Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40235
Docket No. MW-39795
09-3-NRAB-00003-060603
(06-3-603)

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Holland Welding Co.) to perform Maintenance of Way Track Sub-Department work (track welding and related work) at Roosevelt Road Track 10 and Roosevelt Road Old Taylor Lead, Track 10 in Chicago, Illinois on June 9, 10, 13 and 14, 2005 instead of Track Department employees (System File BMWE-523 NRP).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advanced notice of its intent to contract said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 24.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, all Track Department employees with an active employment relationship during the above-referenced period shall now '. . . be paid an equal amount of the total manhours expended by the Contractor in performing this work. . . .'"

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.

On February 11, 2005, the Carrier notified the Organization of its intent to contract out the work of installing 15 non-insulated No. 8 115RE panelized turnouts and rebuilding 8500 feet of existing yard track at the Chicago Yards. The notice advised the Organization that the project was expected to take 85 days to complete, at a total cost of $1,110,000. It further advised that the existing workforce of 23 capital project Maintenance of Way employees were fully engaged in other work and unavailable to complete the project as scheduled. It further stated that no employees would be furloughed as a result of the contracting. It enclosed a list indicating the location and specifics of the work to be contracted.

The Organization responded by letter dated February 15, 2005, requesting a conference. The conference was held, but no understanding was reached. The Carrier proceeded with the contracting and the Organization filed the claim that is before the Board.

This claim raises issues concerning the interplay of Rules 1 and 24 of the controlling Agreement. Rule 1, Scope, provides:

> "The Rules contained in this Agreement shall govern the hours of service, rates of pay and work conditions of Maintenance of Way Department employees classified as B&B Foreman, Track Foreman,

B&B Mechanic, Assistant Track Foreman, Welder, Welder Helper, Machine Operator, Foreman Repairman & Repairman MW Equipment, Truck Driver, Trackman, Bridge Operator (MBTA) Highway Crossing Watchman (MBTA), Trackman/B&B Mechanic (Fla. & Calif.) and of other employees of similar classifications under the jurisdiction of the Maintenance of Way Department, except those employees who come within the scope of other existing agreements.

While it is not the intent of the parties to either diminish or enlarge the work being performed in a territory under this Agreement, the work generally recognized as work ordinarily performed by the Brotherhood of Maintenance of Way Employees as it has been performed traditionally in the past in that territory will continue to be performed by those employees.

Recognizing that it is extremely difficult to ensure strict compliance to the agreements negotiated by other parties and for management to be fully aware of the intricacies of the past practice at each point, the parties have inserted the word 'ordinarily' in the above paragraph. The use of the word ordinarily is designed to preclude Scope/Classification Rule based claims and or grievances which arise as a result of either the assignment of Maintenance of Way employees to perform work customarily performed by other crafts or the erroneous assignment of other crafts to perform work customarily performed by Maintenance of Way employees at that location."

Rule 24 - Contracting Out, provides:

"1. In the event the Carrier plans to contact out work within the scope of the schedule agreement, the Chief Engineer shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

2. If the General Chairman requests a meeting to discuss matters relating to the said contracting transaction, the Chief Engineer or his representative shall promptly meet with him for that purpose. The Chief Engineer or his representative and the General Chairman or his representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Chief Engineer may nevertheless proceed with said contracting, and the General Chairman may file and progress claims in connection therewith.

3. Nothing in this Rule shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman to discuss and if possible reach an understanding in connection therewith.

4. (1) Amtrak may not contract out work normally performed by an employee in a bargaining unit covered by a contract between a labor organization and Amtrak or a rail carrier that provided intercity rail passenger transportation on October 30, 1970, if contracting out results in the layoff of an employee in the bargaining unit.

(2) This subsection does not apply to food and beverage services provided on trains of Amtrak."

The Organization contends that the work that was contracted out is work that BMWE-represented employees had ordinarily and customarily performed. Consequently, the Organization urges, Rule 1 mandates that the work "will continue to be performed by those employees," and the contracting out of the work violated that mandate. Furthermore, the Organization maintains that the Carrier failed to establish a legitimate justification for the contracting. The Organization argues that the Carrier admitted that the employees possessed the skills needed to

perform the work, but failed to attempt to assign them the work on overtime or by rearranging schedules. The Organization urges that the Carrier's assertion that it lacked sufficient manpower to staff the project cannot justify the contracting because the Carrier, over the years, reduced the size of its force by attrition and with proper planning would have hired sufficient forces to perform the job. In this regard, the Organization relies on Public Law Board No. 6204, Award 33. In the Organization's view, the Carrier breached the obligation of good faith imposed on it by Rule 24.

The Carrier contends that the Organization failed to prove that the Agreement reserved the work exclusively to the employees. The Carrier further contends that it complied with Rule 24 by giving proper written notice of its intent to contract out the work and meeting with the General Chairman in an effort to reach an understanding. The Carrier argues that no employees were furloughed as a result of the contracting, but that the contracting was necessary because the project was beyond the capacity of the employees to handle in a timely manner. Citing Third Division Award 38195, the Carrier concludes that because the contracting did not cause any employees to be furloughed, the claim must be denied.

There is no question that the employees performed and were capable of performing the work. We conclude that the Organization proved that the work which was contracted was within Rule 1 Scope of the Agreement.

However, just because the work fell within the scope of the Agreement does not mean that it may not be contracted out. The language of Rule 1 on which the Organization relies must be read in conjunction with Rule 24. As the Board stated in Award 38195:

> "Notwithstanding the provisions of the Scope Rule, the Carrier has the right to contract out work. If the Carrier did not have that right, Rule 24 would have no meaning."

The record is clear that the Carrier served the required notice and held the required meeting. It is also undisputed that no existing employees were furloughed as a result of the contracting. The Carrier argues that by serving the notice,

conducting the meeting and not furloughing any employees, it met all of its obligations under the Agreement. The Carrier asserts that such is the holding of Award 38195.

We do not read Award 38195 in the same manner as the Carrier does. It is true that Rule 24 prohibits contacting if the contracting results in a layoff, but it does not follow that the Rule allows contracting whenever no layoffs result. Award 38195 held as follows:

> "The Carrier met its obligations under Rule 24. Timely advance notice was given to the Organization by the Carrier of its intent to contract out the work and the parties met on several occasions in an effort to reach agreement concerning the Carrier's stated intent. Further, no employee was furloughed as a result of the contracting out of the work in dispute. The parties' inability to reach agreement in their discussions concerning the Carrier's decision to contract out work does not amount to a showing by the Organization that the Carrier failed to meet its obligations under Rule 24 or any other requirements as being indicative of bad faith on the Carrier's part."

Thus, Award 38195 did not do away with the Carrier's obligation of good faith. It did not allow the Carrier to contract out arbitrarily as long as it does not result in layoffs. In this regard, Award 38195 is unremarkable – it holds that the Organization has the burden to prove the Carrier's lack of good faith. Such a holding is consistent with Rule 24.

In the instant case, the Organization asserted, but failed to prove, that rearranging employee schedules and assigning work on overtime would meet the Carrier's legitimate needs with respect to the project. Indeed, the primary thrust of the Organization's argument is that the Carrier must be acting in bad faith because it previously reduced the size of its force by attrition. As the Organization argued during on-property handling, "Until three years ago the Construction Gang would have performed this work. The Carrier has had more than sufficient time to increase its BMWE forces to perform the BMWE work."

In support of its position, the Organization relies heavily on Public Law Board No. 6204, Award 33. That Award, however, was not rendered on this property, but rather involved the Organization and the Burlington Northern Santa Fe Railroad Company. Because the Award did not quote the relevant Agreement language directly, we cannot tell whether the Agreement in that case contained a provision comparable to Rule 24. Unfortunately, for the Organization, the Agreement at issue in this case does not require the Carrier to restore the size of its workforce to a prior level before it may contract out to meet needs raised by the current level of its forces. Rather, it merely requires that the Carrier not contract out if doing so will result in the layoff of any current employees. There is no dispute that no current employees were furloughed. We conclude that the Organization failed to prove that the Carrier contracted out the work arbitrarily or otherwise in bad faith. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of December 2009.

LABOR MEMBER'S
CONCURRENCE AND DISSENT
TO
AWARDS 40233, 40234 and 40235
DOCKETS MW-39689, MW-39757 and MW-39795
(Referee Malin)

After careful consideration, I must concur in part and dissent in part to the findings of the Majority in Awards 40233, 40234 and 40235. In each of these three awards, the Majority found that the disputed work was ordinarily and customarily performed by BMWED represented employes and within the Scope of the Agreement. More specifically, the Majority held as follows in each of these awards:

> AWARD 40233 - **"*** We conclude that the Organization has proven that the employees have ordinarily performed work of the nature of the work that was contracted."** (Emphasis added)
>
> AWARD 40234 - **"There is no question that the employees performed and were capable of performing the work. We conclude that the Organization has proven that the work which was contracted was within the Rule 1 Scope of the Agreement."** (Emphasis added)
>
> AWARD 40235 - **"There is no question that the employees performed and were capable of performing the work. We conclude that the Organization proved that the work which was contracted was within Rule 1 Scope of the Agreement."** (Emphasis added)

I concur with the findings of the Majority that the work involved in Awards 40233, 40234 and 40235 was customarily performed by BMWE represented employes and within the Scope of the Agreement. Indeed, there could be no other reasonable conclusion because there was substantial evidence in each case that the employes had routinely performed the disputed work in the past and had all necessary skills to perform the disputed projects if only the carrier had assigned the work to them. This should have ended inquiry and all three claims should have been sustained.

However, instead of sustaining the three claims in question, the Majority instead denied these claims based on the contract language in Paragraph 4 of Rule 24 which provides:

> "4. **(1) Amtrak may not contract out work normally performed by an employee in a bargaining unit covered by a contract between a labor organization and Amtrak or a rail carrier that provided intercity rail passenger transportation on October 30, 1970, if contracting out results in the layoff of an employee in the bargaining unit.**
>
> (2) This subsection does not apply to food and beverage services provided on trains of Amtrak." (Emphasis added)

After analyzing the above-quoted language, the Majority denied each of the claims in question based on the following observation:

> "In support of its position, the Organization relies heavily on Public Law Board No. 6204, Award 33. That Award, however, was not rendered on this property, but rather involved the Organization and the Burlington Northern Santa Fe Railroad Company. **Because the Award did not quote the relevant Agreement language directly, we cannot tell whether the Agreement in that case contained a provision comparable to Rule 24. Unfortunately, for the Organization, the Agreement at issue in this case does not require the Carrier to restore the size of its workforce to a prior level before it my contract out to meet needs raised by the current level of its forces. Rather, it merely requires that the Carrier not contract out if doing so will result in the layoff of any current employees. There is no dispute that no current employees were furloughed.** We conclude that the Organization failed to prove that the Carrier contracted out the work arbitrarily or otherwise in bad faith. Accordingly, the claim must be denied." (Emphasis added) (Page 7 of Awards 40233, 40234 and 40235)

Apparently, the union did not make it clear (and the Majority did not understand) that the language in Paragraph 4 of Rule 24 upon which it relied to deny the three claims in question was placed in all collective bargaining agreements in effect on Amtrak as a result of the Amtrak Reform and Accountability Act Pub L. No. 105-134 (1997) ("Amtrak Reform Act"). A review of the Act itself and its legislative history makes it transparently clear that the Amtrak Reform Act cannot be taken as overriding any part of the Amtrak collective bargaining agreements. To the contrary, the language of Section 121 of the Act adds to, rather than supercedes, the existing contractual restrictions on the contracting out of work. While the union may not have made the legislative history of the Amtrak Reform Act sufficiently clear in the record of these cases, that does not change the legislative history or Congressional intent. Consequently, I must vigorously dissent to the Majority's findings that the Agreement merely requires Amtrak not to contract out if doing so will result in the furlough of any current employes. That finding is clearly and unequivocally based on a misunderstanding of the intent of Congress when it enacted the Amtrak Reform Act and, as such, that finding has no precedential value.

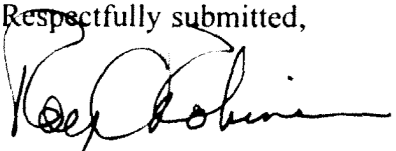
The basis for my dissent in this case is not a matter of first impression. To the contrary, precisely the same issues were presented in cases decided by Award Nos. 1, 2 and 3 of Public Law Board No. 6671. A review of these three awards establishes the PLB No. 6671 was a special board established specifically to resolve contracting out disputes on Amtrak and that in Case Nos. 1, 2 and 3 Amtrak and BMWE exhaustively briefed the legislative history and meaning of the Amtrak Reform Act and how the language from that Act came to be a part of every collective bargaining agreement in effect on Amtrak (*See* BMWE's position at PP.6-9 and Amtrak's position

at PP.12-14 of Award No. 1 of PLB No. 6671). After carefully analyzing the positions of the parties (*See* PP.24-25 of Award No. 1), the Neutral Member of PLB No. 6671 made the following determination with respect to the Amtrak Reform Act and its effect on Amtrak's collective bargaining agreement:

> **"Based on its express language, this Board finds that the Amtrak Reform Act cannot be taken as overriding any part of the Amtrak collective bargaining agreements. Instead, the language of Section 121 of the Act must be read and understood as adding to, rather than superceding, the existing contractual restrictions on the contracting out of work. Applying this to the instant dispute, it must be noted there is no allegation, and no evidence in the record, that the contracting out of the carpet installation work at issue resulted in any bargaining unit layoffs. The Amtrak Reform Act's single limitation on the contracting out of work therefore does not apply to this dispute, making the Reform Act and its impact on the parties' collective bargaining agreement irrelevant to the resolution of this matter. Accordingly, this Board shall determine whether the contracting out of the carpet installation work at issue constituted a contract violation based upon the Scope Rule language as written in the parties' collective bargaining agreement, without any further specific consideration of the provisions of the Amtrak Reform Act."** (Emphasis added) (Award No. 1 of PLB No. 6671 at P.25)

It is transparently clear that the Neutral Member of PLB No. 6671 rendered a carefully reasoned and fully informed interpretation of the language in the Amtrak Reform Act (Rule 24, Paragraph 4 in the instant cases) after an exhaustive review of the legislative history that spawned the Act and the specific contract language in question. On the other hand, a review of Awards 40233, 40234 and 40235 and the records in those cases establishes that the complex legislative history and Congressional intent that spawned the language in Rule 24, Paragraph 4 was not in evidence before the Majority when it rendered its interpretation of that contract language. As a result, the Majority was unable to render a fully informed opinion and made an interpretation of the Amtrak Reform Act (Rule 24, Paragraph 4) which is in conflict with the more fully informed and carefully reasoned opinions in Award Nos. 1, 2 and 3 of PLB No. 6671. Consequently, I dissent with respect to the Majority's interpretation of Rule 24, Paragraph 4 and admonish the union that is incumbent upon it to make the legislative history and Congressional intent of the Amtrak Reform Act more clear in future cases if it intends to obtain a different outcome.

Respectfully submitted,



Roy C. Robinson
Labor Member