

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 38

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the current Agreement, specifically the Scope Rule when it failed to properly assign Scope covered work on the claim dates of August 18 & 20, 2009 and September 11, 17, 18 and 22, 2009 to the Claimant, Michael Stanford.
2. For this violation the Organization is requesting that the Carrier be required to compensate Claimant 8 hours for each claim date at his B&B Mechanic overtime rates of pay due to violation of the Rules cited for a total of 48 hours."

FINDINGS:

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it assigned certain Scope-covered work to Mechanical Craft employees, rather than to the Claimant. The Carrier denied the claim.

The Organization contends that the instant claim should be sustained in its entirety because the work in question was improperly assigned to Mechanical forces in violation of the Agreement's Scope rule, and because BMWED members exclusively have performed the work at issue, providing track protection for outside forces, since 1987. The Carrier contends that the instant claim should be denied in its entirety because the work in question does not fall within the Agreement's Scope Rule, because the Carrier's practice has been to train and utilize all Engineering Department field employees and

employees in other departments to perform such work, and because the work in question is not recognized as having been ordinarily performed by BMWED employees, although they have performed such work at times. The Carrier further points out that the Claimant was on paid vacation on August 18 and 19, 2009, so he was not available to perform the work on those dates, and he was fully employed on the other claim dates so he has not suffered any loss.

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 Agreement when it failed to assign the work at issue to the Claimant. Therefore, the claim must be denied.

Rule 1 states, in part:

While it is not the intent of the parties to either diminish or enlarge the work being performed in the territory under this Agreement, the work generally recognized as work ordinarily performed by the Brotherhood of Maintenance of Way Employees as it has been performed traditionally in the past in that territory will continue to be performed by those employees. Recognizing that it is extremely difficult to ensure strict compliance to the agreements negotiated by other parties and for management to be fully aware of the intricacies of the past practice at each point, the parties have inserted the word "ordinarily" into the above paragraph. The use of the word ordinarily is designed to preclude Scope/Classification Rule based claims and or grievances which arise as a result of either the assignment of Maintenance of Way employees to perform work customarily performed by other crafts or the erroneous assignment of other crafts to perform work customarily performed by Maintenance of Way employees at that location.

In this case, the Carrier has shown that it has been its practice in the past to train

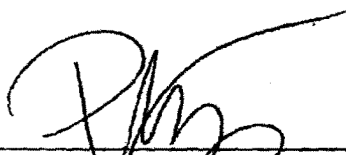
and use all Engineering Department field employees as well as Roadway Worker Protection employees to perform the work at issue. Although the Carrier admits that the BMW employees have been used to provide protection for other Engineering Department personnel, the Carrier contends, and there is no showing to contradict it, that those times were of limited duration. Consequently, the work is not generally recognized as "work ordinarily performed by the Brotherhood of Maintenance of Way Employees."

Moreover, the record reveals that the Claimant was on paid vacation on August 18 and 20, 2009, and was not available to perform the work.

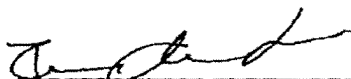
For all the above reasons, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: 11 / 17 / 11



ORGANIZATION MEMBER

DATED: 10/26/11