BEFORE PUBLIC LAW BOARD NO. 6915

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD

Case No. 35

STATEMENT OF CLAIM:

1. The Carrier violated the Scope Rule and Side Letter #3 of the Agreement when it assigned non-agreement employes Robert Craig and Dale Kotbauer instead of Track Inspectors Michael Lone and James Mabie, Jr. to perform track inspection work on the Wisconsin Central system (System File C-330-01/BMWED-2008-00002 WCR).

2. As a consequence of the violation referred to in Part 1 above, Track Inspector Michael Lone and James Mabie, Jr. shall be allowed pay at the applicable Track Inspector's rate for an equal and proportionate share of all straight time and overtime man-hours worked by Messrs. Rob Craig and Dale Kotbauer in the performance of track inspection work beginning sixty (60) days retroactive from March 12, 2008 and continuing until the violation is corrected.

FINDINGS:

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the controlling Agreement when it assigned certain track inspection work to non-Agreement, supervisory employees, instead of to the Claimants. The Carrier denied the claim.

The Organization initially contends that the Carrier violated the Agreement, and the Claimants are entitled to the requested remedy. The Organization asserts that as track maintenance work has evolved with new technology and more complex equipment, Boards consistently have held that the general class, character, and purpose of the work as a whole and the reason for doing it, rather than the manner, method, or detail of the

performance of the work, are determinative factors. The Organization argues that track inspection is nothing new to Maintenance of Way employees, and it has been and is routinely performed by employees such as the Claimants, who have honed the various skills necessary to perform all aspects of that work.

The Organization maintains that it defeats the very intent and purpose of the collective bargaining process to assign work of this character to other than those employees holding appropriate seniority within the appropriate classes under this Agreement. Pointing to a number of Board Awards, the Organization emphasizes that it is fundamental that work of a class belongs to those for whose benefit the contract was made, and delegation of such work to others not covered thereby is a violation of that agreement. In this case, the proper employees to perform the track inspection work in question would have been track inspectors, not supervisors.

The Organization points out that the Scope Rule clearly reserves the inspection of track to BMWED employees. In addition, Rule 3 – Classification establishes the position of track inspector, while Side Letter #3 the only exception to assigning track inspection work to other than BMWED track inspectors. The Organization asserts that the Claimants were assigned to track inspector positions in accordance with Rule 8, and they have established and hold seniority there in accordance with Rule 4. The Organization therefore argues that the Claimants are entitled to perform work in that classification, subject only to the exceptions of Side Letter #3.

The Organization maintains that Side Letter #3 provides only for the use of incumbents of non-agreement unit assistant track supervisor positions until such time as

they permanently vacate the position now held. The Organization insists that Craig and Kotbauer are not incumbent to any assistant track supervisor positions, as contemplated by Side Letter #3. The Organization submits that there can be no doubt that the Claimants are proper claimants, and that the Carrier violated the Agreement when it assigned the subject track inspection work to those not subject to the Schedule Agreement.

The Organization submits that in denying the claim, the Carrier placed emphasis on the method of performing the track inspection rather than the work itself. The Organization insists that it is clear and undisputed that the claimed work and the work performed by the non-agreement employees is track inspection. The Organization maintains that track inspection is track inspection regardless of the method used to perform the work. Citing a number of prior Awards, the Organization contends that it is well settled that the method of performing work does not remove the work from the Agreement. The Organization argues that there can be no doubt that the track inspection work at issue is reserved to the Claimants.

The Organization goes on to address the assertion that track inspectors "do not possess the requisite qualifications to perform this work." The Organization suggests that new hires and newly assigned or promoted employees do not initially possess the requisite qualifications to perform their newly assigned work, but employees learn the necessary skills and develop through experience or training. The parties recognized that training for various job classifications would be necessary, so they negotiated and incorporated Rule 33 – Training into the Agreement.

The Organization therefore maintains that if track inspectors require additional training to possess the requisite qualifications to perform work such as that claimed here, the Agreement provides for that training. The Agreement does not provide for the Carrier to assign such Scope-covered work to those not covered by the Agreement, rather than training those for whom the work is reserved.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that there is no clear, specific language in Rule 1 – Scope and Side Letter #3 that grants exclusive rights to the work of Rail Flaw Detection. The Carrier asserts that the particular function that is at the heart of this matter is not even mentioned in the Agreement.

The Carrier argues that the Organization bears the burden of proof, and it must fulfill its obligation to identify, with specificity, that a violation occurred, and that the provisions of the Agreement were violated. The Carrier maintains that it falls far short of the Organization's burden to merely assert that rail flaw detection is akin to the normal and customary inspection of track. The Organization must prove that such work was in any way contemplated by the provisions of the Agreement.

The Carrier points out that track inspection is a visual inspection of the outside surfaces of the rail, and the Carrier agrees that track inspection is work contemplated by the Scope Rule and in Side Letter #3 and is normally and customarily performed by track inspectors. The Carrier maintains, however, that Side Letter #3 is not applicable here in that it provides that employees who are incumbents of Assistant Track Supervisor

positions may continue to perform track inspector duties so long as they remain on those positions. This Side Letter further provides that when these incumbents vacate their Assistant Track Supervisor positions, then the track inspector work formerly performed by them would come under the Scope provisions of the Agreement.

The Carrier goes on to submit that rail flaw detection, in contrast, is accomplished by the use of sophisticated ultrasonic equipment to detect flaws and defects in the steel within the composition of the rail that are undetectable to anyone performing a visual track inspection. The Carrier insists that rail flaw detection is not track inspection, and it never has been viewed as such by the parties.

The Carrier suggests that if Side Letter #3 supports any position, it supports the Carrier. The Carrier emphasizes that the Organization has not provided any proof that track inspectors performed any rail flaw detection at or before July 20, 2004, the effective date of that Agreement. The Carrier insists that there is no such proof. The Carrier points out that prior to the July 2004 Agreement, and continuing for nearly four years thereafter, rail flaw detection was performed by outside contractors. Moreover, prior to the July 2004 Agreement, there was no collective bargaining agreement on the WC property. The Carrier maintains that subsequent to the inception of the present collective bargaining agreement, the work of rail flaw detection continued to be performed by outside contractors, and it never was performed by track inspectors or other Agreement employees.

The Carrier insists that because the Organization never asserted a contractual right to the work of rail flaw detection until nearly four years after the Agreement became

effective, the Organization is estopped by the doctrine of laches from bringing this claim now.

The Carrier points to the final sentence of Rule 1 – Scope, which plainly provides that this Rule shall neither expand nor contract the respective rights of the parties. The Carrier suggests that if the work of Rail Flaw Detection had been within the rights of bargaining unit employees prior to the inception of Rule 1, then the Organization's argument here might have some merit.

The Carrier maintains that Rule 13(k) also is in play here, which confirms the Carrier's unilateral right to contract any and all work contemplated in Rule 1. The Carrier therefore asserts that even if the specialized RFD work was contemplated in Rule 1, Rule 13(k) permits the Carrier to have that work performed by contractors or management. The Carrier contends that the Organization's endeavor in the instant case is a poorly veiled attempt to obtain through arbitration a privilege or right that it could not and did not obtain through negotiations. Moreover, if the Organization were to prevail, the language and right conveyed to the Carrier by Rule 13(k) would be rendered meaningless.

The Carrier insists that the Organization has not met its burden of proof in this matter, so the Organization cannot prevail.

Although the Carrier asserts that no remedy is due here, the remedy sought by the Organization is excessive and would produce a significant windfall. The Carrier points out that the Claimants were paid for the days they worked as track inspectors, so they did not lose any earnings or work opportunities as a consequence of the Carrier's exercise of

its clear and unambiguous contractual right. The Carrier argues that the Organization's requested remedy would more than double the Claimants' earnings for the period claimed. The sought-after remedy also would produce an amount greater than twice the amount the Claimant would have earned had they had any right to and been assigned to the positions.

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.

This Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the Scope Rule and Side Letter No. 3 of the Agreement when it assigned non-Agreement employees to perform track inspection work on the Wisconsin Central System. Therefore, the claim must be denied.

Although the Union has developed an excellent case that it has often performed regular track inspection work, the record makes it clear that this was not simple track inspection work but was more defect detection work that was performed by using an ultrasonic testing device that employs ultrasonic technology to identify defects in the rails that are internal and not visible or detectable by normal and customary track inspection methods. The record reveals that the Carrier contracted this work out for several years because it did not have the equipment that was owned by the vendors. Since 2004, the Carrier purchased smaller hand-held ultrasonic devices and that equipment was used

under the direction of management personnel who were specifically trained in the use and operation of that equipment. The record reveals that the training that is necessary to operate that equipment takes approximately one to two years. Hence, it is clear that this work is very different from the normal and customary track inspection work that is usually performed by Organization-represented employees.

The Organization relies on Side Letter No. 3, which refers to "its track inspector duties now performed" that will continue to be performed "in the same manner and to the same extent" as was the case in July of 2004, which is the effective date of the Agreement. There is no evidence that the Organization ever performed the rail flaw detection work using the ultrasonic equipment that is currently being disputed in this claim.

It is fundamental that the Organization bears the burden of proof in cases of this kind. As the Third Division stated in Award No. 35457:

> . . . the Organization has not shown that clear contract language supports its position.

For all of the above reasons, the claim must be denied.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: Sept 17, 2010

CARRIER MEMBER
DATED: Sept 17, 2010