

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44050
Docket No. MW-44114
20-3-NRAB-00003-170218**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 on January 12, 2015 and continuing when the Carrier assigned outside forces (Steven Boukis and Standard Plowing) to perform Maintenance of Way work (removing snow) within the Parma Yard, Clark Yard and Lester Yard on the Great Lakes Division (System File H43604415/2015-184000 CSX).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the above-referenced contracting transaction as was practicable and in any event not less than fifteen (15) days prior thereto or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by the Scope Rule and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Marasco and J. Lomas shall ‘... be paid an equal amount of all time worked by all contractor employees from the beginning of this violation up until the time it is corrected, divided equally amongst the Claimants at their respective straight time and overtime rates of pay and that all time be credited towards vacation and retirement for the Claimants. ***”**

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.

The Claimants have established and maintain seniority in various classifications on the Carrier's Great Lakes Division. On January 12, 2015 and continuing, the Carrier assigned three employees from outside forces (Steven Boukis and Standard Plowing) to remove snow within the Parma Yard, Clark Yard, and Lester Yard on the Great Lake Subdivision, using various hand tools and equipment, including a pick-up truck with a snowplow.

The Organization filed this claim asserting that the snow plow work was reserved to its members. The Carrier denied the claim. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

The Organization contends that the Carrier improperly assigned Maintenance of Way work of snow removal to outside forces. The Organization contends that the Scope Rule clearly and unambiguously reserves "snow removal" work to BMW members. The Organization further contends that even if the work were not specifically reserved, it has shown that this work is customarily or traditionally performed by BMW represented employees. The Organization points out that previous decisions of this Board have found that snow removal work at a fueling facility and parking lot and found that the work was, in fact, reserved to the employees. Third Division Awards 39138 and 39139.

The Carrier contends that snow-removal work is only scope-covered when it pertains to snow removal on track structures and the right of way, which this work was not. The Carrier contends that there is no explicit reservation of other snow removal

work, so the Organization must demonstrate a practice of snow removal at this specific facility. The Carrier contends that the Organization has failed to demonstrate that the claimed work was customarily and exclusively performed in the past by BMW forces, at that location, predating the June 1, 1999 System Agreement.

Prior interpretations of this Agreement have held that while “snow removal” is specifically reserved, the reservation covers only snow removal from track structures and right of ways. Not all snow removal is scope-covered. Public Law Board 6510, Award 6. This reservation does not, on its terms, include snow removal for parking lots, roadways, or areas adjacent to buildings in yards, as is disputed here.

Nonetheless, this Board has held that where the Organization can establish that the snow removal work in question has customarily or traditionally been performed by its members, it will establish a prima facie case of a Scope Rule violation under paragraph 2. Third Division Award 39138; Third Division Award 39139. Here, the Organization submitted several statements that in the past, its members have been asked to clear snow, spread salt and smooth the areas in dispute. The Carrier presented a statement from Roadmaster Snell that contractors had been used in the past to plow these locations and that there was no plow available this year for employees to use.

The Organization bears the burden of demonstrating that the disputed work has customarily or traditionally been performed by its members. The record before this Board presents a mixed practice which falls short of demonstrating that it was customarily and exclusively performed in the past by BMW forces.

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 18th day of June 2020.

LABOR MEMBER'S DISSENT TO
AWARD 44050, DOCKET MW-44114

(Referee Kathryn Van Dagens)

The Majority erred application in its finding that the Organization failed to establish customary and exclusive performance of the claimed snow removal work. Initially, the Majority properly highlighted the proper analysis, which is:

“... this Board has held that where the Organization can establish that the snow removal work in question has customarily or traditionally been performed by its members, it will establish a prima facie case of a Scope Rule violation under paragraph 2. Third Division Award 39138; Third Division Award 39139. Here, the Organization submitted several statements that in the past, its members have been asked to clear snow, spread salt and smooth the areas in dispute. ****”

Of particular note, Awards 39138 and 39139 both hold that the Organization must establish “customary and traditional” performance, which was acknowledged by the Majority in the above-quoted portion of the award. Moreover, neither award mentions exclusive performance. This Board has previously addressed the distinction between customary and traditional performance and exclusive performance. Specifically, in Award 43628, the Board cited Award 40563, which reads, in pertinent part:

“*** In Third Division Award 40563, this Board wrote,

‘After reviewing and considering the Awards submitted, the Board is of the opinion that the better interpretation is that “customarily” has its ordinary meaning, that is, “historically and traditionally.” For one thing, it is a basic principle of contract interpretation that language should be given its ordinary meaning, in the absence of any indication from the parties that they intended some different meaning....The reasoning set forth in Public Law Board No. 4402, Award 20 is persuasive, particularly in noting that “Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so.” As the PLB pointed out in that case, the word “exclusive” is used extensively throughout the industry. The parties’ failure to use it in the Note to Rule 55, using “customarily” instead, “supports the conclusion that the parties did not intend to apply the exclusivity principle to contracting out issues.”’

The Agreement in this case reserves work, among other ways, for “...any other work customarily or traditionally performed by BMW represented employees.” Consistent with the analysis contained in Award 43628, the Majority erred when it held otherwise.

Labor Member's Dissent

Award 44050

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To further highlight this error, in Award 44052, which was rendered on the same date as this award and consisted of the same three (3) Board members, the Board denied the claim but properly determined the burden of proof was not met when the Organization failed to demonstrate customary or traditional performance and made no mention of exclusivity.

For these reasons, I must dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Zachary C. Voegel', with a stylized flourish at the end.

Zachary C. Voegel
Labor Member