AWARD NO. 216
Case No. 216

Organization File No. B17161313
Carrier File No. 2013-143838

PUBLIC LAW BOARD NO. 7163

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) INTERNATIONAL BROTHERHOOD OF TEAMSTERS
TO)
)
DISPUTE) CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

1. The Agreement was violated when, on March 11, 12, 13 and 14, 2013, the Carrier assigned Mechanical Department employes to perform Maintenance of Way work compacting ballast between tracks in the Recovery Yard near Mile Post S247.1 on the Raleigh/Rocky Mount Seniority District.

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Lisk, Jr. shall now be compensated for eight (8) hours' straight time and two (2) hours' overtime at his respective rates of pay.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

It is undisputed that the Carrier utilized employees of the Mechanical Department to compact ballast between the tracks in the Recovery Yard at Hamlet Yard. The Organization insists this is work reserved to employees covered by its Agreement, and Claimant should have been called to perform this service.

The Carrier does not deny that compacting ballast is work that is covered by the Scope Rule of the Agreement. It asserts, however, that this work has been done in the past by mechanical forces at this location. In fact, it avers that the shop employees utilized a mechanical roller packer, the equivalent of a ballast regulator, that is assigned to the mechanical shop. In denying the claim, the Carrier relied upon the third paragraph of the Scope Rule, reading as follows:

> It is agreed that in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement; and it is also understood that work not covered by this Agreement which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement.

This provision is a double-edged preservation of work rule that is site specific. If, prior to the effective date of the Agreement (June 1, 1999), the Carrier utilized employees not covered by the Agreement to perform work that is within the scope of the Agreement, it may continue such a practice, but only at that location. On the other hand, if Agreement employees performed work that is not covered by the Scope Rule, they will continue to have the right to perform that work, but only at that location. Where the Carrier has utilized employees who are not covered by the Agreement to perform scope work, it carries the burden of proving its affirmative defense. Just as it argues that the Union's assertion of exclusivity is not sufficient without some documentary evidence, the Carrier cannot rely upon its simple assertion that other employees have performed the work. It must offer some proof to support its defense of the claim.

In this case, the Board is satisfied that the Carrier has established that Mechanical Department employees have performed this work. Although the record does not contain any statements

from mechanical forces to this effect, the undisputed fact that the work was performed with machinery belonging to the shop is sufficient to demonstrate that they have done this work. There is no indication the machine has any other purpose. If not to perform this work, the Board sees no other reason for the shop to have the machine. We conclude, therefore, that the Agreement was not violated.

AWARD: Claim denied.

Barry E. Simon
Chairman and Neutral Member

**Dissent to Follow
Andrew Mulford
Employee Member

Rob Miller
Carrier Member

Dated: 10/19/16
Arlington Heights, Illinois

LABOR MEMBER'S DISSENT
TO
AWARD 216 OF PUBLIC LAW BOARD NO. 7163
(Referee Barry Simon)

The Majority seriously erred when it determined that the Carrier's assignment of Car Shop craft employes to perform track ballasting work in the Hamlet Yard did not violate the Agreement. As the violation is clear, a dissent is required for this palpably erroneous award.

On several dates in March of 2013, the Carrier assigned Car Shop employes to perform track maintenance and repair work (i.e., ballast work) at the Carrier's Hamlet Yard. Ballast unloading, regulating, equalizing and stabilizing is unequivocally Maintenance of Way work by virtue of the clear language of the Scope Rule. In this manner, the pertinent part of the Scope Rule reads:

"**SCOPE**

These rules shall be the agreement between CSX Transportation, Inc., and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work recognized as Maintenance of Way work, such as inspection, construction, dismantling, demolition, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences, road crossings, and roadbed, and work which as of the effective date of this Agreement was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees.

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** rail, guard rail, switch stand, switch point, frog, tie, plate, spike, anchor, joint, gauge rod, derail and bolt installation and removal; erection and maintenance of signs, such as mile posts, speed restriction signs, resume speed signs, crossing and station signs, warning signs, and signs attached to buildings or other structures (except billboards); construction of track panels; welding, grinding, burning, and cutting; **ballast unloading, regulating, equalizing, and stabilizing**; track and switch undercutting; cribbing between ties; track surfacing and lining; snow removal (track structures and right of way); road crossing installation and renewal work; asphalting of road crossings (unless required by outside agencies), culvert installation, repairs, cleaning and removal; yard cleaning; security and ornamental fences; distribution and collection of new and used track, bridge and building material; operate machines, equipment, and vehicles; transporting maintenance of way employees; mowing; installation, maintenance, and repairs of turntables, platforms, walkways, and handrails; head

> "wall and retaining wall erection; cleaning, sandblasting, and painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities; rough and finish carpentry work; concrete and masonry work; grouting, plumbing, and drainage system installation, maintenance, and repair work; cooling and heating system installation, maintenance, and repair work; fuel and water service work; roof installation, repairs, and removal; drawbridge operation and maintenance **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 is not exhaustive**."

As identified above, ballasting work in conjunction with Carrier tracks, bridges, buildings or other facilities **is undeniably and specifically** reserved to Maintenance of Way forces.

In addition to the clear reservation of work, the record is undisputed that Maintenance of Way forces have historically and customarily performed such work across the Carrier's rail network as well as on the former component railroads which now comprise the Carrier. During the on-property handling, the Carrier did not dispute the reservation of work or historical performance by Maintenance of Way forces. Based on this alone, it should have been crystal clear that the Carrier's assignment of Car Shop employes to perform track ballasting work constituted a violation of the clear language of the Scope Rule. However, the Majority failed to follow the clear language and customary and traditional performance by Maintenance of Way forces and instead errantly held that the Carrier properly assigned Car Shop employes at the Hamlet Car Shop based on a Carrier assertion that the Car Shop employes performed the work using a ballast regulator which "belong[ed]" to the shop. As admitted even by the Board, the Carrier offered no statements or evidence which established that Mechanical Department forces had **a bona fide past practice of performing ballasting work prior to the Maintenance of Way (Effective June 1, 1999), or, that there was agreement with the Organization for Car Shop employes to perform such work which was in effect prior to the effective date of the Maintenance of Way Agreement**. The Carrier's failure to establish such is paramount, considering the Scope Rule plainly provides:

> "It is agreed that in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement; ***"

Regardless of the clear language of the Scope Rule - and the Carrier's burden - the Majority mistakenly found that because the Car Shop supposedly had a ballast regulator assigned to it, that, in and of itself, was sufficient to constitute a bona fide past practice or establish an agreement existed prior to the June 1, 1999 effective date of the Maintenance of Way Agreement. **The Majority determination is in serious error. Particularly considering it recognized that record lacked any evidence to establish that Car Shop employes had a bona fide past practice or agreement with the Organization to perform the subject work which was in existence prior to the effective date of the Maintenance of Way Agreement (i.e., pre-dating the 1999 Agreement).** For reference, the Majority openly admitted that:

> "In this case, the Board is satisfied that the Carrier has established that Mechanical Department employees have performed this work. Although the record does not contain any statements from mechanical forces to this effect, the undisputed fact that the work was performed with machinery belonging to the shop is sufficient to demonstrate that they have done this work. There is no indication the machine has any other purpose. If not to perform this work, the Board sees no other reason for the shop to have the machine. ***"

Clearly the Majority erred by allowing an **assumption** to trump the clear and unambiguous language of the Scope Rule. Moreover, such a finding turns on its head the Carrier's heavy burden to establish the existence of a bona fide past practice or agreement which predates the June 1, 1999 Maintenance of Way Agreement. Indeed, as cited above, the Majority openly admits that the record lacks **the very evidence** that is called for by the Agreement to allow the Carrier to assign other crafts to perform Maintenance of Way work at a specific location. Whether a Department or craft might have a machine or tool assigned to it does not, in and of itself, establish the existence of a bona fide past practice or agreement with the Organization to perform the subject work which was in place prior to the June 1, 1999 Maintenance of Way Agreement.

In light of the Majority's palpably erroneous decision, the Organization respectfully dissents.

Respectfully submitted,

Andrew M. Mulford
Labor Member

CARRIER MEMBERS' RESPONSE TO DISSENT
TO
AWARD 216 OF PUBLIC LAW BOARD NO. 7163
(Referee Barry Simon)

In response to the dissent of the Organization where Maintenance of Way employees filed claims against Car Shop craft employees who performed the work of compacting ballast in the Hamlet Yard. The Organization asserts that the Carrier did not dispute the reservation of work or historical performance by Maintenance of Way forces in the on property handling. This statement is factually incorrect.

The Carrier supported these facts with the June 1, 1999 Basic Agreement Scope Rule which excludes work previously performed by other crafts. The Scope Rule in pertinent part:

> *"These rules shall be the agreement between CSX Transportation, Inc., and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employees, engaged in work recognized as Maintenance of Way work, such as inspection, construction, dismantling, demolition, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences, road crossings, and roadbed, and work which as of the effective date of this Agreement was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees.*
>
> ***
>
> *It is agreed that in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement;" (emphasis added)*

The facts of this case clearly stated in the on property handling that "it is the practice and customary for Hamlet Yard employees to compact ballast. ...it is common practice for Mechanical Department employees to compact ballast in the yard." And again at the HDO level, "...this work has been performed by such employees for many years. The ballast compactor used was owned by the Mechanical Department and they have always compacted their own ballast in and around the mechanical shop areas." This demonstrates without a doubt that the Carrier did not agree that this work was reserved for Maintenance of Way forces.

Mechanical department employees have historically performed ballast compacting in and around the mechanical shop areas at Hamlet Yard using their own equipment for many years. The Organization failed to refute the Carrier's position that the work at that location has historically been performed by several Mechanical Department crafts.

The Majority did not rule by assumption, but by the facts and the clear language of the agreement allowing other crafts to continue to perform work they have a historical past practice of performing on a location by location basis. The Organization did not produce evidence or refute the fact that mechanical employees perform this work as a practice.

In light of the inaccuracies in the Organization's dissent, the Carrier's response is to preserve the facts of record.

Respectfully Submitted,

Rob Miller
Director, Labor Relations