established a prima facie claim of a Scope Rule violation by the Carrier when it contracted out the construction of the office building at its Selkirk, New York, property.

As held by Referee Douglas held in Public Law Board No. 6508, 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 two of the Scope Rule "will be performed by BMWE employees." The record establishes that the Carrier complied with the notice and conference provisions contained in paragraphs four and five of the Scope Rule. Thus, the Board must examine the specific facts and circumstances presented in the instant claim and determine whether there was a highly compelling reason to justify the Carrier's decision to contract out the construction of an office building, rather than assigning such task to BMWE-represented employees.

The Board finds insufficient evidence, after applying a "strict scrutiny" standard of review, which would establish any compelling reason(s) to justify the Carrier's decision to employ a contractor to perform the scope covered work of constructing an office building at mile post QC 15.0. Based upon the evidence of record presented, the Board determines that the Carrier presented insufficient evidence that the work in question was beyond the scope of available skills, equipment, and the time of Carrier forces. The Board notes that a copy of the Carrier's agreement with the contractor to construct the building in question is not contained in the record. As such, the Carrier is unable to point to any specific task involved with the construction of the building that was unable to be performed by BMWE-represented employees due to a lack of skill or qualifications. Additionally, the Board has no evidence before it regarding a deadline for the completion of the building, other than the Carrier's self-imposed time limits. Thus, the project was not time sensitive based upon the record presented. Moreover, there was no showing that the construction of the building was considered to be a project of critical importance to the Carrier's operations.

The record further reveals that there are approximately 1,300 Track Department employees holding seniority in the districts within the Albany Service Lane. The Carrier had the opportunity to assign some of those employees to perform the work of constructing the office building at its Selkirk, New York, property. However, it chose not to do so. In fact, there is no evidence that the Carrier contacted any of its BMWE-represented employees in the Albany Service Lane regarding such work. The Board also notes that although the Carrier issued its notice of intent to contract out the work in question approximately two months prior to the start of the project, there is no evidence that the Carrier made any effort to hire any employees that may have been necessary to perform said work. As such, 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 construction work reserved to bargaining unit employees under the Scope Rule.

It is well established that compensatory remedies have been awarded by numerous Boards in the past in order to preserve the integrity of the Agreement, notwithstanding arguments by the Carrier that the claimants were fully employed during the period at issue. The Board concurs with the reasoning set forth in those Awards. The result of such a remedy effectively requires the Carrier to pay twice for the same work. The Board notes that the Carrier is fully aware of such a

consequence for its decision to contract out work, which work is subsequently determined to be scope covered work reserved to BMWE-represented employees. The Carrier specifically acknowledged so in its Opposition to Motion for Preliminary Injunction (Brotherhood of Maintenance of Way Employes vs. CSX Transportation, Inc., Case No. 3:00-cv-264-J-21B) which provides, in pertinent part, as follows:

> "The standard remedy in arbitration is not, as BMWE suggests, to have work which was done by the contractor 'redone with BMWE members.' BMWE at 26. The standard arbitration remedy is that CSXT must, in effect, pay for the work twice. The arbitrator could order that CSXT pay BMWE-represented employees as if they had done the work in question." (Employee's Exhibit R.)

Therefore, as a result of the Carrier's violation of the Scope Rule in this case, the Claimants shall each be compensated at their straight time rates of pay for an equal proportionate share of all hours worked by employees of the outside contractor in the construction of the office building at mile post QC 15.0 in Selkirk, New York. See Third Division Award 36092.

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 AWARD 39141; DOCKET MW-38621

(Referee Jonathan I. Klein)

The Board's decision to allow the claim for *". . . all hours worked by employees of the outside contractor in the construction of the office building . . ."* **is erroneous. The Board erred in three fundamental areas of consideration involving work associated with all phases of construction of the Consolidated Office Building at Selkirk, New York.**

First, substantial portions of the project work announced in the valid **and timely notice of intent to contract work are not included in the Scope Rule, i.e., building design, project management, sheet metal work and electrical work. Design and project management are functions not assigned to any craft. Needless to say, the Organization failed to demonstrate the** existence of those skills among its membership. Sheet metal work and **electrical work are tasks assigned to other crafts. The sophisticated and experienced negotiators of the single System Agreement effective June 1, 1999,** which was controlling in this case, sought in paragraph 3 of the Scope **Rule to avoid infringement upon the rights of other craftsmen. The Board's Award ignored the fact that these tasks are not found in the Scope Rule and that the parties guaranteed their continued performance by those crafts assigned by contract or past practice.**

Second, the magnitude of the multi-faceted project was beyond the capacity of the skills and size of the existing, assignable work force. It is a fact of record that all Bridge and Building Department employees in the District and among the Districts in the Albany Service Lane were fully employed and occupied with concurrent projects of equal importance. Amazingly, the Board asserted, *"The Carrier had the opportunity to assign some of those [1,300 Track Department] employees to perform the work . . . . However, it chose not to do so. In fact, there is no evidence that the Carrier contacted any of its BMWE-represented employees in the Albany Service Lane regarding such work."* **No contract provision requires the** Carrier to *"contact"* other employees who would otherwise not be primarily assigned to perform the work and/or for work which they are not skilled to accomplish. The Track Department employee population, while skilled in track maintenance, would not serve as a pool from which to satisfy the need for skilled building trades craftsmen. The Board's assertion replaces a

management right not restricted in any way by contract language and offers an unsolicited, improbable and unrealistic alternative.

This unsolicited and unrealistic alternative was not proffered by the Organization as a viable option to contracting in its May 17, 2004 letter from BMWE General Chairman P. K. Geller. The General Chairman merely stated the Carrier may assign these employees to "*install the new track. . . .*" (Carrier's Exhibit "G", Page 2, ¶1) which, bespeaks he was not pressing to have Track Department employees construct the building, as the Board erroneously concluded (Emphasis added). Nonetheless, if the Organization indeed intended to offer this alleged alternative, the proper time to make this suggestion, as stated in Third Division Award 37830 (Wallin) was during the pre-contracting conference regarding the Carrier's notice of intent to contract out. In that case, the Board held "*. . . it is clear from Article IV of the 1968 National Agreement as well as the 1981 Berge-Hopkins Letter of Understanding, that the parties intended to establish a contracting review process based on good faith and fair dealing with each other. However, the Organization's position leaves the door open to allow the General Chairman to unreasonably withhold approval. Thus, despite the unlikelihood of its occurrence, it is conceivable that a contracting situation could arise that is compelling by any objective standard of review, but the involved General Chairman could nevertheless unreasonably withhold approval out of pique, retaliation for some other perceived transgression, or simply as a show of power. Such a possibility is such an affront to the obligations of good faith and fair dealing that an opportunity for objective arbitral acceptance of the compelling reasons must be available.*" Moreover, the Organization did not produce any evidence to demonstrate that these employees were, in fact, qualified to perform the service.

In addition, the utilization of Track Department employees as a viable alternative, again the Board's sole invention in this case, would not be a realistic proffer by the Organization because it is contrary to its grievance handling history on the Carrier's property when there is arguably a cross-departmental utilization of forces. For example, see Third Division Awards 37669 (Bierig) and 37319 (Kenis). In the Bierig Award, a Track Inspector assigned to the Track Department performed work that the Organization characterized as Welder's work. In the Kenis Award, a Bridge & Building Department Mechanic performed work that the Organization characterized as Welder's work. In both cases, the Organization filed a claim on behalf of an employee assigned to the Welding Department who was not offered the work. Clearly, if the Organization did not cherish such a demarcation

between the classes of BMWE-represented employees, its entire history of grievance handling would not reflect this division. The Board's alternative suggestion to contracting cannot be justified by the facts present in this case or the realities present on the property, as evidenced by BMWE's position in past cases.

Third, the Board observed, *". . . a copy of the Carrier's agreement with the contractor to construct the building in question is not contained in the record. As such, the Carrier is unable to point to any specific task involved with the construction of the building that was unable to be performed by BMWE-represented employees due to a lack of skill or qualifications."* Such a statement bespeaks a prejudice on the Board's part to grant all building construction functions to BMWE-represented employees regardless of the nature of the function, regardless of its absence in the Scope Rule, and regardless of the existence of a compelling reason to contract out the project. Under the Board's logic, had BMWE's claim sought a remedy for the most fundamental human functions of workers during the project such as, but not limited to, breathing, walking, eating, communicating, etc., it would have awarded such time in performing those functions to BMWE-represented employees.

The findings and decision of the Board are clearly absurd and will not be considered as precedent setting.

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Martin W. Fingerhut
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September 5, 2008