BEFORE PUBLIC LAW BOARD NO. 6671

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Case No. 1

STATEMENT OF CLAIM:

1. Did Amtrak violate its May 19, 1976 Agreement with BMWE (as amended) when it contracted out the carpet installation work identified in Carrier's contracting file numbers 03-LCR-10-0403, 03-LCR-14-0503, 03-LCR-16-0603, 03-LCR-23-0803 and 03-LCR-29-0903?

2. If the answer to Question No. 1 above is "Yes," what shall the remedy be?

Introduction

In a series of letters dated April 10, May 28, June 17, August 13, and October 1, 2003, the Carrier notified the Organization of its intention to contract out carpet installation work in various lobbies and offices throughout the Carrier's 30th Street Station. The Organization objected to the contracting out of this work. The parties were unable to resolve their dispute, and they subsequently agreed to submit their dispute to this Board.

Position of the Organization

The Organization contends that this is a straightforward contract-interpretation case. The Organization argues that the Scope Rule does not permit the Carrier to contract out carpet installation in connection with building maintenance work. The Organization emphasizes that the Rule plainly provides that building maintenance or repair of the type

being performed by Amtrak forces under the scope of the Agreement on January 1, 1987, may not be contracted out without the written concurrence, except in case of emergency, of the appropriate General Chairman. The Organization points out that the parties clarified their intent with regard to the Scope Rule in a January 1987 Side Letter, which provides that it is the Carrier's intent to preserve work of the scope and magnitude historically performed for the Carrier by BMWE members as of, or before, January 1, 1987. The Organization therefore asserts that the critical question in this case is whether the Carrier's B&B forces performed routine carpeting work in the public lobbies and administrative offices on or before January 1, 1987.

The Organization maintains that the obvious answer to this question is "Yes." The record demonstrates that the Carrier's B&B employees began installing carpet at various Amtrak facilities in 1978, shortly after Amtrak's inception, and continued installing carpet on a regular basis up to the time that the instant dispute arose. The Organization emphasizes the Carrier's admission that its forces historically performed carpet installation work. Moreover, when the standard changed from roll carpet to carpet squares, the Carrier admittedly trained its employees in this new method and continued to assign them to perform that work. More specifically, the Organization points to a January 2000 letter in which the Carrier stated that carpet squares had become the standard for the 30th Street Station, and that the BMWE forces at the 30th Street Station have performed carpet-square installations throughout the building. The Organization therefore claims

that there can be no question that work at issue is reserved to BMWE-represented employees by the January 1987 revisions to the Scope Rule, and that the Carrier violated the Scope Rule when it contracted out carpet square installation work at the 30th Street Station during 2003 without the written concurrence of the General Chairman.

The Organization further points out that on five occasions during 2003, the Carrier sent letters to the Organization wherein Amtrak served notice of its intention to contract out the carpet work in question. Because the Scope Rule provides that such notice is required only in the event that Amtrak plans to contract out work that is within the scope of the Agreement, the Organization asserts that the Carrier's notice letters represent a tacit admission that carpet-installation work falls within the scope of the Agreement. Because none of the exceptions included in the Scope Rule apply to the instant matter, the Organization maintains that the Carrier violated the Agreement when it proceeded to contract out the carpet-installation work at issue.

The Organization then addresses the Carrier's reliance on the so-called exclusivity test. The Organization maintains that for a number of reasons, the exclusivity test is invalid in this case. The Organization points out that the contract makes no reference to exclusive past performance of work by Amtrak forces. Instead, the Scope Rule and Side Letter No. 2 simply refer to work that was being "performed" by BMWE-represented forces on or before January 1, 1987. The Organization argues that the Carrier is attempting to modify these controlling provisions by adding the word "exclusively" to

modify the term "performed." The Organization contends that the NRAB and similar forums repeatedly have held that arbitrators acting under Section 3 of the Railway Labor Act have no authority to rewrite the Agreement and limit the meaning of the terms chosen by the parties themselves.

The Organization goes on to argue that another problem with the Carrier's reliance upon the so-called exclusivity test is that this test is entirely inconsistent with the overarching meaning of the Scope Rule. The Scope Rule provides that work identified in Paragraph A.1.a. and A.1.b. generally may not be contracted out without the written concurrence of the General Chairman, with specific exceptions under which such work may be contracted out. The Organization maintains that during the period of NECIP funding and the Minimum Force Agreements, the Carrier was permitted to contract out Scope-covered work so long as it maintained the stipulated minimum BMWE force levels. The Organization asserts that if any of these specified conditions existed in the past, then it is clear that virtually any Scope-covered work may have been subject to contracting out. In fact, General Chairman Dodd agreed to permit the contracting out of carpet installation at the 30th Street Station in connection with a major reconstruction of that station beginning in 1988. The Organization maintains that these conditions fully account for all of the pre-1987 examples of contracted out carpet installation that the Carrier has cited herein. This is why the Scope Rule and Side Letter No. 2 simply require the Organization to show that its members had "performed," rather than "exclusively

performed," specified work on or before January 1, 1987, to bring such work within the protections of the 1987 revisions to the Scope Rule. The Organization argues that if the exclusivity test were applied to this matter, the exceptions in the Scope Rule that permit contracting out under specific circumstances would swallow the general provision that work enumerated in the Scope Rule may not be contracted out without the General Chairman's written concurrence. The Organization argues that a contract provision should not be interpreted so as to nullify or render meaningless another part of the contract.

The Organization maintains that the Carrier's reliance on "exclusivity" is nothing but an attempt to add another, all-encompassing exception to the Scope Rule. In addition to having the right to contract out major B&B construction projects, non-railroad projects, and in certain situations where there is a lack of skilled manpower or essential equipment, the Carrier also wants the right to contract out any work that has not been exclusively performed by B&B forces in the past. The Organization asserts, however, that the parties specifically enumerated certain exceptions to the Scope Rule and the lack of exclusive past performance was not among them. The Organization emphasizes that no other exceptions should be implied.

The Organization further argues that the final problem with the Carrier's reliance on the exclusivity test is that the overwhelming precedential authority from the NRAB has held that the exclusivity test has no application at all to contracting-out disputes.

Instead, the exclusivity test applies only in disputes between different classes or crafts of a carrier's own employees. In class or craft disputes, the petitioning class or craft is claiming an exclusive right to certain work as opposed to all other classes or crafts of the carrier's own employees. In contracting-out disputes, by contrast, the petitioning union rarely claims an exclusive right to perform the disputed work. Instead, the union claims a general right to the work, absent the application of express or implied exceptions. The Organization emphasizes that the NRAB repeatedly has held that the past-practice test in contracting-out cases is one of customary or general performance, and that the exclusive performance test has no application to contracting-out disputes. The Organization therefore contends that the Carrier's reliance upon the exclusivity test clearly is misplaced, and this is not an appropriate test in contracting-out cases.

The Organization then points out that, as to the Carrier's assertion that Shop Craft employees also have performed carpet installation work, this fact is irrelevant here. The Organization emphasizes that the NRAB consistently has held that the inability of a class or craft to prove exclusive jurisdiction as between itself and another class or craft does not give the carrier the right to disregard its obligations to both crafts and assign the work to an outside contractor.

With regard to the Carrier's contention that the Amtrak Reform and Accountability Act (hereinafter "the Amtrak Reform Act") expressly gives Amtrak the right to contract out work previously denied it under its agreements with the Organization, the

Organization asserts that the Carrier's arguments relies wholly on a bootstrapping of the general Congressional findings contained in the Amtrak Reform Act's preamble to amend, by implication, the plain language of Section 121 of the Act, and by further implication, amend the parties' collective bargaining agreement *sub silentio*. Although the Carrier's arguments are clever, the Organization maintains that they are specious at best and dishonest at worst.

The Organization contends that, contrary to the Carrier's assertions, the Amtrak Reform Act did not create such a fundamental rearrangement of the parties' collective bargaining relationship. The Organization emphasizes that Section 121 simply transferred a restriction on Amtrak's ability to subcontract scope work from the statute books into each labor organization's collective bargaining agreements with Amtrak. Moreover, Section 121 obligated both Amtrak and all the unions representing its employees to bargain over that term's continued inclusion in the agreements no later than five years after the Amtrak Reform Act's enactment. The Organization asserts that if Amtrak truly believed that Section 121 amended the collective bargaining agreements to remove all subcontracting provisions save the statutory language, then it would have said so in the contemporaneous December 1997 letter from its Vice President – Labor Relations to its employees' representatives. Instead, as the Carrier well knew, Section 121 merely began a process that obligated the parties to bargain over the continued

existence of the former statutory provisions in the collective bargaining agreements, and nothing more.

The Organization then maintains that the utter dishonesty of the Carrier's novel position on the impact of the Amtrak Reform Act is demonstrated by the competing House and Senate versions of the Act. The Organization emphasizes that the House version of the Act proposed the outright repeal of all collectively bargained restrictions on subcontracting. The purpose of the House version was the negotiation or arbitration of entirely new provisions regarding "all issues" concerning subcontracting. The Organization contends that the Carrier wants this Board to believe that this is what Congress accomplished in enacting the Amtrak Reform Act, but this version never passed the House and never was enacted into law. The competing bill that was introduced in the Senate also initially contemplated a process that required bargaining and a negotiated or arbitrated settlement of "all issues relating to subcontracting." Various amendments to the Senate version, however, substantially changed the subcontracting provisions in Section 121. The Organization emphasizes that the amended Senate version that ultimately passed and became the Amtrak Reform Act applies, by its own terms, only to subcontracting that "results in the layoff of an Amtrak employee," and not to "all issues relating to contracting out by Amtrak of work normally performed by an employee in a bargaining unit covered by a contract between Amtrak and a labor organization representing Amtrak employees." The Organization maintains that the version of the Act

actually passed by Congress focuses only of the statutory restriction on subcontracting that leads to the layoff of an Amtrak employees. The Organization contends that in the Amtrak Reform Act, Congress did not seek to remove all restrictions on the Carrier's ability subcontract work.

The Organization then points out that the "no inference" provision in subsection (d) of Section 121 actually supports the Organization's position. Contrary to the Carrier's assertion, the Organization argues that this term means that nothing in the Amtrak Reform Act should be read to affect the collectively bargained rights and restrictions on Amtrak's ability to subcontract work. The Organization contends that those provisions remain unchanged, and the parties were left to negotiate these provisions under the standard Railway Labor Act process. The Amtrak Reform Act was a compromise bill that offered Amtrak limited relief on the statutory restrictions on subcontracting. The Organization argues that the Carrier's specious claims, seeking to breathe life into a bill that could not pass the House or the Senate, should be summarily rejected by this Board.

The Organization goes on to assert that the Carrier's warranty defense is both contractually irrelevant and factually wrong. The Organization points out that the opportunity to obtain a warranty is not among the specific exceptions to the contractual Scope Rule. Accordingly, there is no contractual basis for the Carrier to assert a warranty exception to the general work reservation of the Scope Rule, and the NRAB has rejected similar warranty defenses. The Organization then argues that even if the Scope Rule did

contain a warranty exception, which it does not, it simply is too late for the Carrier to credibly raise a warranty defense. Not only has the Carrier failed to present any documentation to support its warranty defense, but it is undisputed that the Carrier's own B&B forces have been installing carpet squares at the 30th Street Station since at least the early 1990s, after the Carrier provided them with special manufacturer's training on carpet-square installation. Moreover, the Carrier admitted, in a January 2000 letter, that the BMWE forces at the 30th Street Station have performed carpet-square installation throughout the building. The Organization therefore asserts that the Carrier cannot credibly raise a warranty defense at this late date because its own forces have been installing carpet square throughout the 30th Street Station for more than ten years. The Organization asserts that it is reasonable to conclude that either the Carrier did not consider a warranty to be essential or that the Carrier was able to obtain a warranty because its own forces are considered to be qualified installers as a result of their training and experience.

The Organization then contends that although it is not necessary to rely on bargaining history in order to sustain its position, an analysis of the parties' bargaining history lends further support to the Organization's position in this matter. The Organization points out that the Scope Rule that controls this case was preceded by the massive federal funding associated with the NECIP, which led to the May 1980 Minimum Force Agreements. The Organization maintains that by 1987, it agreed to free the Carrier

from the Minimum Force Agreements in exchange for scope language that would maintain the vitality of the bargaining unit by guaranteeing that scope-covered work could not be contracted out except under the very limited circumstances specifically included in the January 5, 1987, Scope Rule. This January 1987 Agreement relieved the Carrier from having to maintain an artificial number of Maintenance of Way employees, while it guaranteed the Organization that when the Carrier had the resources to perform maintenance of way work, that work would be performed by the bargaining unit. The Organization argues that if the Carrier can contract out fundamental building maintenance work, such as carpet installation, by the simple expedient of obtaining a warranty, then the entire *quid pro quo* inherent in the January 1987 Agreement would be a sham. The Organization emphasizes that it did not surrender the May 1980 Minimum Force Agreements in exchange for such a hollow promise.

The Organization argues that in this case, it is not relying on the statutory subcontracting restrictions, but solely upon the contractual restrictions found in the Scope Rule and Side Letter No. 2. Accordingly, the employment status of potential B&B claimants, active or furloughed, simply is not relevant here. The Organization points out that what is relevant is the precedent on this property that monetary awards are appropriate in contracting out cases, without regard to the employment status of the claimants, in order to compensate the claimants for lost work opportunity and to enforce the integrity of the Agreement. The Organization maintains that the evidence clearly

demonstrates that if the Carrier had not contracted out the carpet-installation work at issue, Amtrak's B&B forces at 30th Street Station would have performed the work through some combination of recalling furloughed employees, rearranging the schedules of active employees, or the use of daily or weekend overtime. Amtrak's B&B employees lost a very real work opportunity when Amtrak contracted out the work in question.

The Organization ultimately contends that the instant claim should be sustained; the carpet-installation work should be returned to B&B Department forces covered by the May 16, 1976, Agreement, as amended; and the appropriate B&B Subdepartment forces should be compensated at their applicable rates of pay for an equal and proportionate share of the hours expended by the contractor's forces in performing the identified work. The Organization contends that the instant matter therefore should be remanded for a joint check of the Carrier's records to determine the number of hours worked by the contractor's employees, and to also determine the appropriate claimants from the B&B seniority rosters.

Position of the Carrier

The Carrier initially contends that in December 1997, its labor agreements were amended by the Amtrak Reform and Accountability Act of 1997 (hereinafter "the Amtrak Reform Act") to provide that Amtrak may not contract out work normally performed by bargaining unit employees if the contracting out results in the layoff of an employee in the bargaining unit. The Amtrak Reform Act further provides that this amendment is without

prejudice to the Carrier's power to contract out work not resulting in the layoff of Amtrak employees. The Carrier maintains that this amendment was intended to afford it greater flexibility in the use of outside forces so that the Carrier could become more efficient and productive, thereby reducing the need for federal subsidies. The Carrier argues that the language inserted into the contract was not an addition to existing restrictions, but rather constitutes an overriding provision, consistent with Congress' intent to improve Amtrak's financial and operating performance.

The Carrier argues that the Amtrak Reform Act was intended to ensure that Amtrak could make the most efficient use of its financial resources by eliminating restrictions on the use of the most cost-effective means of accomplishing work, including broader use of outside forces. The Carrier asserts that the only restriction that was preserved was that Amtrak could not contract out work that resulted in the furlough of bargaining unit employees. Moreover, by placing this provision in the contract, the parties had the ability to bargain over the elimination of that remaining restriction. The Carrier points out that in printing the agreement following the contract settlement and the Amtrak Reform Act, the statutory amendment was simply inserted in the contract. The Carrier argues that this does not mean that the parties agreed that this change simply was an addition to existing provisions. In fact, the parties agreed that the reprint was a synthesis, intended as a guide, and that the terms of the actual contract provisions would govern the resolution of disputes. The Carrier asserts that the synthesis cannot now be

used to support the Organization's position that the prior restrictions continue to apply. The Carrier therefore contends that the contracting out of the work at issue did not violate the Agreement, as amended by the Amtrak Reform Act, as no employees were furloughed as a result of the contracting out of this work.

The Carrier then argues that even if this Board rejects the fact that the previous Scope Rule restrictions were eliminated by the Amtrak Reform Act, the Organization has failed to establish that the carpet-installation work in dispute is work that previously was reserved to the craft under the contract. The Carrier submits that throughout the Northeast Corridor, such work has not traditionally or customarily been performed by BMWE forces. The Carrier emphasizes that there is no reference to carpet installation in the Scope Rule's discussion of work generally recognized as Maintenance of Way work. The Carrier argues that the work at issue predominantly has been performed by outside contractors. Moreover, at various Maintenance of Equipment facilities, office carpeting has been installed by Shop Craft employees (Upholsterers), who are skilled in such work through their installation of carpet in passenger cars. The Carrier points out that the Organization has recognized and accepted that it does not have exclusive rights to the work in question when it recognized the historic practice regarding carpet installation of certain Maintenance of Equipment facilities.

With regard to carpet installation at 30th Street Station, the Carrier maintains that this work is not reserved to the Organization. The Carrier asserts that available records

show that during the years following a major rehabilitation project at this station in 1980, a number of carpeting projects were assigned to outside contractors, including instances where carpet installation was assigned to outside forces without written notice to the Organization. The Carrier points out that 30th Street Station was redeveloped in 1986, including the installation of carpeting throughout the office towers; all of this carpet installation was performed by outside contractors. The Carrier contends that this evidence demonstrates that carpet installation is not a type of work performed under the scope of the agreement on or prior to January 1, 1987, so Amtrak is not precluded by the exceptions in the Scope Rule from contracting out this work without the Organization's concurrence.

The Carrier additionally contends that the Minimum Force Agreements were separate and apart from the General Scope Rule, and were applicable to NECIP, federally funded, projects. The Carrier argues that the Minimum Force Agreements were not applicable to carpet-installation projects of the type and nature in dispute here. Instead, the contracting out of such projects was subject to the general provisions of the Scope Rule, and this work was contracted out based on the recognition that carpet installation was not work generally recognized as Maintenance of Way work. Nothing has occurred that would suddenly convert this function to Scope-covered work.

The Carrier then addresses the amended Scope Rule restrictions that were agreed upon in 1987 in exchange for the elimination of the Minimum Force Agreements. The

Carrier maintains that the Organization's assertion, that any past performance of a function reserved that work to BMWE employees under the Scope Rule, is inconsistent with the language of the Scope Rule itself. The Carrier points out that Scope Rule originally covered "work generally recognized as Maintenance of Way work." The 1987 exceptions referred to "inspection, maintenance, construction, or repair of the type being performed by Amtrak forces under the scope of this Agreement on January 1, 1987." Moreover, the January 1987 Side Letter No. 2 clarified that the parties' intent was to preserve work "of the scope and magnitude historically performed" by BMWE members. The Carrier emphasizes that the language of the Scope Rule and the Side Letter are intended to define work preserved as the type and of the size they historically performed. The Carrier asserts that the Organization's contention, that any performance of work automatically reserves that function to the craft, flies in the fact of the clear and unambiguous language of the Scope Rule and Side Letter that demonstrates the parties' intent to preserve the scope of work "historically" performed by the BMWE.

The Carrier goes on to assert that after the 1986 station redevelopment, and consistent with the January 1987 Side Letter No. 2, the Carrier has utilized BMWE employees to perform carpet-installation work, as deemed appropriate in relation to the needs of more customary construction, maintenance, and repair work. The Carrier points out, however, that Side Letter No. 2 specifically states that the use of employees for work beyond that reserved to them under the Agreement does not create obligations or rights to

work that did not previously exist. Although BMWE employees have been utilized for certain carpet-installation projects in the years following the 1986 redevelopment, there also have been occasions where such work was contracted out.

The Carrier argues that there is an unrefuted historical record of contracting out the installation of carpet, demonstrating that this work is not covered by the Scope Rule. Accordingly, the Carrier asserts that it was not restricted from continuing to assign the work to contractors. Where there is a history of contracting out disputed work, such work cannot be characterized as work reserved to the craft under the Scope Rule. The Carrier maintains that even if the Organization can prove that BMWE employees performed carpet-installation work prior to 1987, such a showing, when combined with the record of historical utilization of outside contractors to perform the work as well, would establish only that it was a shared function, not work accruing exclusively to BMWE. The Carrier asserts that the Organization has not provided any proof that this work is reserved exclusively to the bargaining unit on a system-wide basis, a well-recognized requirement in arbitral precedent. The employee statements submitted by the Organization, which establish that BMWE employees were utilized for occasional minor carpet-installation projects, do not constitute evidence of a regular and consistent practice of using BMWE employees to perform carpet-installation work. The Carrier maintains that the history of contracting out this work far outweighs the performance of the function by BMWE

employees, so carpet installation cannot be viewed as "work of the scope and magnitude historically performed" by the craft.

The Carrier contends that the limited performance of a function by a craft cannot grant that craft a system-wide demand right to the work under the craft's scope rule. The Carrier points out that in connection with the instant dispute, the Organization has asked that Amtrak hold in abeyance, pending the Board's decision herein, a contracting out notice involving carpet installation at Wilmington, Delaware, where the Organization was advised and accepted the fact that such work at that location customarily has been performed by the Shop Craft forces. The Carrier emphasizes that although various tribunals may have found that a craft need not prove exclusive rights to work in contracting out matters, it nevertheless must be recognized that employees still have an obligation to prove traditional performance of work, on a regular and continuing basis, in order to establish coverage under the Agreement's Scope Rule. The Carrier argues that this Board must reject the Organization's contention that any performance of a function places it under the Scope Rule and reserves it forevermore to the craft.

The Carrier then asserts that the fact that it notified the Organization of its intent to utilize outside contractors is neither an admission nor evidence that the disputed work is covered by the Scope Rule. The Carrier argues that there is a long history of outside forces and other crafts installing carpet, so this work is not reserved to the craft under the

Scope Rule. The Carrier therefore maintains that it is not prohibited, in any manner, from contracting out the work in question.

Addressing the Organization's argument that two prior settlements establish that carpet installation is reserved to the craft under the Agreement, the Carrier points out that the record does not support such a conclusion. In connection with the 30th Street Station Rehabilitation Project, the Carrier emphasizes that the exchange of correspondence between the parties demonstrates that the settlement agreement there was driven by several factors, none of which involved the desire or right of BMWE forces to install carpet. The Carrier argues that the Organization's reliance on the settlement relating to this project is misplaced. With regard to the January 2000 notice of intent to install carpet in the Customer Services Office at 30th Street Station, the Carrier acknowledged that the request to utilize outside contractors on the basis that the BMWE employees had been trained and utilized to perform carpet tile installation and could be utilized to perform the subject project when time permitted. The Carrier argues, however, that it is inappropriate to characterize the withdrawal of that request to contract out the work as determinative of the overall dispute.

The Carrier acknowledges that it did train and does utilize BMWE employees to install carpet tiles. The Carrier maintains, however, that the BMWE employees performed this work consistent with the commitment made in the January 1987 side letter, in which the parties agreed that Amtrak would use BMWE employees to perform work

beyond what is reserved to them under the Agreement. The Carrier points out that it was clearly stated that such use would not create obligations or rights that did not previously exist. The Carrier therefore asserts that training and utilizing employees in 1990 for carpet installation does not now convert that to "work normally performed" by the BMWE. The Carrier asserts that the Organization's reliance on the withdrawal of this request to contract out work is outrageous, particularly in light of the substantial history of the Carrier contracting out this work without dispute or protest from the Organization.

As for the Organization's contention that the exceptions to the Scope Rule preclude the Carrier from contracting out this work while employees are furloughed, the Carrier maintains that this argument is without basis and is misplaced. The Carrier maintains that Paragraph B.1. of the Scope Rule only precludes the contracting out of work specified in Paragraph A.1., A.2., and A.3., if there are sufficient furloughed employees in the involved sub-department to perform the project. The Carrier argues that because the disputed work is not work reserved to the craft under Paragraph A.3., Paragraph B.1. does not require utilization of furloughed or active employees for the work.

As for the Amtrak Reform Act's restriction on the contracting out of work normally performed by the bargaining unit if such contracting out results in the layoff of bargaining unit employees, the Carrier maintains that this provision does not support the Organization's position. The Carrier argues that this work is not "normally performed"

by the bargaining unit; instead, it routinely has been contracted out or performed by other crafts, and the Organization has not demonstrated that this is covered work on a system-wide basis. The fact that the Carrier has utilized BMWE employees to perform this work does not convert the installation of carpeting to "work normally performed" by the BMWE. Moreover, there is no evidence that by assigning this work to outside contractors, the Carrier forced employees into furlough status. The Carrier asserts that although employees were on furlough well before the current dispute arose, they were not placed in such status as a result of Amtrak's decision to have an outside concern install carpet. Instead, these employees were furloughed because of Amtrak's minimal capital and operating budgets. The Carrier emphasizes that the Agreement does not preclude the use of outside forces simply because covered employees are in furlough status due to other financial constraints. Instead, the contract simply provides that Amtrak will not assign work to outside forces and furlough bargaining unit employees who, prior to the contracting, were normally performing that work.

The Carrier then contends that a ruling prohibiting it from contracting out work at any time that employees are in furlough status would be changing the language of the Agreement, and Boards are constrained from such action. The Carrier emphasizes that the Organization has not and cannot show that the assignment of a contract to install carpet was the cause of or had any direct relation to employees who had been and continued to be on furlough. In fact, during the period involved in these projects, the

furloughed B&B employees were recalled to service and assigned to various construction, maintenance, and repair projects in their respective territories. The Carrier asserts that because there is no evidence that any of the furloughed employees were placed on furlough as a direct result of the decision to utilize contractors to install carpeting, there was no violation of Paragraph E of the Scope Rule.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

Findings

The instant matter is one of three separate, but related, claims that the Organization has pursued over the Carrier's decisions to contract out certain work to outside contractors. This case specifically focuses on carpet installation work. As is true of any contract-interpretation matter, the analysis of the parties' respective positions must be based upon the relevant language of the parties' agreements. Here, the Scope Rule in the parties' collective bargaining agreement is the starting point, but other agreements and statutes also come into play. The Carrier has pointed to both the Amtrak Reform Act and the so-called exclusivity test, focusing on their respective impacts upon the proper interpretation of the collective bargaining agreement's provisions relating to subcontracting. The Organization has emphasized that Side Letter No. 2 must be read

along with the contractual Scope Rule for a full understanding of the collective bargaining agreement's restrictions on contracting out and the exceptions thereto. The logical first step in the Board's analysis of the proper interpretation and application of the contractual Scope Rule is to determine whether and how the Amtrak Reform Act has modified the Scope Rule.

The Carrier's position in this case rests heavily upon its assertion that the Amtrak Reform Act eliminated the bargained-for restrictions on contracting out that appear in the parties' collective bargaining agreement. The Carrier argues that the single restriction on subcontracting that appears in the Amtrak Reform Act – prohibiting Amtrak from contracting out work normally performed by bargaining unit employees if the contracting out results in the layoff of a bargaining unit employee – serves to override the express restrictions on contracting out that appear in the parties' collective bargaining agreement. The Carrier maintains that the contracting out of the carpet installation work at issue did not violate the parties' collective bargaining agreement because it did not result in any layoffs of bargaining unit employees.

Collective bargaining, of course, helps to form the very foundation of the relationship between management and labor, and agreed-upon contractual provisions cannot be lightly tossed aside. The Carrier's position here, however, requires a finding that the Amtrak Reform Act operates to supercede bargained-for provisions relating to the contracting out of work, replacing any and all mutually agreed-upon prohibitions on

contracting out – in all of the collective bargaining agreements between Amtrak and the labor organizations that represent its employees – with the single restriction that such contracting out may not result in the layoff of bargaining unit employees. The Carrier's suggestion that Congress intended to work such an extreme change upon these collective bargaining agreements must, to be accepted, be supported by clear and credible evidence.

This Board, however, finds no support in the record for the Carrier's assertion about the impact of the Amtrak Reform Act on the contractual restrictions on the contracting out of bargaining unit work. If the Amtrak Reform Act actually was intended to override specific provisions of the parties' collective bargaining agreement, then this would unequivocally be stated within the Act itself. Nothing in the language of the Reform Act itself, or in the cited legislative history, suggests that the Act was intended to override any bargained-for provision contained in any of the collective bargaining agreements between Amtrak and the labor organizations that represent its employees. In fact, Section 121 of the Reform Act specifically states that any Amtrak collective bargaining agreement is deemed amended "to include" the prohibition against contracting out work if it results in bargaining unit layoffs, thereby demonstrating that this limitation is to be added to whatever other limitations on contracting out already appear in the Amtrak labor agreements. Moreover, Section 121's general emphasis on party negotiations, which underlines the importance of collective bargaining, is at odds with the

Carrier's assertion that the Reform Act should be read as superceding the contractual limitations on the contracting out of work.

Based on its express language, this Board finds that the Amtrak Reform Act cannot be taken as overriding any part of the Amtrak collective bargaining agreements. Instead, the language of Section 121 of the Act must be read and understood as adding to, rather than superceding, the existing contractual restrictions on the contracting out of work. Applying this to the instant dispute, it must be noted there is no allegation, and no evidence in the record, that the contracting out of the carpet installation work at issue resulted in any bargaining unit layoffs. The Amtrak Reform Act's single limitation on the contracting out of work therefore does not apply to this dispute, making the Reform Act and its impact on the parties' collective bargaining agreement irrelevant to the resolution of this matter. Accordingly, this Board shall determine whether the contracting out of the carpet installation work at issue constituted a contract violation based upon the Scope Rule language as written in the parties' collective bargaining agreement, without any further specific consideration of the provisions of the Amtrak Reform Act.

Focusing, then, upon the contractual Scope Rule as the basis for this Board's analysis of the instant dispute, it must be emphasized that the contractual Scope Rule, when read together with Side Letter Number 2, generally is intended to preserve work of the scope and magnitude historically performed by BMWE forces. The Scope Rule specifically protects the types of work described in Paragraph A.1.a., including "bridge

building and inspection, maintenance, construction or repair of the type being performed by Amtrak forces under the scope of this Agreement on January 1, 1987, specifically excluding major construction projects such as station redevelopments or tunnel and bridge projects and non-railroad projects."

The critical question, of course, is whether the carpet installation work at issue falls within the coverage of the Scope Rule. Carpet installation certainly falls within the category of maintenance and repair work, as described in the portion of the Scope Rule quoted above, but this particular work may be deemed Scope-covered only if the Organization sufficiently establishes that BMWE forces historically have performed such work of this scope and magnitude. The Carrier maintains that the exclusivity test applies here, meaning that the Organization can prevail only if it can prove that it has had exclusive rights to the work at issue, i.e., that its members performed this work in the past, to the exclusion of all others. The Organization argues that it need not show exclusivity, and that the proper test for determining whether the work at issue is Scope-covered is to demonstrate a general right to the work, absent the application of express or implied exceptions.

The Carrier's insistence that the exclusivity test applies here is unsupported by the parties' collective bargaining agreement, past Board decisions, and the evidentiary record. Neither the contractual Scope Rule nor any other evidence in the record establishes the existence of any provision indicating that work identified in the Scope Rule is protected

only if a craft can prove exclusive rights to the work. In fact, the Scope Rule and Side Letter No. 2 refer to work "being performed" by Amtrak forces, and neither provision ever indicates that covered work must be "exclusively performed" by Amtrak forces. In addition, the overwhelming weight of the cited Board decisions indicates that the exclusivity test does not properly apply to disputes over the contracting out of work; instead, this standard has been applied to disputes between a single carrier's different craft employees. Accordingly, this Board finds that the exclusivity test does not apply to the instant dispute. We hold that the Organization need not show exclusive rights to the work at issue, but instead must demonstrate only that its forces historically have regularly performed carpet installation work of this scope and magnitude on or before January 1, 1987.

A related point is the Carrier's argument that other crafts have performed carpet installation work. As with the Carrier's assertion about the exclusivity rule, this contention would be directly relevant if this were a dispute between crafts over which had the right to perform carpet installation work. This matter, however, is not a dispute between crafts, but rather a dispute over whether the Carrier may contract out the work in question. The fact that more than one craft may have performed this work is not relevant to the resolution of this contracting out dispute. So long as the Organization can demonstrate that its own forces historically regularly performed carpet installation work of this scope and magnitude on or before January 1, 1987, it does not matter, at least so

far as this particular proceeding is concerned, whether another craft's forces may have performed the same or similar work.

The evidentiary record contains competent, credible evidence that conclusively establishes that BMWE forces installed both carpet rolls and carpet squares at different Amtrak facilities, including the 30th Street Station, beginning shortly after Amtrak's inception in 1978. Among other compelling evidence, the record shows that when the standard changed from roll carpet to carpet squares, the Carrier trained its employees regarding the installation of carpet squares, and it continued to assign such work to its employees. Moreover, January 2000 correspondence from the Carrier confirms that BMWE forces installed carpet squares throughout the 30th Street Station. The record therefore demonstrates that BMWE forces historically have performed carpet installation work of the scope and magnitude at issue in this proceeding, so we find that this work must be deemed as falling within the coverage of the contractual Scope Rule.

Although it is true that the Carrier has contracted out such work in the past, these instances of contracting out all appear to have happened pursuant to explicit exceptions contained within the Scope Rule, such as station redevelopments, or in conjunction with agreements, such as the 1980 Minimum Force Agreements, that no longer are in effect. The evidentiary record demonstrates that in those situations outside of the explicit exceptions set forth in the Scope Rule, Amtrak forces, and particularly those employees represented by the Organization, regularly have performed such carpet installation work.

This Board accordingly finds, that the carpet installation work at issue is covered and protected by the contractual Scope Rule, so the Carrier had no authority to contract out the work without the written concurrence of the General Chairman.

The work in question clearly does not fit within any of the Scope Rule's exceptions to this limitation. There has been no claim that this work was involved in an emergency situation, or that a lack of available skilled personnel or of essential equipment meant that the work could not be completed in a timely fashion. It was not a major construction project. In fact, there appears to be no dispute between the parties that Amtrak's BMWE-represented forces had been trained to install carpet squares, had the necessary skills and experience to install carpet squares, and had access to whatever tools and equipment were necessary to install carpet squares. There were no proven warranty or other issues associated with the disputed work that might lend support to the Carrier's decision to contract out the work, so the Carrier was obligated to comply with the requirements of the Scope Rule.

Although it certainly is correct that BMWE forces have not performed carpet installation work on a frequent basis, that is nothing more than a function of the nature of the work. Quite simply, the Carrier does not need to have new carpet installed on a weekly or monthly basis, and it may not have a need for such work even over the course of several years. The fact that certain work is not performed on a frequent basis does not mean that it falls outside of the coverage of the Scope Rule. We find that based on this

record, carpet installation work, however infrequently required and performed, has been regularly historically performed by BMWE forces, so this is Scope-covered work. Because the particular carpet installation projects at issue did not fall within any of the explicit exceptions to the Scope Rule's prohibition on the contracting out of covered work, this Board finds that the Carrier violated the Scope Rule when it contracted out this work without fulfilling the requirements of Paragraph A.1.a. of the contractual Scope Rule, i.e., obtain the written concurrence of the General Chairman. The instant claim therefore must be sustained.

Award

The claim is sustained. Amtrak violated its May 19, 1976, Agreement with the BMWE (as amended) when it contracted out the carpet installation work. The Carrier is ordered to return the carpet installation work to the BMWE forces covered by the May 16, 1976, Agreement (as amended) and compensate the appropriate BMWE sub-department forces at their applicable rates of pay for an equal proportionate share of the man hours expended by the contractor's forces in performing the work identified in the claims. The case shall be remanded for a joint check of the Carrier's records to determine the number of man hours worked by contractor employees and the appropriate claimants from the

BMWE seniority rosters.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: May 11, 2004

CARRIER MEMBER

DATED: 5/11/04

Written Dissent to follow

Carrier Member's Dissent – Public Law Board No. 6671 , Award No. 1

The Majority determined in this case that the Amtrak Reform and Accountability Act did not alter the Amtrak – BMWE Northeast Corridor Scope Rule and proceeded to decide that the evidence presented established that BMWE installed both rolled carpet and carpet tiles since 1978 and that Amtrak's examples of contracting out were under special exceptions or agreements, such as the Minimum Force Agreement. The Majority not only exceeded their authority, by interpreting the Amtrak Reform and Accountability Act, and did so incorrectly, but it also reached a decision that flies in the face of the facts presented.

First, the Amtrak Reform and Accountability Act of 1997, amended Amtrak's collective bargaining agreements. While the parties differed in their view of that amendment, the Board exceeded its' authority by interpreting the Act.

Notwithstanding the above, relative to the merits in this case, as admitted by the BMWE, carpet tiles were not utilized until the 1990's. Amtrak trained employees on that type of installation and assigns them the work consistent with the needs of service involving other maintenance, construction and repair projects. As stated in Amtrak's submissions in this case, this training and work assignment was done under the January 22, 1987 side letter, where Amtrak agreed to use BMWE forces for work beyond that reserved under the scope rule. That side letter contained the clear recognition that such use does not create obligations or rights to the work:

> "Amtrak intends to use the BMWE represented employees to perform work beyond that which is reserved to them in Items A.1.a. (1), (2) and (3). However, such use does not create obligations or rights to work which do not exist in the current Agreement."

Carpet tile installation in the 1990's does not support the BMWE's burden to prove a consistent past practice of performing the work on or prior to the defining date in the Scope Rule – January 5, 1987. The Board's reliance on post 1987 performance and the January 2000 correspondence regarding carpet tile installation as proof of historic past practice under the Scope Rule is wrong.

Second, Amtrak did not rely on carpet work done during Station Rehabilitation Projects as proof that the work was not scope covered. Rather, the BMWE attempted to argue that the only carpet installation contracted out was in major rehabilitation projects, which are exempt from the scope rule. They also contended that the Settlement Agreement in connection with the 1986 Rehabilitation Project was somehow centered on carpet installation work. Amtrak proved in its rebuttal submission that was not the case, and that the employees never questioned the carpet work in the station rehabilitation project. The employees did not dispute that argument at the hearing.

More importantly, Amtrak provided a number of examples of carpet installation by outside forces over a seventeen-year period, which the employees did not dispute. Contrary to the determination of the Board as stated in the findings, none of that work was performed under special exemptions or under the Minimum Force Agreement. The majority fully understood, as clear from the Minimum Force Agreement and verified by a prior National Railroad Adjustment Board decision, that the Minimum Force Agreements only applied to federally funded rehabilitation projects. The examples provided in Amtrak's submission of contracted out carpet installation were basic maintenance budget projects, not federally funded Northeast Corridor Improvement projects. Each and every one of the carpet projects cited was contracted out under the basic scope rule. The fact is, Amtrak contracted out all of those projects based on clear recognition by the BMWE that it was not their work. The majority of those projects were prior to January 1987, proving there was no historic regular practice of carpet installation work being performed by BMWE, and some were after January 1987, proving they never contested the contracting of that work after the change in the scope rule. The fact is with this history, the BMWE did not and could not demonstrate this work was "of the scope and magnitude historically performed by members of the BMWE for the Carrier as of January 1, 1987, or prior thereto", as defined in the Scope Rule modifications of January 5, 1987.

The changes in the Scope Rule in 1987 had absolutely no impact on carpet installation work. Amtrak frequently contracted out the work prior to 1987 and continued to do so after 1987, without protest from the BMWE. The overwhelming evidence of past practice clearly demonstrates that carpet installation work was customarily performed by outside forces – not by BMWE.

The decision in this case is not based on the facts presented to the Board and appears to focus primarily on carpet work in the 1990's rather than on the full history. Clearly, reliance on performance in the 1990's to establish scope coverage constitutes a change in the agreement by eliminating the clear language mandating historic performance on or before January 5, 1987.

Finally, notwithstanding the fact that the Board chose to ignore the substantial evidence of carpet installation work being performed prior to 1987 by outside forces, the flawed determination, that the limited occasions where BMWE forces installed carpet during that period constitutes sufficient evidence of historic performance, fails to recognized that the scope and magnitude of that performance – all involving small projects – does not afford them rights to all carpet installation work. As indicated in the initial notices on the intent to assign this work to outside forces, several of the projects were substantial in size – one, in excess of 25,000 square feet, another in excess of 50,000 square feet – of far greater magnitude than any carpet project ever performed by BMWE. Accordingly, it was inappropriate to conclude that the few small projects performed by BMWE prior to 1987 would give them rights to <u>all</u> future carpet installation work, regardless of size. This is an expansion of their scope rule, and a modification of Side Letter No. 2, when the parties specifically agreed in the side letter that it was not the intent to either expand or contract rights to work under the agreement.

Relative to the remedy in this case, the Board has again exceeded its authority by directing that the work be returned to the BMWE. The Board does not have the power to direct Amtrak to, in essence, cancel a commercial contract. Similarly, it is well established that arbitration boards such as this do not have the authority to direct the establishment of positions. At most, the Board has the authority to find monetary damages for a contract violation.

The award in this case is palpably erroneous. Installation of carpet is not maintenance, construction or repair of structures reserved to BMWE under the Scope Rule.

R. F. Palmer
Carrier Member

Labor Member's Response
To Carrier Member's Dissent
To
Award 1 Of Public Law Board No. 6671

With the exception of his newfound position concerning the Amtrak Reform and Accountability Act, the Carrier Member's Dissent is largely an attempt to reargue points that were fully aired in the written briefs of the parties, oral argument and in an extensive Executive Session. As the Neutral Member so carefully explained in his well-reasoned award (as well as in Executive Session), these arguments simply have no merit under standard principles for interpreting contract language and evaluating evidence. I urge the Carrier Member to simply accept the plain meaning of the Scope Rule and to abide by its terms rather than engendering future disputes and the attendant monetary liability that will almost certainly redound to Amtrak if it continues to violate the Scope.

While I hesitate to be pejorative, there is no way to describe the Carrier Member's position on the Amtrak Reform and Accountability Act other than to label it as frivolous. I agree that as a general matter, Section 3 tribunals do not have the authority to interpret statutes. However, in this case, the Amtrak Reform and Accountability Act was made a part of and physically inserted into the collective bargaining agreement. In other words, it became a contract term and was therefore clearly subject to interpretation and application by the Board pursuant to Section 3 Second of the Railway Labor Act and the terms of the Agreement establishing Public Law Board No. 6671. Moreover, it was Amtrak, and not BMWE, who raised the Amtrak Reform Act in defense of its position in this case. Hence, it is more than a little disingenuous for the Carrier Member to complain that the Board exceeded its jurisdiction by interpreting the language of the Amtrak Reform Act when it was Amtrak itself that raised the Reform Act as a defense in this case.

The Carrier Member's attempt to distinguish between carpet tiles and roll carpet is a distinction without a difference. The Agreement reserves the type of work and the method of performing it is simply not relevant. Moreover, as the record clearly demonstrated, Amtrak's own B&B forces are well qualified to perform the installation of both roll carpet and carpet tiles as evidenced not only by the training they received, but by their past performance of that work.

The Carrier Member attempts to make much of the fact that Amtrak had contracted out carpet installation work both before and after 1987. This is really nothing but a repackaging of the so-called exclusivity argument that Amtrak advanced in its submission and which was so decisively rejected by the Majority based not only on substantial well-reasoned arbitral precedent, but also because of the specific contract language involved in this dispute. Under that language, BMWE was simply obligated to show that it had performed carpet installation work prior to 1987, not that it had performed such work to the exclusion of all others. Moreover, it is hysterical

hyperbole for the Carrier Member to assert that the award grants BMWE the right to all future carpet installation work regardless of the size of the project. While the Scope Rule clearly reserves carpet installation work to Amtrak's B&B forces in most circumstances, the plain language of the rule provides exceptions for "... major construction projects and non-railroad projects." Hence, BMWE does not claim, and the Scope Rule does not reserve, all future carpet installation work, regardless of size, because major construction projects are excepted by the rule.

Finally, the Carrier Member is simply wrong when he asserts that the Board exceeded its authority by directing that the carpet installation work be returned to the BMWE. Public Law Board No. 6671 was established pursuant to Section 3 Second of the Railway Labor Act which grants the Board broad discretion to resolve disputes growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. Hence, the Board had broad discretion to resolve the instant dispute pursuant to the Railway Labor Act itself. Moreover, the Questions At Issue referred to the Board by the parties were as follows:

> "1. Did Amtrak violate its May 19, 1976 Agreement with BMWE (as amended) when it contracted out the carpet installation work identified in Carrier's contracting file numbers 03-LCR-10-0403, 03-LCR-14-0503, 03-LCR-16-0603, 03-LCR-23-0803 and 03-LCR-29-0903?
>
> 2. If the Answer to Question No. 1 above is 'YES', what shall the remedy be?"

The Questions posed to the Board make it clear that once the Board found that Amtrak had violated the May 19, 1976 Agreement (as amended), it had broad discretion to determine "... what shall the remedy be?".

Award 1 of PLB No. 6671 could hardly have been reasoned or written more clearly. If future readers accept the inexorable logic that the precedential value of an award is proportionate to the clarity of reasoning in the award, then Award No. 1 of this Board will indeed carry powerful precedential value.

Respectfully submitted,

Jed Dodd
Labor Member