PUBLIC LAW BOARD NO. 6510

Case No. 4

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
vs.
CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM - EMPLOYE:

(1) The Carrier violated the Agreement when it assigned outside forces (PSI Construction) to perform Maintenance of Way work (install warning signs) at crossings on the Chicago main line between Mile Posts 248 and 296, on the Montreal main line between Mile Posts 1 and 31, and on the Baldwinsville and Fulton Branch Lines beginning August 11 and continuing through August 26, 1999, instead of Messrs. J.D. Caudill, L.W. Robinson, G.M. Kimak, G.F. Ashby and L.E. Houghton [Carrier's File 12(99-0950) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants J.D. Caudill, L.W. Robinson, G.M. Kimak, G.F. Ashby and L.E. Houghton shall now each be compensated for eighty-eight (88) hours' pay at their respective straight time rates of pay and fifty-three and one-half (53.5) hours' pay at their respective time and one-half rates of pay.

FINDINGS:

The Public Law Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employe within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement; that it has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing held. At the hearing of this matter, the parties indicated that the Claimants had waived the rights of appearance and were therefore not present.

The parties entered into an Agreement, dated April 29, 2002, pursuant to Section 3, Second of the Railway Labor Act, as amended to establish the Public Law Board to resolve Eight cases. The National Mediation Board subsequently created Public Law Board No. 6510 as reflected in certain correspondence dated March 23, 2004. The undersigned was named to be the Neutral Member of the Public

Law Board. A hearing was held at the offices of the National Mediation Board in Washington, District of Columbia, on Wednesday, April 21, 2004, at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to present such evidence and argument as desired, consistent with the agreement that created the Public Law Board. The parties waived any oath that may apply to the Neutral Member of the Public Law Board.

This record reflects that after the above-noted hearing was concluded, in correspondence dated June 25, 2004, the parties agreed to the withdrawal of Case No. 7, so that currently pending for decision are Public Law Board No. 6510, Case Nos. 1-6 and 8.

The parties have stipulated that the currently pending 7 cases, including Case No. 4, which is the specific case to be dealt with by this Opinion and Award, all involve the interpretation of the parties' June 1, 1999 System Agreement ("System Agreement"). As such, it is well-settled that the burden of proof must be satisfied by the party bringing the grievance, namely, in this case, the Organization. Accordingly, the Organization must prove by a preponderance of the evidence that its position is correct.

The parties have also stipulated that all 7 pending cases, including Case No. 4, have in common the fact that the events that gave rise to each specific claim involve contracting out of work this Organization claims was exclusively reserved to its members. It firmly believes that it successfully negotiated and expanded the Scope Rule in the current System Agreement which, if properly

interpreted, would constitute an iron-clad bar to any contracting-out of the above-mentioned work reserved to its members by Paragraph 2 of this Scope Rule, absent its express consent. It submits that the work that was contracted out by this Carrier beginning August 11 and continuing through August 26, 1999, as spelled out in its Statement of Claim, i.e., erecting crossing signs at road crossings on the Mohawk-Hudson Seniority District of the Albany Service Lane, is covered by the current Scope Rule and particularly Paragraph 2 of that Rule, which expressly states that this work is "reserved to BMWE members"; was thus on its face reserved to members of this Organization, such as these Claimants; was not work covered by the exception excluding billboards from scope-covered work; and that the General Chairman never consented that the involved work could be contracted out as this Carrier did in the instant matter.

The Organization acknowledges that the comprehensive Opinion and Award in Public Law Board No. 6508 involving these parties, Cases 1-8 ("Douglas Award") sets forth a differing interpretation of the meaning and application of the Scope Rule under discussion. To the extent that the Douglas Award does not adopt the Organization's reading that this Scope Rule constitutes an absolute bar to the Carrier's contracting out, the Organization contends that the holding of the Douglas Award is palpably erroneous. The Organization maintains that this Board should therefore follow its reading of the Scope Rule and reject those aspects of the Douglas Award that are inconsistent with this position, it argues.

In the instant case, the Organization concedes that the Carrier gave the required notice that it would subcontract the work set out above on June 1, 1999 and that there was a conference between the parties on June 8, 1999 during which the Carrier attempted to justify its contemplated decision to contract out this scope-covered work. As the Organization sees it, the proffered justifications by Carrier for that decision are completely specious. Specifically, there were no actual time constraints for the putting up of the crossing signs, since although there was a three month period to do that work from the "split date" of June 1, 1999, there was over a one year time period prior to that date when the Carrier could have made arrangements to have the work needed to be done to be performed by Carrier's BMWE employees.

Additionally, says the Organization, the claim that the work at issue involved "technological tasks" (GPS Enhancements) was rebutted at the conference by the Organization's presentation of the fact that its members had historically performed GPS Enhancements on Conrail and the technology existed in its data banks.

As regards the contention of the Carrier that it had insufficient forces to perform the work in the time required, the Organization countered that sufficient manpower was available if the Carrier chose to use service lane gangs to cover the installation of the signs or if it had utilized flexibility in scheduling straight time and overtime work. At any rate, the Organization concludes that staffing issues concerning manpower or

force levels is no excuse for violating the Agreement and assigning scope-covered work to outside contractors.

Consequently, the Organization submits that there is no question that there was a violation of the Scope Rule and the claim is required to be sustained on that basis. However, it also maintains its position that it is more desirous of a ruling that the Scope Rule constitutes an iron-clad bar on any contracting out by CSXT of scope-covered work, absent consent by a General Chairman.

The Carrier argues that there is no express prohibition against contracting out to third parties contained in the current System Agreement. It also argues that Paragraphs 4 and 5 of the current Scope Rule require merely that this Carrier give notice not less than 15 days before it subcontracts work. Thereafter, according to Paragraph 5, if the Organization feels it is necessary, it can ask for a meeting which shall be granted by the Carrier to discuss the contemplated contracting out of work, as specified in its notice to the Organization. Paragraph 5 further provides that in the event the parties do not agree whether or not the Carrier is authorized to contract out the work, each party reserves the right it had and the Carrier can go forward with the contracting out of this work. In other words, in the event of no agreement at the conference, the Carrier is free to proceed with the contracting out of the work and the Organization is free to file and process a grievance.

However, the Carrier also strenuously argues that the work at issue is not in fact covered by the applicable Scope Rule. Although it recognizes that the Organization has argued that the construction, assembly, repair, maintenance and installation of signs have historically been performed by members of this Organization and craft, the Carrier emphasizes that what was actually involved was the installation of signs with emergency "800 number" information at approximately 4,077 public and private highway rail crossings on the lines allocated to CSXT in the Conrail transaction, including the work which is the subject of this current claim.

To the Carrier, the work at issue was the installing of signs which advised motorists of an emergency "800 number" for CSXT and also for the Surface Transportation Book ("STB"), at every railway grade crossing in the part of the former Conrail System allocated to it. These signs were thus informational in nature and not related to the operation of the railroad, as the Carrier sees it. Applicable precedent further mandates the conclusion that such installation of these emergency number signs was not substantially related to CSXT's train operations. For all these reasons, the Carrier submits that the work underlying this claim did not come under the purview of this particular Scope Rule.

Although the work at issue thus is not considered to be covered by the Scope Rule, the Carrier also points out that a notice was given to the Organization on June 1, 1999 disclosing the Carrier's intent to contract out the installation of the required

informational signs and that a conference to discuss the matter occurred on June 8, 1999, a fact not disputed by this Organization, the Carrier is quick to add. Consequently, all requirements for contracting out, from the Carrier's point of view, were fully satisfied in the instant case; moreover, since there are no further contractual provisions limiting the Carrier's right to subcontract, there is no merit to any of the particular procedural or substantive contentions proffered by this Organization in this matter relating to the Carrier's business justifications presented at that conference.

However, it is also the position of this Carrier that the holdings of the Douglas Award constitute binding precedent in this case, as well as in the other 6 pending cases before the Board. It is the firm position of the Carrier that the findings of the Douglas Award are not palpably erroneous, which is the proper standard to be used by this Board in analyzing whether the Douglas Award's findings must be considered to be binding precedent on each pending claim presently before this Board, as the Carrier sees it.

The Carrier goes on to reason that applying the holdings of the Douglas Award to the instant claim, there cannot be considered to be any basis for any of the procedural or substantive arguments presented by the Organization. Thus, the instant claim should be denied in its entirety, the Carrier urges.

Applying the teachings of the Douglas Award, the Carrier presented several affirmative defenses which it asserts demand a

finding that there was no violation of the System Agreement in this instant dispute.

First, the Carrier argues that the Surface Transportation Board's approval of CSXT's acquisition of the part of Conrail allocated to it was predicated upon (among other things) installation of these emergency signs at all grade crossings transferred to it by Conrail within three months of June 1, 1999, the "split date". Consequently, this specific work was mandated to be done by a governmental agency for reasons of safety and specific time constraints were placed upon the Carrier in which the work had to be performed, the Carrier strongly emphasizes.

Second, the Carrier asserts that there was insufficient manpower available among the employees represented by the Organization to draw upon to do the required work in the time required for it to be done.

Third, the Carrier contends that there was not the proper skill level possessed by its own workforce to perform the work within the time required for the informational sign installations, since, again, time is of the essence but also because unique technological expertise in using and inputting GPS data entry was required.

Fourth, the Carrier forcefully argues that the work needed had not been customarily nor historically performed by Maintenance of Way Employes. Moreover, the Board is reminded that, specific to this instant claim, it is highly relevant that the signs at issue would be installed at 1,712 road crossings on the Albany Service

Lane. Most important, says the Carrier, the work at issue was not only mandated by a governmental agency to be accomplished in a limited amount of time, the project was a unique and one-time-only endeavor. Several persuasive Third Division Awards involving the Brotherhood of Railroad Signalmen (Third Division Awards Nos. 35039 through 34045 and 35173 through 35180) fully support this Carrier in support of its decision to contract out work identical in nature, the Carrier further argues. In other words, the applicable precedent fully supports the Carrier's conclusion that there was no violation of the System Agreement in its decision to contract out this non-scope-covered work.

Finally, asserts the Carrier, with respect to these particular Claimants, all were fully employed and, under these circumstances, an award of monetary damages would give the Claimants a windfall to which they are not entitled, the Carrier avers.

The Board has carefully reviewed the record in this case. It is the opinion of the majority of the Board that the Douglas Award was not palpably erroneous and constitutes a binding precedent for this case, as well as the other six pending matters, as was discussed in great detail in the lead case issued by this Board, Case No. 1. To the extent applicable, all findings of fact and the holdings in Case No. 1 are expressly incorporated in the instant award as if fully rewritten and are expressly adopted by this Board, we rule.

A careful review of the record in Case No. 4 discloses that the Organization established a prima facie case that Paragraph 2 of

the expanded Scope Rule covers the work in question. The installation of informational signs containing an "800 number" for the general public to call in the case of emergency at approximately 4,077 public and private highway rail grade crossings can colorably be considered the "erection and maintenance of signs," we rule. Such can be work considered reserved to BMWE members under this Scope Rule, since "signs" were being installed, we hold.

The record, however, contains considerable evidence from the Carrier which attempts to rebut the Organization's prima facie showing that this particular work is scope-covered, the Board also observes. Despite these strenuous Carrier arguments, the Organization has been able to show that the construction, assembly, repair, maintenance and installation of crossing signs have historically been performed by BMWE members. The issue is whether the particular informational signs are "crossing signs" or whether what is on the signs means the work of installation was not scope-covered.

The majority is convinced that the reasoning in Third Division Awards Nos. 35039 through 34045 and 35173 through 35180 is not applicable in the instant case. What is critical in analyzing whether these specific signs were scope-covered work is not whether these signs are substantially related to train operations, we are convinced, but whether the work comes under the wording of the Scope Rule. What is important here is that these signs not only give an "800 number," but each also contains a mile post location.

The purpose of protecting safety is also "operationally-related," we rule. There is a nexus to the work that had been reserved to BMWE represented employees, the majority thus concludes, which in turn compels us to find that the disputed work in fact is scope-covered and we so rule.

That does not end the inquiry, however, even though we are satisfied that the work at issue is scope-covered. As the Carrier has contended, the majority of the Board finds that there exist several compelling reasons that permitted this Carrier to contract out the disputed work that were timely presented to the Organization on the property. The Carrier, for example, provided specific evidence that the safety concerns of an outside government agency, the STB, caused that agency to mandate a specific time line for the performance of the disputed work, namely, within three months of June 1, 1999. That sort of time constraint was found explicitly by the Douglas Award to be highly relevant to satisfying a proffered business justification, we further stress. See the Douglas Award, at pp. 93-95, this observation causes the majority to answer. The question of whether a compelling business justification has been shown by the Carrier in this case must be answered with a "yes," we specifically find.

Moreover, there was also presented compelling evidence on this record to suggest that the work at issue involved data entry skills and GPS Enhancements that Maintenance of Way Employes do not in fact ordinarily possess. We understand that the Organization disagrees with that assertion, but the majority stand convinced

that sufficient evidence is present on the record to satisfy even the high standard proof held to be the proper standard by the Douglas Award. The arguments of the Organization that the employees it represents could properly and skillfully input the required GPS data were insufficiently detailed to rebut the Carrier's assessment that such was not the case, the majority concludes. The point is that, from the standpoint of the degree of proof required to be offered by the Organization, generalized claims of competence for data entry cannot be substituted for concrete facts that in a given case BMW represented employees have done precisely this sort of work.

Also, given the fact that a governmental agency mandated the specific work to be accomplished in a limited amount of time, the evidence presented by this Carrier that its forces on the former Conrail-Indianapolis Division were all occupied during this time with transitional projects and could not be spared to perform the work was relevant and provided a persuasive business justification too, we also find. The fact that the project was to be one-time only is further significant and probative evidence contracting out was proper here, the majority also rules. The salient factor is that this sort of one-time only project is precisely the type of work where an outsourcing decision can withstand "strict scrutiny," and it does in the instant matter, we hold.

Thus, the majority finds persuasive evidence from the Carrier has been established to justify contracting out this scope-covered work. The Carrier is correct that the teaching of the Douglas

Award mandates the denial of the instant claim. The magnitude of this project, when coupled with the significant fact that it would happen in this manner only once, permitted the Carrier to contract out the disputed work under the special circumstances reflected in the record, even though these informational signs are deemed to be scope-covered, the majority finally holds.

In sum, based on all the foregoing, the claim must be denied in its entirety and an award to that effect follows.

AWARD:

Claim denied in accordance with the Findings incorporated herein as if fully rewritten.

Elliott H. Goldstein
Chairman and Neutral Member

Steven V. Powers
Employee Member

Jim H. Wilson
Carrier Member

Dated: 1/18/05