PUBLIC LAW BOARD NO. 6510

Case No. 6

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 (Tomascello Construction, Inc.) to perform Maintenance of Way work (operate equipment and trucks to plow and remove snow) at the Frontier Yard in Buffalo, New York on January 13 and 14, 2000, instead of Vehicle Operators R.J. Witkowski, D. Cronk, M.J. Stortz, J. Hepfer, R. Defedericis, R.M. Sander, Class A Machine Operators E. Townsend, J.P. Tripi and J. Lafler [Carrier's Files 12(00-0130 and 12(00-0131) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants R.J. Witkowski, D. Cronk, M.J. Stortz, J. Hepfer and E. Townsend shall now each be compensated for twenty-four (24) hours' pay at their respective straight times of pay and Claimants J.P. Tripi, R.M. Sander, R. Defedericis and J. Lafler shall now each be compensated for nine (9) hours' pay at their respective straight time 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. 6, 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. 6, 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 on January 13 and 14, 2000, as spelled out in its Statement of Claim, i.e., snow plowing and removal from around the car and engine shops and hump track areas, roadways and parking areas in Frontier Yard at Buffalo, New York, 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; has been found to be covered by Conrail's former Scope Rule; 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 some sort of notice on December 16, 1999, that it would subcontract snow removal, but urges that this "notice" was pro forma and worded in a manner to justify the ultimate outsourcing of all snow removal work during the winter of 2000 and 2001. Such blanket notices have been found to be improper in Third Division Awards 29121, 29312 and 30066, the Organization stresses, as utterly unreasonable and per se violative of similar labor agreements.

The matter was discussed at a conference between the parties on January 11, 2000, during which the Carrier attempted to justify its contemplated decision to contract out this work as not scope-covered but also seemed to claim an "emergency" for all snow removal work. Such a claim is rejected out of hand by the Organization, as making a joke of the emergency exception.

As the Organization sees it, there were no other justifications by Carrier for its blanket decision to contract out this work. Alternatively, the Organization asserts that there was no evidence of a good faith effort to avoid or minimize contracting out of this work when the Carrier could have made arrangements to have the work that needed to be done performed by Carrier's BMWE employees, including the furloughed claimants, the Organization maintains.

Finally, the Organization asserts that in his refutation to the Carrier's alleged defenses, the General Chairman in this case accurately observed that the Carrier had dramatically reduced its

track forces in the Buffalo Seniority District. The General Chairman made reference to Federal Railroad Administration ("FRA") & CSXT compliance agreements which show that the Federal Railroad Administration was concerned about a manpower shortage in CSXT's Maintenance of Way Department. Thus, as regards the allegations presented by the Carrier that there was a manpower shortage so as to justify the subject blanket outsourcing of snow removal for the entire Winter 1992-2001 snow season, the Organization avers that the staffing issues concerning manpower or force levels is no excuse for violating the Agreement and assigning scope-covered work to outside contractors. It also emphasized again that all the named Claimants in the instant case were furloughed but could have come to the property to do the work timely, as the Organization sees it.

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, which it did here on

December 16, 1999, despite the Union's bogus argument that notice was defective as "pro forma". According to Paragraph 5 of the Scope Rule, if the Organization felt it is was necessary, it could ask for a meeting, the Carrier adds. In this case, that is precisely what happened and the conference to discuss contracting out of snow removal happened on January 11, 2000. This conference satisfied the Carrier's obligation to discuss the contemplated contracting out of work, as was specified in the Carrier's December 16, 1999 letter, mentioned above, the Carrier opines.

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 all the rights it had under the System Agreement and the Carrier may go forward with the contracting out of this work, the Board is reminded. 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, which is precisely what happened here, the Carrier maintains.

However, the Carrier also strenuously argues that the work at issue is not in fact covered by the applicable Scope Rule, despite the fact that this Carrier gave the Organization an "informational notice" of its intent to contract out this sort of snow removal. It recognizes that the Organization has argued that snow removal is mentioned in Paragraph 2 and thus was for that limited purpose work that triggered the notice requirement, but certainly, says the Carrier, a fair reading of the Scope Rule should disclose "snow

removal" is limited for scope coverage by the next parenthetical phrase "track structures and right of way."

Carrier further stresses that snow removal not involving track structures and right of way historically had been performed by other crafts and contractors under Conrail and throughout CSXT. The notice requirement demands a very low level of proof, Carrier avers, but, as to the actual burden of proof on the part of the Organization to show that snow removal from roadways, parking lots, and areas adjacent to buildings in a railway yard, is covered under this Scope Rule, the burden placed upon the Organization is much higher. The Carrier argues that, on that point, the Organization has simply failed to show any of the three elements it has claimed make this specific snow removal scope-covered, namely, because it was "snow removal" (track structures and right of way); equipment, yard cleaning or maintenance; or "any other work customarily or traditionally performed by BMWE represented employees."

Along those lines, this Carrier strongly emphasizes that the work of snow removal does not accrue exclusively to these Claimants in the instant case by virtue of this Scope Rule nor to BMWE represented employees generally, since the wording in Paragraph 2 contains a direct limitation on the claimed "reservation" to the Organization's members of "snow removal". This is so, says the Carrier, since as already explained the phrase "snow removal" in Paragraph 2 is immediately followed by the words of limitation "track structures and right of way" contained in parentheses after snow removal. Thus, asserts the Carrier, on its face, Paragraph 2

demands a reading that snow removal is exclusively reserved to employees represented by this Organization only when done on the Carrier's tracks and right of way, which was not the case here, the Carrier submits. That is the critical point of this case, the Carrier therefore urges.

It is also Carrier's position that one of its business justifications for contracting out the subject snow removal was to expedite the removal of all the snow from the roadways and parking lots, and adjacent to its buildings at the frontier yard, so as to ensure maximum safety for all its employees and the general public. In addition, the Carrier argues that the Organization was fully apprised of all of its business justifications at the January 11, 2000 conference, including the need for expediting snow removal. To that extent, the Organization should not be heard to complain that it got merely a "blanket notice," the Carrier suggests.

Although the work at issue thus is not considered to be covered by the Scope Rule by it, the Carrier goes on to point out that the notice that was indeed given to the Organization on December 16, 1999 was absolutely sufficient to satisfy the notice and confer requirements of this System Agreement. The Carrier further argues that the timing and extent of snow removal cannot be anticipated with any specificity as the work is entirely dependent on the weather. Therefore, its letter of December 16, 1999, in advance of the winter snow season, was proper, it simply concludes.

Since the Carrier asserts that it complied with the notice requirement, assuming arguendo that snow removal is scope-covered,

all the 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, it directly argues.

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 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 outside contractor was "on property" or located close to the Frontier Yard.[1] More important, the work at issue was triggered by unpredictable and varying weather conditions which cannot be controlled by the Carrier. Accordingly, although the Carrier expressly says there is no emergency defense being presented here, still it insists that the location of the outside contractor is relevant because its employees could clear the snow quickly. The Claimants however were furloughed and could not have come as quickly to the property to do the needed work, given the realities of what is involved in calling furloughed employees back to work, the Carrier asserts.

Active employees were all unavailable, the Carrier also avers, and the need to allow time for Claimants to come to work flies in the face of the real need of Management to get the snow removed from the areas involved in this claim in an expeditious way, the Carrier maintains. If the Board reaches the point of assessing the propriety of Carrier's business justifications, it asserts it proved its business justification for contracting out that snow removal no matter what standard of proof is applied. But the

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[1] The Organization at the hearing objected to this argument as "new argument not raised on the property." We do not reach that issue because of the majority's ruling on the threshold issue of scope coverage, but note that it is well-established that this Board cannot consider argument or evidence not presented during the handling of the matter on the property, as was apparently the case here as to the location of the outside contractor near the Frontier Yard.

Carrier also strongly maintains that the sort of snow removal involved in the instant claim is absolutely not covered by the Scope Rule, the Carrier again insists.

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.

Second, a careful review of the record in Case No. 6 discloses that the Organization established a prima facie case that Paragraph 2 of the expanded Scope Rule covers the work in question, sufficient to trigger the "notice and confer" requirements of Paragraphs 4 and 5 of the System Agreement. Snow removal is mentioned in Paragraph 2. Yard cleaning is also reserved to BMWE represented employees. Snow removal is also work customarily or traditionally performed by BMWE represented employees, the Organization submits. Those facts are sufficient to satisfy the low standard of proof necessary to trigger the notice requirement in this matter, we hold, but it is also true that the Carrier gave notice and there was a conference on the matter, the majority rules.

The majority understands that this Organization strenuously objects to the "blanket notice" given by the Carrier in its December 16, 1999 letter which stated its intent to contract out snow removal work. In response, the Organization characterizes this notice as "pro forma" and thus defective.

The Organization also argues that such "blanket notices" have been found insufficient in several awards where the underlying facts were similar to the instant case. Where snow removal is the specific disputed work, other awards have rejected the claim that this type of notice is automatically defective, we however find. See particularly Third Division Award No. 36271, Docket No. MW35904, decided by Referee Ann S. Kenis, which deals with this Organization and Conrail. That case arose from this identical property, the Frontier Yard, Buffalo, New York, and, a similar "blanket notice" that was issued by Conrail on November 26, 1997 of its intent to contract out the snow removal work there, among many other Conrail locations. Referee Kenis rejected the "blanket notice" argument as follows:

> "There is an important distinction to be drawn between those cases and this one. The timing of excavation work can be anticipated. However, both the timing and extent of snow removal work cannot be anticipated with any specificity as the work is entirely dependent upon the weather. The Carrier is required to give 15 days advance notice of its intent to contract work within the Scope of the Agreement. In light of the unpredictable and varying weather conditions which can trigger the need for snow removal, we find that the Carrier's letter in advance of the winter snow season constituted proper notice. The Organization was [thus] fully apprised of the

prospective work and the operational reasons for contracting out the work."

The majority adopts that reasoning here as being a cogent and correct finding of fact. We find that the notice given in this case on December 16, 1999 was sufficient to satisfy Paragraphs 4 and 5 of the Scope Rule, and the majority so holds.

The majority of the Board further notes that the Organization has failed in its higher burden of showing that snow removal for parking lots, roadways or areas adjacent to buildings in yards is the precise types of work covered by the express term "snow removal (track structures and right of way)". As the Carrier has argued, the Organization reads the two words "snow removal" as if the parenthetical phrase "(track structures and right of way)" does not exist in this Scope Rule, or at least as if this phrase is not intended to be read as a limitation on the type of snow removal intended to be reserved to the employees represented by it under Paragraph 2. Such a reading makes no sense. The normal reading of this entire phrase must be that the only snow removal expressly reserved by paragraph 2 to BMWE represented employees is snow removal from track structures and right of way, the majority holds. It certainly can be inferred that not all snow removal, then, is scope-covered, unless the Organization successfully shoulders its burden of proving that other parts of paragraph 2 place the disputed work within the Scope Rule, the majority also specifically holds.

The record further indicates that the Organization's claim is also that the operation of certain equipment somehow shows that

snow removal is reserved to the Organization. That argument overstates the case, when backhoes, trucks, and front end loaders are the claimed equipment, we find. What is necessary is "to tie the equipment" to exactly what work was contemplated to be scope-covered by the remainder of Paragraph 2. In this case, it is the "work" and not the equipment which must be the focus of an analysis of whether the Scope Rule applies or at least the Organization has not presented any persuasive proofs otherwise, we hold.

The next issue is whether the Organization has successfully shown this particular snow removal can fairly be read as part of "yard work" or is covered by the general term "maintenance". Again, no proof that this was intended by the parties is evident from the majority's reading of the record created during the parties' handling of this matter on the property. The question remains whether it can fairly be inferred that the parties intended this sort of snow removal to be covered by the Scope Rule by the use of these general terms. The clear answer is, if that were the case, there would seem to be no logic to the inclusion of the phrase "snow removal" as limited by the added words "(track structures and right of way)", the majority finds.

Based on this analysis, and given the fact no affirmative proof was presented to establish coverage under the rubric of the general terms, "yard work" or "maintenance," the majority holds scope coverage was not shown to exist by this Organization's referencing the presence of these terms either, we hold.

The last point of reliance by the Organization in its attempt to show scope coverage is the argument that the specific disputed work -- snow removal from roadways, parking lots, and areas adjacent to buildings at the Frontier Yard -- is covered by this Scope Rule, based on the phrase "and any other work customarily or traditionally performed by BMWE represented employees."

The Carrier proffered substantial evidence that this precise type of snow removal has historically not been considered scope-covered on Conrail and on this property was not work done by its BMWE represented employees, we note. The Organization on the other hand presented argument and conjecture but no specifics to establish its contention that this snow removal was customarily and traditionally done by BMWE represented employees.

Certainly, the Organization is well aware how to do that, given the many successful awards in the industry where it has successfully presented concrete evidence to establish similar points in contention. Short of that sort of evidence being contained in this record, the majority finds once again a failure to prove scope coverage on this last contention, and we so hold.

The majority thus finds that the Carrier has successfully rebutted the Organization's prima facie case that snow removal from the roadways and parking lots in or adjacent to the Frontier Yard, and also snow removal from the public or common areas adjacent to the buildings at this yard, was scope-covered and therefore that such work was reserved to the Organization through Paragraph 2 of

this System Agreement. Accordingly, once that finding is made, the claim must be denied.

AWARD:

Claim denied in accordance with the above 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