BEFORE PUBLIC LAW BOARD NO. 7007

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD

Case No. 19

STATEMENT OF CLAIM:

(1) The Agreement was violated when the Carrier assigned outside forces (Dooley Construction) to perform Maintenance of Way work (snow removal) at station platforms at Sharon and Mansfield, Massachusetts on December 9 and 10, 2005 (Carrier's File MBCR-BMWE-08/0506).

(2) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (snow removal) at station platforms at Newburyport and Rowley, Massachusetts on December 9 and 10, 2005 (Carrier's File MBCR-BMWE-09/0506).

(3) The Agreement was further violated when the Carrier failed to furnish the General Chairman a proper written advance notice of its intent to contract out the aforesaid work as required by Rule 24.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants R. Lynch, R. Chaves and J. Saunders shall now each be compensated for seven and one-half (7.5) hours at their respective straight time rates of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants R. Pelletier, R. DeJesus and R. Shanley shall now each be compensated for seven and one-half (7.5) hours at their respective straight time rates of pay and eight (8) hours at their respective time and one-half rates of pay.

FINDINGS:

The Organization filed the instant claims alleging that the Carrier violated the parties' collective bargaining agreement by assigning snow removal duties and related work at various station platforms to outside forces, instead of to the Claimants. The Carrier denied the claims.

The Organization initially contends that the record establishes that Organization-represented employees historically have performed routine snow removal and related work of the nature involved here without the need for or assistance of outside forces. The Organization asserts that the work at issue was the ordinary maintenance work of snow removal on passenger platforms. The Organization argues that this work unquestionably accrued to the Carrier's maintenance forces, such as the named Claimants, because similar work undisputedly had been assigned to them as a matter of historical past practice.

The Organization points out that during the handling of this matter on the property, the Carrier admitted to assigning such work to its Maintenance of Way forces. As for the Carrier's argument about exclusivity, the Organization maintains that exclusivity is inapplicable here because the Carrier violated the "notice" provision relating to the contracting out of scope-covered work. Citing a Third Division Award, the Organization contends that the instant claims should be sustained based upon the Claimant's undisputed failure to provide proper advance notice.

The Organization maintains that the contractual advance notice provisions specifically stipulate that in the event that the Carrier plans to contract out scope-covered work, it shall notify the General Chairman in writing in as far in advance as practicable, but not less than fifteen days prior. The Organization acknowledges that the Carrier did provide notice of its intent to contract out snow removal work, but this notice was issued only nine days before the work was performed by outside forces. Moreover, the parties did not held a conference on this matter until four days after the work was performed by

outside forces.

The Organization insists that the Carrier's failure to provide proper and timely advance notice is no small or insignificant matter. The Carrier's failure goes to the very heart of this dispute and serves as a basis to question the Carrier's good faith in handling this situation. The Organization emphasizes that the Carrier's actions precluded any possibility of engaging in a good-faith attempt to reach an understanding concerning the intended contracting. Pointing to a number of Board Awards, the Organization contends that the Carrier's decision to contract out the work at issue, without first fully complying with its notice obligations, was a direct and serious violation of the Agreement.

The Organization emphasizes that Rule 24, the notice rule, is clear, unambiguous, and not subject to misinterpretation. The Organization asserts that there is no question that the Carrier failed to comply with the notice requirements by failing to provide proper and timely notice to the General Chairman of its intent to contract out the work at issue. The Organization argues that this failure is a threshold issue that requires that the instant claims be sustained.

As for the Carrier's challenge to the number of hours claimed, the Organization points out that the Carrier was in sole possession of documentary proof on this issue in the form of contractor records. The Organization asserts that a negative inference may be drawn from the Carrier's failure to produce any such documentary evidence in its sole possession to substantiate that the number of hours claimed was excessive or incorrect.

The Organization then addresses the Carrier's assertion that the instant claims are similar to a separate claim that is currently pending before the Board. The Organization

acknowledges that this other claim also involves the contracting out of work, but this is the only similarity between the two cases. The Organization points out that the other claim relates to the paving of a station platform, and there simply is no nexus between this other claim and the instant claims over snow removal on platforms. The Organization suggests that the Carrier is grasping at straws to avoid monetary consequences for its violation of the Agreement.

The Organization ultimately contends that the instant claims should be sustained in their entirety.

The Carrier initially contends that the Organization has utterly failed to present and prove with sufficiency of evidence that the work in question accrued to the Claimants to the sole exclusion of other parties and/or a contracted entity. The Carrier asserts that the employee statements that they have performed snow removal in the past hardly meets the "burden of exclusivity" so widely accepted in this industry as the standard of proof necessary to support an alleged violation of the Scope Rule.

The Carrier argues that the Scope Rule here is general in nature, and it does not refer to "snow removal" as part of station "maintenance." The Carrier emphasizes that in the absence of such specific language, the Organization was required, but has failed, to present proof of an overwhelming past practice that allows for a conclusion that the Organization enjoys the exclusive right to the dispute work, under any condition. The Carrier emphasizes that it has employed snow removal contractors prior to the instant dispute.

Pointing to a Third Division Award, the Carrier further argues that in the absence

of a *prima facie* showing that the disputed work fell within the scope of the Agreement, the Carrier was not required to provide written notice of its intent to contract out the work. Citing a number of prior awards, the Carrier insists that the work of snow removal from station platforms is not reserved to the Organization. Accordingly, the Carrier insists that the Board should not consider the Organization's contentions that the Carrier violated the notice provisions.

The Carrier insists that it acted in good faith in issuing notice to the General Chairman and scheduling a conference. The Carrier points out that a snow storm "emergency" occurred between the issuance of the notice and the meeting. The Carrier emphasizes that although this emergency would have removed the requirement of delivering notice, the record shows that the Carrier already was in the process of fully complying with the notice requirements, even where it arguably did not need to comply.

The Carrier maintains that there is nothing in the record to suggest that the Carrier intentionally reassigned the work at issue in order to dilute any scope of work even "generally" performed by the BMWE. The Carrier further contends that the record shows that its BMWE forces, including the Claimants, were at work fighting snow during the period claimed. The Carrier argues that pay records establish that the Claimants each earned twenty consecutive hours pay on December 9-10, 2005. The Claimants therefore exceeded the seventeen hours that the contractor spent clearing snow during the same period.

The Carrier argues that the Claimants simply were not harmed as a result of the circumstances in this case. In fact, the Claimants were not available for this work. The

Organization has utterly failed to meet its burden of proof, and the instant claims are entirely groundless, excessive, and lacking in contractual support.

The Carrier ultimately contends that the instant claims should be denied in their entirety.

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

This Board has thoroughly reviewed the record in this case, and we find that although the Organization charges that the Carrier did not give the Organization notice pursuant to Rule 24 that the Carrier would be contracting out snow removal work at passenger stations, the record contains just such a notice dated November 29, 2005, and addressed to the Vice Chairman of the Organization. In that letter, the Chief Engineer clearly states the following:

> This letter is notification per Rule 24 of the current Agreement between Massachusetts Bay Commuter Railroad and the Brotherhood of Maintenance of Way Employees that MBCR will be contracting out snow removal at passenger stations. Based on past employee response to work overtime, contracting out is necessary to supplement the efforts of the existing work force to meet contractual requirements.

The record also contains similar letters sent by the Chief Engineer to the Organization representative in November of 2004 and 2003. Therefore, this Board finds that contrary to the Organization's claim, the Carrier did issue the proper notice pursuant to Rule 24 in November of 2005.

The unfortunate part of the factual pattern set forth in this record is that a snow

storm took place prior to the time that the parties were able to meet to discuss this potential subcontracting. There was no way to predict that storm, and the Carrier properly termed it an "emergency," which even excuses the Carrier from the requirements of Rule 24. Nevertheless, the Carrier did send out the appropriate notice prior to contracting out the work and the only violation here is not being able to hold the conference before the winter storm hit the area.

It is fundamental that the Carrier may contract out the work at issue in this case as long as it complies with the rules. This Board has upheld other claims where the Carrier failed to issue the proper notice. In this case, the Carrier met the requirements of Rule 24 and, therefore, the claim must be denied.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 4/9/09

CARRIER MEMBER

DATED: April 9, 2009