Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39278
Docket No. MW-38637
08-3-NRAB-00003-050012
(05-3-12)

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
(
(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 (Kopper Industries) to perform Maintenance of Way work [construct (8) track panels] which were delivered to Selkirk, New York on October 13 and 15, 2003 instead of Albany Service Lane employes A. Amburg, R. Payne, J. Worley, G. Bruyette, J. Boehm and R. Irwin [Carrier's File 12(04-0039) CSX].

(2) The Carrier violated the Agreement when it assigned outside forces (Kopper Industries) to perform Maintenance of Way work [construct (12) track panels] which were delivered to Selkirk, New York on January 6, 2004 instead of Albany Service Lane employes M. Lacey, J. Druzba, J. Worley, G. Bruyette, J. Boehm and R. Irwin [Carrier's File 12(04-0352)].

(3) The Carrier violated the Agreement when it assigned outside forces (Kopper Industries) to perform Maintenance of Way work [construct (16) track panels] which were delivered to Selkirk, New York on January 23 and 24, 2004 instead of Albany Service Lane employes M. Lacey, J. Worley, G. Bruyette, J. Boehm, J. Druzba and R. Irwin [Carrier's File 12(04-0351)].

(4) The Carrier violated the Agreement when it assigned outside forces (Kopper Industries) to perform Maintenance of Way work [construct (32) track panels] which were delivered to Selkirk, New York on February 8, 17 and 26, 2004 instead of Albany Service Lane employes M. Lacey, J. Druzba, J. Worley, R. Payne, J. Boehm and R. Irwin [Carrier's File 12(04-0717)].

(5) As a consequence of the violation referred to in Part (1) above, Claimants A. Amburg, R. Payne, J. Worley, G. Bruyette, J. Boehm and R. Irwin shall now each be compensated for sixteen (16) hours at their respective time and one-half rates of pay.

(6) As a consequence of the violation referred to in Part (2) above, Claimants M. Lacey, J. Druzba, J. Worley, G. Bruyette, J. Boehm and R. Irwin shall now each be compensated for eighteen (18) hours at their respective time and one-half rates of pay.

(7) As a consequence of the violation referred to in Part (3) above, Claimants M. Lacey, J. Worley, G. Bruyette, J. Boehm, J. Druzba and R. Irwin shall now each be compensated for twenty-four (24) hours at their respective time and one-half rates of pay.

(8) As a consequence of the violation referred to in Part (4) above, Claimants M. Lacey, J. Druzba, J. Worley, R. Payne, J. Boehm and R. Irwin shall now each be compensated for forty-eight (48) hours 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 (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 (Wallin).

As stated in Third Division Award 37985 (Klein) 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 incorporated herein by reference.

The dispute in the instant case concerns the Carrier's purchase of track panels from an outside company rather than utilizing BMWE-represented employees to construct such items at the Carrier's yard in Selkirk, New York. Specifically, Kopper Industries manufactured and delivered eight track panels to Selkirk Yard on October 13 and 15, 2003; 12 track panels on January 6, 2004; 16 track panels on January 23 and 24, 2004; and 32 track panels on February 8, 17 and 26, 2004. The Carrier provided no notice to the Organization that it would be purchasing the track panels at issue from an outside company.

On November 4, 2003, the Organization filed its initial claim asserting that the Carrier violated the Agreement as a result of contracting out scope covered work involving the construction of track panels that were delivered to Selkirk Yard on October 13 and 15, 2003. The Organization also asserted that it was not notified of the Carrier's intent to contract out the work in question. The Organization subsequently filed three additional claims regarding the contracting out of track

panel construction work and the delivery of track panels to the Carrier on each of the dates referenced above. The Carrier's denial of the initial claim issued by the Division Engineer on December 30, 2003, reads, in pertinent part, as follows:

> "My investigation into this claim reveals that the Carrier did not contract out the construction of track panels, but, in fact, purchased pre-assembled track panels from vendor, Kopper Industries, Inc. (See attached requisition request). The Scope Rule of the System Agreement does not require the Carrier to notify the General Chairman, in writing, when it makes a material purchase. Therefore, it is the Carrier's position that a notice is not required and there is no violation of the agreement."

The Organization's appeal submitted to the Director of Employee Relations on January 5, 2004, reads, in pertinent part, as follows:

> "Mr. Evers denies that the Carrier contracted out the construction of track panels and alleges that the pre-assembled track panels were a material purchase which did not require notification to the Organization. Panels consist of rail, ties, plates, spikes, rail anchors and plates which have to be assembled (constructed) into a single unit. The panels are made to the specification of the Carrier and to attempt to call this a material purchase is just an attempt to circumvent the provisions of our Agreement which reserves the Construction (assembling) to the BMWE. The Carrier controls this process as the specification for the construction (Anchor patterns, spike patterns, types of plates, rail size, rail drilling rail size and length etc.) are set and controlled by the Carrier. The BMWE has historically constructed (assembled) panels and has a template in Selkirk yard where this is done. The claim of this being a material purchase is nothing more than an artful dodge in an attempt to circumvent our Agreement rights which are vested to the BMWE both historically and contractually."

Following discussion of the claim in conference on February 11 and 12, the Carrier once again denied the claim on April 7, 2004. Each of the Organization's claims regarding the contracting out of track panel construction work was

ultimately denied by the Carrier on the property. On January 6, 2005, the Organization notified the Carrier of its intent to combine the aforementioned claims in a joint Submission to the Board for final resolution.

The Organization contends that the clear and unambiguous language of the Scope Rule plainly stipulates that all work in connection with the construction of track, expressly including the construction of track panels, is work reserved to BMWE members. It points out that the track panels at issue in this case were undeniably built to meet the Carrier's list of precise specifications and schematic requirements for use in its operations as a common carrier. Moreover, even if the work in question was not expressly included in the Scope Rule, it would nevertheless be reserved to BMWE members because it is "work customarily or traditionally performed by BMWE represented employees."

The Organization asserts that the customary, traditional and current practice of assigning Maintenance of Way forces to perform the work of constructing track panels was well documented throughout the on-property processing of this dispute as evidenced by the following: a copy of the Carrier's schematic standards for track panel construction; the unrefuted statements by the Claimants' representative that thousands of track panels were constructed by the Carrier's Maintenance of Way forces and that a template therefore was still being utilized at Selkirk Yard for such purpose; an unrefuted statement that a picture of the referenced track panel construction template at Selkirk Yard had been provided to the Carrier; an undisputed statement from Track Foreman M. L. Benaquisto that "this fall we made panel to cross over the reservoir bridge in Gilderland and also for a xing that was renewed. . . . Selkirk Yd. has a panel jig and we always made are (sic) own panels and enough extras to fill panel cars for derailments;" and a copy of a notice dated August 6, 2004, wherein the Carrier admitted that its Maintenance of Way forces would be busy performing track panel construction work. The Organization also points out that the primary duties of Trackmen are to "construct, maintain, repair, inspect, and dismantle track and appurtenances thereto."

The Organization notes that the Carrier's defense in this case is that the work in question was not covered by the Scope Rule because the contractor merely delivered preassembled track panels purchased "off a shelf," and no work was performed by the contractor on the Carrier's property. However, the Organization points out that the outside contractor was ordered to perform work that is expressly

reserved to the Claimants by the clear and unambiguous language contained in the June 1, 1999 Agreement, as well as historical, traditional and customary past practice. Additionally, the outside contractor was ordered by the Carrier to meet an assortment of specifications and standards. As such, the Carrier controlled the track panel construction work in question and paid for such work. Moreover, the work at issue was for the exclusive use and benefit of the Carrier irrespective of where the work was performed. Therefore, the track panels were not purchased "off the shelf" by the Carrier. The Carrier's acquisition of track panels amounted to an order for the work of the construction of track panels because the order required that a rigid set of specifications be met.

The Organization also contends that even if the Carrier purchased preassembled track panels "off the shelf," that fact would be irrelevant under the controlling contract language of the Scope Rule and Rule 1 of the Agreement because those provisions reserve specified work to BMWE-represented employees, such as the construction of track panels. It is the work that is protected and it is irrelevant who owns the material, equipment, or facilities so long as the work is performed at the Carrier's instigation, under its control, at its expense, and for its benefit. The Organization maintains that to allow the Carrier to indirectly do that which it could not do directly under the terms of the Agreement would result in a classic triumph of form over substance. Furthermore, the Awards cited by the Carrier are without precedential value inasmuch as they involved very different Agreement Rules and practices, and more recent Awards which considered facts and Agreement Rules similar to those in the instant case support the Organization's position.

According to the Organization, the Carrier is attempting to remove work from the Agreement by moving the work from its property to a third party facility. The test developed and consistently applied by the Board for evaluating such circumstances was most recently enunciated in Third Division Award 32941 which held that the Carrier would not be liable for contracting out where the work, while perhaps within the control of the Carrier, is totally unrelated to railroad operations; where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on the Carrier's property and is undertaken at the sole expense of that other party; and where the Carrier has no control over the work for reasons unrelated to having contracted out the work. Applying the aforementioned test to the instant case clearly establishes that the Carrier should be liable for

contracting out because the construction of track panels is not only within the Carrier's control, but is intimately related to its railroad operations; the construction of track panels is for the ultimate benefit of the Carrier, has nothing to do with the operations of others on the Carrier's property and is ultimately the Carrier's expense. The totality of the record demonstrates that the Carrier retained significant control over the construction of track panel work because it caused such work to be done by contracting with others.

Even if the Carrier's contention could possibly rise to the level of an exception that would allow the assignment of the track panel work in question to an outside contractor, the Organization points out that the Carrier admittedly failed to provide notice to the General Chairman concerning its intention to contract out the work to outside forces. The Carrier compounded its violation of the Scope Rule in this case by failing to provide the required written notice.

The Organization submits that Arbitrator Douglas correctly concluded that the second paragraph of the Scope Rule clearly and plainly indicates that only BMWE members have a right to perform the enumerated work. Moreover, Arbitrator Douglas set the bar extremely high for the Carrier in contracting out disputes. Specifically, the Carrier must demonstrate that it has 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-represented employees. Additionally, such highly compelling reason is subject to strict scrutiny. In the instant case, the Carrier's reason for contracting out the work in question was that it purchased the 68 track panels preassembled "off the shelf." However, as discussed above, there is no evidence that such was the case. The Carrier's "purchase" was for work, and not for track panels off any shelf.

Finally, a review of the record reveals that the Carrier failed to take issue with the remedy requested by the Organization. Therefore, it cannot validly do so for the first time before the Board. Accordingly, the Organization requests that the Board sustain the instant claim in its entirety.

The Carrier's statement of the issue is as follows: "Whether the Carrier violated the Agreement by purchasing new track panels rather than using its employees to construct them on the job site when the System Agreement does not restrict the Carrier from purchasing products 'off the shelf' from a vendor."

The Carrier contends that the Scope Rule does not restrict its right and/or ability to purchase fully assembled track panels. There is no language contained in the Scope Rule that prohibits the Carrier from purchasing new material in a fully assembled configuration. The Carrier further points out that the issue presented in this case is not a new dispute between the parties on either a local or national level as previous arbitration decisions have supported its right to purchase new track panels.

Additionally, the Carrier contends that it is not required under the Scope Rule to notify the Organization prior to its decision to purchase new material. Specifically, the Scope Rule applies to contracting out work concerning the Carrier's operations on its right-of-way, and not the purchase of new materials. As such, the Carrier clearly has the right to purchase new equipment, in this case track panels, without notifying or consulting the General Chairman. In support of its position, the Carrier cited several cases that have upheld its right to purchase new materials, including track panels, and that such purchases do not trigger the subcontracting provisions of the Scope Rule. The Carrier also points out that the Board has endorsed its right to purchase rail in welded sections "off the shelf" without invoking the subcontracting provisos of the Scope Rule. In the instant case, the Carrier did not procure or purchase rebuilt or reconditioned components. Rather, it purchased new parts in connection with a new track construction project. Thus, the Carrier clearly demonstrated that the Agreement does not restrict its right to purchase new material.

Furthermore, the Organization has not even established a prima facie case of a contractual violation by the Carrier. The Carrier maintains that the Organization must assert more than general statements and mere allegations concerning an alleged violation of the Agreement. The Organization failed to prove that the Carrier violated the Agreement when it purchased assembled track panels. Therefore, the Board should deny the Organization's claim in this case.

Moreover, the Organization failed to establish that the Claimants were monetarily aggrieved by any action of the Carrier. According to the Carrier, each of the Claimants was fully employed on the claim dates. It further points out that the Agreement contains no provisions for granting penalty payments. Therefore, it would be tantamount to writing a penalty provision into the Agreement in the event

that the Board awarded monetary damages to the Claimants in the absence of any monetary loss.

For the following reasons, the Board determines that the Carrier violated the parties' Agreement under the facts and circumstances presented in this case when it purchased track panels from an outside company, rather than assigning BMWE-represented employees to construct and assemble such items at the Selkirk Yard on the dates set forth in the claim.

The Scope Rule contained in the June 1, 1999 System Agreement between the parties' states that BMWE members are reserved the right to perform the work enumerated in paragraph 2. 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 . . . construction of track panels; . . . 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." (Emphasis added)

Paragraphs 4 and 5 of the Scope Rule provide the following provisions regarding the Carrier's obligation to notify the Organization of its intent to contract out scope-covered work and a subsequent meeting regarding the matter if requested by the Organization:

> "In the event the carrier plans to contract out work within the scope of this Agreement, except in emergencies, the carrier shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not

> less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances.
>
> If the General Chairmen, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and Organization Representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith."

Paragraph 2 of the Scope Rule specifically provides that work in connection with the construction of tracks, and particularly the construction of track panels, is reserved to BMWE members. The Board also notes that the primary duties of Trackmen as set forth in Rule 1 of the Agreement include the construction of track and appurtenances thereto. Furthermore, the record establishes that BMWE-represented employees at Selkirk Yard have customarily or traditionally performed work pertaining to the construction of track panels. Moreover, the Board finds that the Carrier acknowledged that BMWE-represented employees have in fact performed such work in the past as evidenced by a notice of intent to contract out field welding of rail ends issued by the Carrier on August 6, 2004, which reads, in pertinent part, as follows: "[a]ll company forces will be working on other projects such as switch tie renewal, renewing road crossings, track panels and turn out panels."

Nonetheless, the Carrier contends that its purchase of fully assembled track panels "off the shelf" from an outside company does not constitute scope covered work under the parties' Agreement. The Carrier cited several Awards in support of its position that the Scope Rule does not restrict its right and/or ability to purchase fully assembled track panels. However, those Awards relied upon by the Carrier do not reference the Scope Rule contained in the June 1, 1999 Agreement which specifically and unambiguously provides that the construction of track panels is scope covered work reserved for BMWE members. The aforementioned Scope Rule contains the controlling contractual language in this case.

The Board further finds that the track panels at issue were manufactured and assembled by an outside company based upon various specifications and schematic requirements provided by the Carrier. Therefore, such track panels were clearly not purchased "off the shelf" as alleged by the Carrier. Additionally, the Board determines that track panels by their very nature must be constructed and assembled in order to be utilized by the Carrier in its operations. As such, scope covered work is necessarily required in order to produce even those track panels which the Carrier attempts to categorize as "off the shelf" purchases. The critical issue is whether the work involved in manufacturing and assembling track panels is covered by the Scope Rule, and not whether the particular item purchased by the Carrier is a finished product. Track panels are clearly not raw materials purchased by the Carrier for use in its operations, but rather items which require scope covered work in order to be properly assembled and constructed for installation and integration into the Carrier's existing trackage. To allow the Carrier to purchase track panels which were assembled and constructed by an outside company, rather than assigning such work to BMWE-represented employees would circumvent the Scope Rule language reserving such work to BMWE-represented employees. Accordingly, the Board concludes that the Organization established a prima facie claim of a Scope Rule violation in this case as a result of the Carrier's purchase of track panels from an outside company.

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 construction of track panels, rather than assigning such work to BMWE-represented employees. The evidence of record establishes that no emergency situations existed during the period covered by the claim, nor was there any indication that time was of the essence in completing any projects which required the Carrier to purchase the track panels in question from an outside company, rather than assigning its own employees to perform such work. Rather than presenting a highly compelling reason for its decision to contract out the scope covered work of constructing track panels, the Carrier simply relied upon the assertion which the Board finds unpersuasive, that the purchase of new material does not violate the Scope Rule. The Board holds that the Carrier failed to present a highly compelling reason for outsourcing the work of constructing track panels under the facts and circumstances presented in this case.

The Board further finds that the Carrier compounded its violation of the Agreement as a result of its failure to comply with the notice provision contained in paragraph 4 of the Scope Rule. In so doing, the Carrier deprived the Organization of an opportunity to request a meeting and discuss the matter of contracting out the work of constructing and assembling the disputed track panels.

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. The Board determines that a compensatory remedy under such circumstances assists in preserving the integrity of the parties' Agreement and adherence to the Scope Rule. The record indicates that the construction of a track panel usually takes six employees approximately one and one-half hours. Accordingly, the Claimants shall each be compensated at their regular rate of pay for the number of hours set forth in paragraphs six through eight of the Organization's Statement of Claim. Those employees listed in paragraph five of the Statement of Claim shall be compensated for 12 hours of work, rather than the 16 hours of work 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 21st day of July 2008.