BEFORE PUBLIC LAW BOARD NO. 7007

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD

Case No. 10

STATEMENT OF CLAIM:

(1) The Agreement was violated when the Carrier assigned outside forces (Matrix) to perform Maintenance of Way work (fabricate a fall arrest system) for use in working on passenger cars at the CRMF-BET and delivered thereat on May 28, 2004 (Carrier's File MBCR-BMWE-14/0904).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with written advance notice of its intent to contract out the work described in Part (1) above, as required by Rule 24.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants N. Munro, P. Popczuk, D. Christian and J. Cronin shall now each be compensated for a total of one hundred fifty (150) hours at their respective rates of pay.

FINDINGS:

The Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it employed outside forces to fabricate a fall arrest system atop passenger cars in the CRMF-BET, instead of assigning this work to its own B&B forces. The Carrier denied the claim.

The Organization initially contends that the work at issue was ordinary work of B&B mechanics, and there can be no question that the work accrued to the Carrier's B&B forces in that it is undisputed that similar work was assigned to them the year before. The Organization asserts that there also is no dispute that Claimant Munro, who was the foreman over similar fabrication work that was performed under his jurisdiction a

year earlier, was asked to provide the Carrier with an estimate for the work at issue here.

The Organization then maintains that the Agreement's advance notice provisions require the Carrier to notify the General Chairman of its plans to contract out work within the scope of the schedule agreement. The Organization argues that the work in question is scope-covered, if not exclusively, then colorably for purposes of notice, particularly in light of the Carrier's request for an estimate on the work from Claimant Munro. The Organization emphasizes that exclusivity need not be shown to establish a "notice" violation. The Organization contends that the Carrier's failure to provide such notice goes to the very heart of this dispute and serves as a basis for questioning the Carrier's good faith in handling this situation. The Carrier simply assigned the work in question to outside forces without first giving advance notice to the General Chairman as required by Rule 24, thereby precluding good-faith conference discussions. As has been found in numerous Board Awards, this constitutes a direct and serious violation of the Agreement. The Organization points out that under the circumstances, it is clear that the instant claim should be sustained based upon the Carrier's undisputed failure to provide advance notice.

The Organization goes on to assert that the Carrier waived exception to the *bona fides* of the instant claim by failing to provide notice and precluding good-faith conference discussions. Moreover, the Carrier cannot validly excuse its violation by asserting that it was not purchasing "labor" when the contractor used materials of the type that AMTRAK furnished the Claimants the years before to fabricate a similar system. The Organization insists that the Carrier's "affirmative defense" is meritless.

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

The Carrier initially contends that the Organization has failed to meet its burden of proof in this matter. The Carrier asserts that the claims are utterly frivolous and should be dismissed in their entirety.

The Carrier argues that the Organization failed to demonstrate how the three Claimants were harmed, or what positions the Claimants held that "normally" would have done this work. The Carrier maintains that the Organization failed to submit any evidence to show that the construction of the pre-fabricated system, as performed by the vendor, constituted 150 hours for each Claimant. The Carrier emphasizes that the Organization also failed to show that the Carrier's decision to purchase the pre-fabricated assets violated the clear and unambiguous language of Rule 24.

The Carrier points out that no layoff of any employee in the BMWE bargaining unit occurred as a result of the Carrier's procurement of the fall arrest components. The Carrier contends, in addition, that the system was installed by BMWE employees. The Carrier insists that there is no evidence that its procurement of pre-fabricated components of the fall arrest system constituted work "normally performed" by and/or historically and customarily accrued to the BMWE. The Carrier asserts that whether or not employees previously had performed similar activity does not advance these claims. Moreover, the Organization has failed to show that the work of building fall arrest systems comes within the exclusive province of the BMWE.

The Carrier then argues that as to the claim that it failed to provide advance notice

of its intent to contract out, the Carrier did not act in bad faith, and the rule does not provide, either explicitly or implicitly, for a monetary award in the event of a failed notification. The Carrier insists that the Organization's claims are entirely excessive, lacking in merit, and warrant denial.

The Carrier then argues that the Organization's referral to a tribunal, dated December 14, 2006, was untimely. Rule 14 of the Agreement requires such referrals to be initiated within 185 days of the Carrier's denial, which occurred in this case on December 8, 2004. The Carrier maintains that the claims are flawed at this point and should be denied.

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 met its burden of proof that the Carrier violated the parties' agreement when it employed outside forces to fabricate a fall arrest system atop passenger cars without giving the required written advance notice of its intent to contract out the work to the Organization. Therefore, the claim must be sustained, in part.

Rule 24 states the following:

> 1. In the event the Carrier plans to contract out work within the scope of the schedule agreement, the Chief Engineer shall notify the General chairman (sic) in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days

> prior thereto.
> 2. If the General Chairman requests a meeting to discuss matters relating to the said contracting transaction, the Chief Engineer or his representative shall promptly meet with him for that purpose. The Chief Engineer or his representative and the General Chairman or his representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Chief Engineer may nevertheless proceed with said contracting, and the General Chairman may file and progress claims in connection therewith.
> 3. Nothing in this Rule shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman to discuss and if possible reach an understanding in connection therewith.

The record reveals that there was no advance written notice given to the General Chairman as required by Rule 24. Consequently, there were no good-faith conference discussions that took place. Although the Carrier states that it was not purchasing labor, the record reveals that the contractor used materials similar to those that the Carrier furnished the Claimants in previous years to fabricate a similar system. Consequently, this Board finds that the notice should have been given to the Organization and, by failing to do so, the Carrier violated the Agreement.

Once this Board has determined that there was a violation of the Agreement because of the failure to issue a notice, we next must determine what the remedy should be. In this case, the Organization requests 150 hours for four Claimants, for a total of 600 hours. There is no question that employees are entitled to pay, even if they were fully employed at the time of the subcontracting, for violations of this rule. However, it is up

to the Organization to provide the evidence to the Board for it to be able to determine what the appropriate number of hours are owed to the Organization members. In this case, there is no evidence in the record to assist the Board in determining the amount of hours that were lost to the Organization employees as a result of the subcontracting. Consequently, this Board must find that it will retain jurisdiction for a period of 180 days while the parties make an effort to obtain the contracts and determine the number of man hours that it took for the subcontractor to perform the work at issue. This Board is optimistic that once that number of hours is determined, the parties will be able to resolve the matter on its own. We reserve jurisdiction only for the purpose of assisting the parties in resolving the matter of the remedy if they are unable to do so on their own.

AWARD:

The claim is sustained in part. The Carrier violated the parties' agreement when it failed to provide the required notice pursuant to Rule 24. The parties are ordered to attempt to determine the number of man hours that it took the subcontractor to perform the work at issue and then reimburse the Organization members who would have performed that work had it not been subcontracted. This Board retains jurisdiction for a period of 180 days to assist the parties in the event that they are unable to reach

agreement as to the amount of the remedy ordered by this Board.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 4/9/09

CARRIER MEMBER

DATED: April 9, 2009

Dissent to follow