

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7163**

Brotherhood of Maintenance of Way)
Employees Division, IBT Rail Conference)
)
and)
)
CSX Transportation, Inc.)

Case No. 169
Award No. 169

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when it assigned four (4) CSXT Transportation Department employees to perform painting work and other Scope covered duties during a Clean Sweep of the Carrier's Ashtabula Yard on October 9, 2012 and failed to properly assign such work to BMWED represented forces (System File CARRICKC.112/2012-133512 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimants J. Carrick, J. Rosario, J. Austin and J. Durkin shall each now be allowed eight (8) hours at their respective over-time rates."

Background

On October 9, 2012 the Carrier initiated and directed a "Clean Sweep" in the Ashtabula Yard located on the Erie West Subdivision. CSX assigned BMWED forces, employees from other crafts and non-represented employees to remove debris and pick-up trash. Additionally, the Carrier directed Transportation Department (T&E) employees to spray paint on ties between Mile Post (MP) QD 128.4 and MP QD 130.4 which is approximately a two (2) mile stretch within the Yard.

Painting ties between those mile posts serves to designate the tie as a "clearance point" on a tie or a rail near a turnout which assists operating craft employees in determining the closest point where a car can remain near the track switch without interfering with movement on an adjacent track. In other words, the painted, marked tie signifies to a train crew, machine operator or others whether they are clear of a switch and, therefore, not fouling a right of way.

The Organization's claim was timely presented on October 30, 2012; the Carrier denied the claim on December 13, 2012. The Organization handled the claim at all stages of appeal up to and including the Carrier's highest appellate officer. Conference convened on January 23, 2013.

In addition to the on-property exchanges, interested parties received notice of this matter and were afforded an opportunity to participate in this proceeding in accordance with the terms of the PLB 7163 Agreement.

Organization's Position

T&E employees performed Scope covered work when they painted ties to designate clearance points throughout the limits of Ashtabula Yard; the Carrier's claim denial acknowledges they performed this work. The Scope Rule states, in relevant part, as follows:

The following work is reserved to BMWED 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 ... erection and maintenance of signs, such as ... warning signs, and signs attached to buildings or other structures ... yard cleaning; ... and painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities; ... and any other work customarily or traditionally performed by BMWED represented employees. In the application of this Rule, it is understood that such provisions are not intended to infringe upon the work rights or another craft as established. It is also understood that this list is not exhaustive[.]

The Scope Rule encompasses "all work in connection with the construction, maintenance, repair, inspection or dismantling of tracks, bridges, buildings and other structures or facilities" and such work is performed by BMWED forces. Also specified within the Scope Rule is "yard cleaning" and "painting of machines, equipment, turntables, platforms, walkways, handrails, buildings and other structures or facilities" as reserved to BMWED. In view of this wording, painting ties deals with painting track and is work reserved to BMWED forces. Thus, assigning the claimed work to T&E employees violated the Scope Rule.

Along with the Scope Rule is Section 4.B.1 in the Memorandum of Agreement (MOA) dated January 23, 2012 which states:

Section 4 - Yard Cleaning

- B. Other than BMWED-represented employees may be used to perform yard cleaning work only as follows:
 - 1. "Clean Sweeps" - Carrier employees of various crafts working in yards may be assigned to 'clean sweep' projects whereby all employees working in a particular yard are assigned to manually pick up trash on a given day to promote safety. Employees not represented by BMWED who are assigned to participate in 'clean sweep' projects (trash* pick-up) will not be permitted to perform Track or B&B maintenance work such as cutting brush, oiling switches, or painting.

Although the Carrier may assign other crafts to perform clean sweep duties, the work performed is restricted to trash pickup and excludes painting because Section 4.B.1 clearly states that "[e]mployees not represented by BMWED who are assigned to participate in 'clean sweep' projects (trash* pick-up) will not be permitted to perform Track or B&B work such as cutting brush, oiling switches, or painting." Thus, the MOA reinforces the BMWED's reserved work in the Scope Rule. Since the work is reserved to BMWED forces, there is no infringement on the rights of other crafts.

The claimed work is ordinarily and customarily performed by BMWED forces; Claimants have performed this work many times in the past and were qualified to do so on the claim date. Contrary to the Carrier's assertion that painting a tie to mark a clearance point benefits only train crews so the work accrues to that craft, the Organization asserts that the claimed work also benefits on-track equipment operators engaged in the operation of vehicles and machinery on the track.

In response to the Carrier's assertion that the work is not reserved to BMWED forces because there is a mixed, past practice where employees from multiple crafts spray paint marks on ties to designate a clearance point and this practice falls within the Scope Rule's exception ("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"), the Organization states the Carrier failed to prove the alleged practice. In this regard, Third Division Awards 37952 and 37976 show that past practice is an affirmative defense with the burden on the Carrier to establish. The Trainmaster's email consisting of two (2) sentences asserting a past practice is of no evidentiary import because the Labor Relations Officer directed the Trainmaster to state there was a mixed practice.

In addition to violating the Scope Rule and MOA and failing to establish its affirmative defense of a past practice, the Carrier's decision not to assign the work to Claimants violated Rule 1 - Seniority Classes, Rule 3 - Selection of Positions and Rule 4 - Seniority.

Since the claimed work is reserved for BMWED forces and Claimants have ordinarily and customarily performed it in the past, the requested remedy of eight (8) hours at the overtime rate of pay for each Claimant is warranted. Any allegation by the Carrier that the remedy is excessive must be discounted "as it was not raised or discussed during the on-property handling." Regardless, the Carrier's concerns about the remedy are readily cured by having the Trainmaster identify the four (4) T&E employees assigned to perform the claimed work and checking their time records for expended hours completing their assignment. The hours claimed are not excessive as the Ashtabula Yard's limits at MP QD 128.4 to MP QD 130.4 is approximately two (2) miles with several switches to paint as clearance points.

Carrier's Position

The claim is vague as the Organization did not provide names or other identifying information of T&E employees performing the claimed work. This thwarts the Carrier's ability to investigate the claim to determine whether the work occurred as alleged and, if it did occur, the hours consumed performing it since the painting is by spray can. Without the Organization offering this information and data, the requested remedy must be viewed as excessive.

Spraying paint on a tie to designate a clearance point is not work reserved to BMWED forces; the Scope Rule does not identify or mention marking clearance points or a similar type of task. "Rather, the painting reserved to the BMWED employees is '... Painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities' and [neither] track nor ties are considered 'other structures or facilities.'"

The MOA, moreover, does not expand the Scope Rule to encompass any kind of painting. The painting reserved under the Scope Rule remains as reserved work during a clean sweep. Additionally, the Scope Rule contains an exception ("it is understood that such provisions are not intended to infringe on the work rights of another craft as established") which applies in this situation. That is, other crafts

historically performing the claimed work continue to perform it. T&E employees have performed this work in the past and continue to do so under the exception in the Scope Rule. The Trainmaster's statement that there is a common or past practice for employees from multiple crafts to paint clearance ties and derails is credible as the Organization never submitted evidence showing a contrary practice.

The claimed work -- marking a tie by spraying paint on it -- is a minute part of the work performed by T&E employees and incidental to the overall task of determining the clearance point. Furthermore, this is not track maintenance or renewal work. "As the marking of ties only benefits train crews, it is logical it would be completed by train service employees."

Finally, Third Division Awards 38087 and 40845 and Award 12 of Public Law Board 7099 show that the Organization carries a more rigorous burden of proof in a jurisdictional dispute to demonstrate exclusivity for the claimed work. BMWED has not proven exclusivity for the claimed work and proffered no evidence showing any practice in this situation. Since BMWED did not meet its burden of proof the claim must be denied.

Parties of Interest Positions

BLET stated that "the painting of railroad crossties, whether connected to a 'Clean Sweep' or otherwise, does not fall under the purview" of its collective bargaining agreement. Its members "are prohibited by agreement, as well as the scope of the BMWED schedule, from engaging in the practice of painting cross ties." BLET's position is that BMWED's claim must "be sustained and the remedies requested by the Claimants be granted."

UTU states that "[t]here are no work rights on the property, either historically or currently, between [UTU], including the application of its UTU National Agreements, and the carrier that permits the painting of clearance points by [UTU] employees." UTU "does not claim any contractual work rights to any of the duties currently outlined in the BMWED claim or agreement" and "UTU is unaware of the carrier utilizing transportation employees represented by the UTU to perform any type of painting that pertains to the items listed within the BMWED's scope provisions." Finally, "the transportation employees represented by the UTU have no contractual authority or working rules that specifically address the painting of railroad clearance ties. Consequently, we find no conflict with the current BMWED claim and our agreement. In other words, 'We have no dog in the fight.'"

SMART - Transportation Division elected not to submit a response other than stating it did not "claim any right under the CSX Yardmaster's CBA to perform the work" at issue in this proceeding.

Findings

Public Law Board 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this dispute were afforded due notice of the hearing and participated in this proceeding. Furthermore parties of interest received notice of this matter and were offered an opportunity to participate under the terms of the PLB 7163 Agreement.

The Organization's claim alleges that four (4) T&E Department employees performed the claimed work on October 9, 2012; the Carrier acknowledges T&E employees performed this work. Uncontested by the

Carrier are the Organization's assertions in support of its claim that (1) the work performed by T&E employees occurred on October 9, 2012 between MP QD 128.4 to MP QD 130.4 within the Yard and (2) Claimants hold seniority in the appropriate classifications for this work and were qualified to perform it on the claim date. The claim is not vague on those points. During on-property exchanges, the Carrier disputed the requested remedy as excessive whereas the Organization states the requested remedy can be established by asking the Trainmaster to confirm the hours expended by the four (4) T&E employees.

According to the Organization, the work of marking ties by spraying them with paint is reserved to BMWED forces under the Scope Rule and is reinforced or supported in the MOA. BMWED relies on the following wording in the Scope Rule:

The following work is reserved to BMWED 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 ... erection and maintenance of signs, such as ... warning signs, and signs attached to buildings or other structures ... yard cleaning; ... and painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities; ... and any other work customarily or traditionally performed by BMWED 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 is not exhaustive[.]

[Emphasis added.]

The Scope Rule identifies "yard cleaning" as well as "painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities" and "any other work customarily or traditionally performed by BMWED represented employees" as reserved to BMWED forces. Tie marking is not identified in the same manner as "yard cleaning" but the "list is not exhaustive" and tie marking with paint is encompassed by "any other work customarily or traditionally performed by BMWED represented employees." The Organization stated in its claim, appeal and post-conference letter that Claimants have customarily performed this work in past years; this statement was not disputed or otherwise shown to be inaccurate by the Carrier during on-property exchanges. This undisputed assertion by the Organization is accepted as fact for purposes of this Award. The claimed work is reserved to BMWED forces under the Scope Rule as "any other work customarily or traditionally performed by BMWED represented employees."

Furthermore, the exception in the Scope Rule relied upon by the Carrier is not applicable based on the submissions from the parties of interest. As plainly and forcefully stated by UTU, "We have no dog in this fight." Under the Scope Rule the custom and tradition of using BMWED forces does not "infringe upon the work rights of another craft[.]"

In addition to the Carrier not directly rebutting or contesting the Organization's statement that BMWED forces, including Claimants, customarily perform the claimed work, the Carrier's statement or assertion of a past practice is not proven. In the circumstances presented, this critical and singular piece of evidence relied upon by the Carrier is not credited.

In a jurisdictional dispute such as this claim there is a higher or more stringent burden of proof to be met by the Organization. The Board finds that the Organization met its burden as the Carrier did not contest the Organization's statement on property that BMWED forces customarily perform the work and, at the same time, the Carrier's asserted defense of a mixed practice is not proven. The MOA is interpreted consistent with these findings. That is, the MOA restricts crafts during a clean sweep to trash pick-up and does not, in the circumstances and location of this claim, authorize crafts to mark a tie with paint.


Notwithstanding the Board's finding on work reservation for BMWED forces, "[i]t is well settled that the Organization bears the burden of proof to establish each element of the claim" as noted in Third Division Award 31930 and that includes the element comprising the remedy requested. Remedy is as much a part of the substantive claim as the underlying alleged facts supporting the requested remedy. BMWED states that four (4) T&E employees performed the work; the Carrier acknowledged T&E employees performing the work but did not acknowledge the number of T&E employees assigned. There is no indication in the record that the Organization requested, or attempted to request, time records of the four (4) T&E employees.

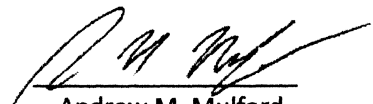
Other details are not in the record which could be reasonably obtained or established by the Organization and would enable the Board to assess hours expended in the context of the requested remedy. For example, the number of ties painted between MP QD 128.4 and MP QD 130.4 in the Yard. Claimants, having performed this work, would know this area where the claimed work occurred and could substantiate time expended by them in the past for marking ties with paint. The evidentiary support for this type of information is lacking in the record and, without it, the Board is unable to form a factual basis from the record for a remedy.

During on-property exchanges the Carrier disputed the hours expended and the Organization did not develop this evidence. Since the Organization did not meet its burden of proof on this element of the claim, the Board denies the claim.

Award
Claim denied.


Patrick Halter
Neutral Member


Rob Miller
Carrier Member


Andrew M. Mulford
Organization Member

Signed on this 20th day
of January, 2016