BEFORE PUBLIC LAW BOARD NO. 7007

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD

Case No. 12

STATEMENT OF CLAIM:

(1) The Agreement was violated when the Carrier assigned outside forces (Colby Paving) to perform Maintenance of Way work (pave station platform) at Cedar Park in Melrose on October 9, 2004 (Carrier's File MBCR-BMWE-02/0505).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with written advance notice of its intent to contract out the work described in Part (1) above, as required by Rule 24.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. DeJesus, E. Shanley and C. O'Brien shall now each be compensated for thirteen and one-half (13.5) hours at their respective rates of pay.

FINDINGS:

The Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it employed outside forces to pave various station platforms, including the one at issue, instead of assigning this work to its own B&B forces. The Carrier denied the claim.

The Organization initially contends that the work at issue was ordinary work of B&B mechanics, and there can be no question that the work accrued to the Carrier's B&B forces. The Organization asserts that similar work undisputedly had been previously assigned to the B&B forces, including the Claimants, at various locations, including the subject location, and this work had been performed with equipment owned by the Carrier.

The Organization argues that exclusivity is inapplicable where, as here, the Carrier admittedly violated the notice provisions in connection with contracting out scope-covered work. The Organization contends that this failure of notice is not a small or insignificant matter. The Carrier simply assigned the work in question to outside forces without giving advance notice, thereby precluding the required discussions with the General Chairman. The Organization insists that this action effectively precluded any good-faith attempt to reach an understanding concerning the intended contracting. Citing a number of Board Awards, the Organization maintains that the Carrier's decision to contract out the work without complying with its obligations under Rule 24 constitutes a direct and serious violation of the Agreement. The Organization emphasizes that under the circumstances at issue, the instant claim should be sustained based upon the Carrier's undisputed failure to provide notice.

The Organization goes on to emphasize that the Carrier waived exception to the *bona fides* of the instant claim by failing to provide notice and precluding good-faith conference discussions. Moreover, the Carrier abandoned its lack of equipment "defense" when it admitted ownership of the equipment necessary to perform the work. The Organization maintains that this is a meritless red herring unworthy of any valid consideration.

The Organization then points to the Carrier's assertions relating to the number of hours claimed. The Organization maintains that as the party in sole possession of documentary proof in the form of contractor records, it could have presented this evidence to defeat the claim. The fact that the Carrier failed to present this

documentation gives rise to a negative inference as to what may be drawn from this evidence. The Organization asserts that this "affirmative defense" is completely invalid.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization has failed to meet its burden of proof. The Carrier asserts that the claim is excessive, and it should be denied or dismissed in its entirety. The Carrier argues that the Organization has failed to demonstrate how the three Claimants were harmed, or what positions they held that "normally" would have done this work. The Organization also failed to submit evidence to show that the paving work took thirteen and one-half hours.

The Carrier maintains that the Organization never demonstrated how the Carrier's decision to contract out the work in question violated the clear and unambiguous language of Rule 24. The Carrier points out that no lay-off of any employee in the BMWE bargaining unit occurred as a result of the contracting out, and there is no evidence that the contracting out of this work diluted any work opportunities that rightfully accrued to the BMWE. The Carrier contends that whether or not it had the required equipment to do to the work is a *non sequitor.*

As for the claim that the Carrier did not provide the required notice, the Carrier argues that it did not act in bad faith. Moreover, the notice rule does not refer to any monetary award in the event of a failed notification. The Carrier insists that the claims are entirely excessive, lacking in merit, and warrant further denial.

The Carrier then points to the 185-day time limit for referring a claim to a tribunal.

The Carrier argues that it denied the claim on November 8, 2005, and the Organization referred this matter to a tribunal on December 14, 2006, well beyond the contractual time limit. The Carrier maintains that the claims are flawed at this point and should be dismissed.

The Carrier ultimately contends that the instant claims should be denied in their entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural argument raised by the Carrier, and we found it to be without merit.

This Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it failed to furnish the General Chairman with the advance written notice of its intent to contract out work involving outside forces paving a station platform at Cedar Park in Melrose on October 9, 2004. Therefore, the claim must be sustained.

Rule 24 dealing with contracting out states the following:

> 1. In the event the Carrier plans to contract out work within the scope of the schedule agreement, the Chief Engineer shall notify the General chairman (sic) 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.

In this case, the Carrier has admitted that it failed to issue a notice to the General Chairman so that the matter of the subcontracting of the work could be discussed. The Carrier simply states that it " . . . did not act in bad faith" and that there is no denial that the notice was not issued. Consequently, there is a clear rule violation.

Once this Board has determined that the Carrier acted in violation of the rules, we next must turn our attention to the remedy sought by the Organization. In this case, it has been shown that three employees of Colby Paving expended a total of thirteen and one-half hours each performing the station platform maintenance work. Although the Claimants in this case may have been fully employed, it has been held in numerous awards that employees are entitled to be reimbursed for subcontracting performed in violation of the rule. Those awards hold that if that is not done, there is no remedy that will act as a deterrent for the Carrier failing to give notice to the Organization in the future so that a discussion of the proposed subcontracting may ensue before the actual work begins.

For all of the above reasons, the claim must be sustained.

AWARD:

The claim is sustained.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 4/9/09

CARRIER MEMBER

DATED: April 9, 2009