PUBLIC LAW BOARD NO. 6510

Case No. 8

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 (Utilico) to perform Maintenance of Way work (operate brush cutter and dump truck) in connection with brush cutting work between Mile Posts OVB-197.9 and OVB-240.5 on the EK Seniority District on January 7, 8, 9, 10, 11, 17, 18, 19 and 20, 2000, instead of EK Seniority District employes D. Finley and B.J. Cundiff [System File G36608300/12(00-0277) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants D. Finley and B.J. Cundiff shall now each be compensated for seventy (70) hours' pay at the respective brush cutter and truck driver's straight time rate of pay and twenty (20) hours' pay at their respective time and one-half rate 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. 8, 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. 8, 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 7, 8, 9, 10, 11, 17, 18, 19 and 20, 2000 (cut brush and operating a dump truck) between Mile Posts DVB-197.9 and DVB-240 on the Eastern Kentucky Seniority District, as spelled out in its Statement of Claim), is covered by the current Scope Rule and particularly unnumbered paragraph 2 of that Rule; was on its face reserved to members of this Organization such as these Claimants; and that the General Chairman never consented that the involved work could be contracted out as this Carrier did in the instant matter.

Thus, the Organization urges that it has a very strong case on the merits and one that requires that this claim be sustained in its entirety, based on the Organization's reading of the Scope Rule and its interpretation of that rule's application to the underlying facts of this case.

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.

Putting aside the general contentions, when the Organization turns to the specifics of the instant claim, it argues that the equipment used by the outside contractor was a high rail bucket truck and a wood chipper. The Organization further argues that it is undisputed on this record that the Carrier either had in its inventory or could have obtained through rental and lease this equipment but that, at any rate, it is to be remembered that "the subject of the Carrier's contract with its employees is work not equipment," citing Third Division Award 6905. The Organization also claims that Claimants were trained and qualified to use this equipment and do the work which underlies the instant claim and that the work is not only scope-covered but also work that has been historically performed by this craft.

With regard to the issues in Case No. 8, the Organization further suggests that any intimations by the Carrier that this case somehow involves the emergency exception or safety issues that would limit the Scope Rule, such arguments should be rejected out of hand. First, the Organization argues that the intent to contract out notice was issued on August 9, 1999 but the work was done starting January 7, 2000, some five months later. Second, although the brush cutting was concededly being done to improve signal visibility, the problem addressed was routine: growth of vegetation and brush along the track that could obscure the track signals. Thus, the Carrier cannot be allowed to create its own

"emergencies" or create safety issues from routine and customary maintenance work that repeatedly comes up each year, the Organization reasons.

The Organization thus stresses that, in the current case, there is no dispute between this Organization and the Carrier concerning the fact that proper notice was given of the contemplated contracting out by the Carrier on August 9, 1999, nor that the matter was discussed by the parties in conference on August 20, 1999. As noted above, however, those conclusions did not allow the Carrier to contract out scope-covered work, absent consent from the General Chairman, as the Organization also sees it. Any claims of emergency or safety exceptions should be discounted as false, the Organization concludes.

Alternatively, even if the teachings of the Douglas Award might be accepted by this Board, the Carrier's alleged business justifications cannot be found to be more than mere boilerplate, the Organization further suggests. It strongly urges that the Carrier claims of a binding past practice for brush cutting work between the Organization and Conrail is completely irrelevant under the current Scope Rule; the Carrier's claim that it had no opportunity to lease the equipment needed nor similar equipment in its own inventory is clearly wrong under recent precedent (Third Division Awards 35531 and 35532), but further certainly stands unproved on this record; and any claim as to a lack of skills or expertise by Claimants as members of the Organization, similarly

was completely unsubstantiated in this case, the Organization avers.

Finally, the Organization submits that the "strict scrutiny" standards set forth in the Douglas Award as required of the proofs presented by the Carrier of its business justifications were unsatisfied, based on the actual proofs brought forth on the property by the Carrier. The claim thus should be sustained in full, the Organization argues.

The Carrier argues on the other hand that there is no express prohibition against contracting out to third parties contained in the current System Agreement. It also reasons 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.

The Carrier also maintains that the required notice was given to the Organization on August 9, 1999, as the Organization has

stipulated. The required conference occurred on August 20, 1999, a fact also 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 procedural or substantive contentions proffered by this Organization in this matter, it also urges.

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 quite clearly the firm position of the Carrier that the findings of the Douglas Award are not palpably erroneous, which it argues 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, the Carrier maintains.

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 asserts.

Applying the teachings of the Douglas Award, the Carrier presented several affirmative defenses which it argues demand a finding that there was no violation of the System Agreement in this instant dispute. First, it argues that the binding past practice

between these Organization and Conrail on this property was to contract out brush cutting, a fair reading of the evidence of record should demonstrate.

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 at all times in question. Additionally, since safety is involved, once an issue of the visibility of track signals has been reported, time is of the essence. Consequently, the Carrier states that the cases relied on by the Organization obliging the Carrier to seek to lease the necessary equipment (Third Division Cases 35531 and 35532) were wrongly decided. In addition, the reliance on the 1981 Berge-Hopkins Letter of Agreement in those Awards was not justified, the Carrier submits.

The Carrier thus concludes that, in this case, there was not the proper equipment available to it to perform the work within the time required for brush cutting along the right of way, and there was no available equipment to lease to do the work of ensuring visbility of the signals in a time span short enough to protect the public's safety.

Finally, asserts the Carrier, with respect to the Claimants, all were fully employed and, in fact, Claimants were all engaged in other projects and day-to-day assignments.

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 thus constitutes a binding precedent

for this case, as well as the other 6 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.

Accordingly, we find that Paragraph 2 of the expanded Scope Rule covers the work in question but that the Organization's contention that this paragraph also constitutes an iron-clad bar against contracting out by the Carrier, absent the Organization's express consent, is not a correct interpretation of the meaning of that paragraph or the reach of the Scope Rule. Contracting out is permitted to the Carrier under certain circumstances under the System Agreement, we rule, but the Carrier is required to shoulder the burden of presenting persuasive and overwhelming evidence of the business justifications that require it to contract out in each specific case. Strict scrutiny of the reasons presented by the Carrier is the required standard of analysis. Prior practices on the property under predecessor agreements cannot properly be deemed to be binding past practices under the expanded Scope Rule, the majority of the Board also holds.

With these findings firmly in mind, the Board turns to the facts and arguments contained in this specific case. The Organization asserts that all the proffered business justifications of this Carrier are mere boilerplate and do not, when fairly read, constitute specific proof so as to carry Management's high burden

of persuasion under the teachings of the Douglas Award. It also relies on two recent awards, Third Division Awards 35531 and 35532, to demonstrate no emergency existed; no general safety issues trumped the rights of the Claimants to do the work at issue; and the Carrier failed to meet its obligations under the December 11, 1981 Berge-Hopkins Letter of Agreement to explain its attempts to procure rental equipment to clear brush around the signals on its right of way or to give reasons why that equipment could not be obtained.

The Carrier argues to the contrary that it presented proofs sufficient to satisfy the standard set forth in the Douglas Award as to each of the above-noted business justifications for contracting out brush cutting in this case. It also claims that the Organization has long acquiesced to the fact that CSX cannot rent the specialized on-track brush cutting equipment such as that used by the contractors in this current case.

The response of the majority of this Board is heavily influenced by the precise nature of the proof presented by the Carrier through its notice to the Organization of its intent to contract out the work sent on August 10, 1999, and the resulting conference between these parties, concededly held on August 20, 1999.

The evidence of record disclosed that the business justifications of the Carrier presented on the property can be fairly considered to be "merely boilerplate," as was the case in Case No. 1 decided by this Board, in the sense that no specifics or

particulars were presented to the Organization to justify the Carrier's contemplated decision to contract out, we hold. This is so because, other than the claim that the Carrier could not, generally, rent the specialized on-track brush cutting equipment needed to do this work, no precise reasons were offered to substantiate that claim. Yet, as these Awards in Third Division Cases 35531 and 35532 demonstate, a greater obligation is required to be shouldered by the Carrier here. The Carrier is obliged to explain its attempts to procure rental equipment or to give reasons why such equipment could not be obtained in the specific case, we hold. The generalized proofs offered by the Carrier do not meet that standard, the majority of the Board specifically rules.

The "past practice" contention cannot be deemed controlling under the current Scope Rule, we also find, for the reasons detailed in Case No. 1. The claim of an emergency or safety concerns does not ring true, when brush cutting to ensure visibility of signals is a routine, normal part of maintenance and not an "Act of God" trigger to action, we are convinced. Crucial to that finding is the time lag between the subject notice and the need for the work. Nearly five months of anticipation is not an emergency situation, we reason.

Consequently, we hold that the Organization has sustained its burden of proving a prima facie case that brush cutting is scope-covered work. The Carrier has not satisfied its burden of proving its affirmative defenses set forth in detail above so as to satisfy the "strict scrutiny" standards mandated by the Douglas Award. On

that basis, we find a contract violation and the claim is thus sustained.

Turning to the remedy, the majority finds the holding in the Douglas Award to be once again extremely significant. The Douglas Award expressly finds that the loss of work opportunities "may permit" compensation of the Claimants, even if there is no showing of an actual, tangible loss of pay for either of them who were, clearly, in a "full employment" situation, the monetary remedy is to protect the Agreement, as the Douglas Award says, we conclude.

However, each case must be decided on its own facts. In this case, where there is evidence of a long-standing past practice of contracting out the work prior to the expansion of the Scope Rule; acquiescence by the Organization in this specific type of contracting out before the Scope Rule came into existence; and no proof of bad intent or motive on the part of this Carrier; there seems to be no need to impose the penalty of overtime pay to protect the contract. Each Claimant shall therefore receive compensation for 90 hours' pay at the respective brush cutter and truck driver's straight time rate of pay. The Board's Award to that effect follows.

AWARD:

Claim sustained in accordance with the Findings incorporated herein as if fully rewritten and to the extent indicated in the Opinion.

Elliott H. Goldstein
Chairman and Neutral Member

Steven V. Powers
Employee Member

Jim H. Wilson
Carrier Member

Dated: 1/18/05