NON-PRECEDENT DECISIONS OF
PUBLIC LAW BOARD NO. 7094

PARTIES EMPLOYES TO THE DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY

DIVISION - IBT RAIL CONFERENCE

VS.

CSX TRANSPORTATION, INC.

FINDING:

This Public Law Board, upon consideration of the entire record and all of the evidence in all five (5) cases, find that the parties are Carrier and employe within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement; that it has jurisdiction over the disputes involved herein; and that the parties were given due notice of the hearing held.

In the Agreement establishing Public Law Board 7094, the parties stated at paragraph 8 that:

> The parties agree that the awards rendered by this Board shall have no precedential value and that each award shall affirmatively state that the award has no precedential value and shall not be referred to by either party in any other case.

The awards issued by Public Law Board 7094 in Cases 1, 2, 3, 4 and 5 conform to this agreement. None of the awards issued in Cases 1-5 have precedential value. These awards shall not be cited in any other case.

BACKGROUND

By agreement dated September 7, 2007, the Carrier and the Organization established, in accordance with Public Law 89-456, this board which shall be known as Public Law Board No. 7094, hereinafter the Board. The agreement provides for the Board's jurisdiction pursuant to Section 3 first and second of the Railway Labor Act, as amended. Initially, the parties listed three cases for resolution by the Board. Subsequently, the parties added two additional cases. Sherwood Malamud was named as the Neutral Member of the Public Law Board. Hearing on the five docketed cases

was held on July 3, 2008 at the offices of the National Railroad Adjustment Board in Chicago, Illinois. The representatives of the parties were afforded a full opportunity to present such evidence and arguments consistent with the agreement that created Public Law Board 7094. In accordance with that agreement, the decisions of this Public Law Board shall **NOT** have precedential effect.

The record for these 5-cases comprise thousands of pages including letters and awards on the subject of contracting in the railroad industry, particularly as the parties, Carrier CSXT, and the Organization, BMWE, have litigated this issue. Much of the record evidence narrates the history of that litigation in a series of letters between these parties setting out their positions extending over the period of 1999 through 2003. The parties include and their arguments refer to Public Law Board Decisions 6508, 6510 and several NRAB decisions that address the shifting burdens that develop in the presentation of a "Scope" case in the railroad industry.

The parties' submissions are in two parts. The exhibits pertain to the general position that each party adopts in a contracting case. The other part of the submission reflects the record, in the form of correspondence between the parties at the levels of appeal, claim and response, developed at the property in each case. In the following section of this Award, the Board addresses the issues involving contract interpretation that overarch and pertain to each of the five cases submitted. After addressing the contractual interpretation issues common to all of the docketed cases, the Board addresses each of the cases submitted seriatim.

Bargaining History and the Scope Language

June 1, 1999, the "split date," the effective date of the Collective Bargaining Agreement between CSX Transportation, Inc. and the Brotherhood of Maintenance of Way Employes, is the singular event that underlies this controversy over contracting out of Scope covered work. Prior to the parties accord to a System Agreement, one Collective Bargaining Agreement covering all the Maintenance of Way employes of the Carrier, the Carrier had absorbed 13 railroads. Each of the Carriers absorbed had their own collective bargaining agreement with the Organization, with a variety of terms and language setting out the Scope of work performed by Maintenance of Way employes and in many containing specific language that listed specific exceptions when the Carrier may contract work that otherwise would fall within the Scope of work to be performed by BMWE members.

When the parties established a single agreement, they created something new, a

national agreement in place of 13 separate agreements; they replaced approximately 400 employee classifications with 16; they established larger areas in which mobile gangs could operate in what the parties identified as service lanes across seniority districts thereby providing the Carrier with greater flexibility in the assignment of work. The parties replaced 13 **"Scope"** clauses with the scope language that is the focus of this dispute. It reads as follows:

SCOPE

> These rules shall be the agreement between CSX Transportation, Inc., and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work recognized as Maintenance of Way work, such as inspection, construction, dismantling, demolition, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences, road crossings, and roadbed, and work which as of the effective date of this Agreement was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees.
>
> The following work is reserved to BMWE members: all work in connection with the construction, maintenance, repair, inspection or dismantling of tracks, bridges, buildings, and other structures or facilities used in the operation of the carrier in the performance of common carrier service on property owned by the carrier. This work will include rail, guard rail, switch stand, switch point, frog, tie, plate, spike, anchor, joint, gauge rod, derail and bolt installation and removal; erection and maintenance of signs, such as mile posts, speed restriction signs, resume speed signs, crossing and station signs, warning signs, and signs attached to buildings or other structures (except billboards); construction of track panels; welding, grinding, burning, and cutting; ballast unloading, regulating, equalizing, and stabilizing; track and switch undercutting; cribbing between ties; track surfacing and lining; snow removal (track structures and right of way); road crossing installation and renewal work; asphalting of road crossings (unless required by outside agencies), culvert installation,

repairs, cleaning and removal; yard cleaning; security and ornamental fences; distribution and collection of new and used track, bridge and building material; operate machines, equipment, and vehicles; transporting maintenance of way employees; mowing; installation, maintenance, and repairs of turntables, platforms, walkways, and handrails; head wall and retaining wall erection; cleaning, sandblasting, and painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities; rough and finish carpentry work; concrete and masonry work; grouting, plumbing, and drainage system installation, maintenance, and repair work; cooling and heating system installation, maintenance, and repair work; fuel and water service work; roof installation, repairs, and removal; drawbridge operation and maintenance and any other work customarily or traditionally performed by BMWE represented employees. In the application of this Rule, it is understood that such provisions are not intended to infringe upon the work rights of another craft as established. It is also understood that this list is not exhaustive.

It is agreed that in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement; and it is also understood that work not covered by this Agreement which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement.

In the event the carrier plans to contract out work within the scope of this Agreement, except in emergencies, the carrier shall notify the General Chairmen involved, in writing, as far in advance of the date of the contracting transaction as is

> practicable and in any event not less than fifteen (15) days prior thereto. "Emergencies" applies to fires, floods, heavy snow and like circumstances.
>
> If the General Chairmen, or his representative , requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said Carrier and Organization Representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
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> All National Contracting Agreements apply, see Appendix "M"

Subsequent to reaching this Agreement, the parties disputed the meaning and reach of the Scope language. The Organization argues that the work specified in paragraph two of the Scope language may not be contracted out without the approval of the General Chairmen of the Organization. The Organization maintains that the Scope language establishes an "iron-clad" bar against the Carrier contracting out work reserved to Maintenance of Way employes.

The Organization maintains that the long detailed list of work reserved to Maintenance of Way employes and the work that traditionally and historically Maintenance of Way employes perform is subject to the contracting ban negotiated by the parties. Furthermore, the Organization argues that the unnumbered paragraphs four and five of the Scope language reflects language included in Article IV of the 1968 National Agreement. The language in paragraphs four and five serves to reinforce the protection of the performance of Scope work by Maintenance of Way employes through the creation of a "belt and suspenders" protective cloak, assuring that Maintenance of Way employes perform the work specifically listed in the Scope provision and work that historically and traditionally had been performed by Maintenance and Way employes.

The Organization interprets the Scope provision, particularly unnumbered paragraphs four and five as follows. The contracting parties established a procedure in the fourth and fifth paragraphs of the Scope provision, quoted above, that mandates

that the Carrier notify the Organization when the Carrier contemplates contracting out work which arguably may be subject to the Scope language. Upon request, the parties are to meet and confer. If no agreement is reached on the proposed contracting of the subject work, i.e., the Organization through its General Chairman does not agree, the Organization may grieve and rely on its contractual rights should the Carrier proceed to contract out the work covered by the notice. The contractual provision, paragraph five allows the Carrier to proceed to contract out the work at issue, subject to challenge by the Organization. Paragraphs four and five of the Scope language do not afford either the Organization or the Carrier any substantive right to contract out scope work. The Organization argues strenuously there is no other source that the Carrier may cite as authority for contracting out Scope work. The Organization reasons that in the absence of any other contractual source to contract out work covered by the Scope language, the contractual effect is to bar such contracting out should the General Chairman not agree to the proposed contracting out of Scope work.

The Carrier argues that the Agreement only requires that it provide the Organization with notice of its intent to contract out Scope work and, upon request, confer with the General Chairman. Should the parties disagree over the contracting out of said work, the Carrier may proceed to contract out the work. The Agreement does not limit the Carrier's right to do so. The use of the term "reserved" establishes the right of Maintenance of Way employes to perform the listed work and work historically and traditionally performed by Maintenance of Way employes to the exclusion of other employe crafts of the Carrier.

The Carrier maintains that its right to contract out, when it has a business justification to do so, is not impaired or limited by the language of the Agreement. Where the Carrier has a business justification for contracting out, such as it does not own the equipment necessary to perform the work, does not have qualified employes available to perform the work or if all employes are underpay or for any other business justification, it may contract out work listed in the Scope provision. The Carrier maintains that the absence of a list of exceptions as previously appeared in predecessor agreements in their scope provisions means that the Carrier may contract out Scope work for any business justification, not just the limited justifications that appeared in the scope language of one or more of the 13 predecessor agreements.

Although the parties are in the tenth year of the agreement at issue, the First Public Law Board 6508 chaired by Neutral Member Robert L. Douglas attempted to bridge the chasm separating the Organization and Carrier's interpretation of the Scope language and establish the rights and limitations of the parties in the case of contracting

out of Scope work listed in paragraph two and/or historically and traditionally performed by Maintenance of Way employes. Public Law Board 6508 at II, the section of the Award titled "The Meaning of the System Agreement" beginning at page 43 concludes as follows:

> The second paragraph of the Scope Rule of the June 1, 1999 System Agreement contains the following critically important and pivotal clause in the first sentence:
>
> "(t)he following work is reserved to BMWE members . . . ." The term "reserved" has a long history in the railroad industry as reflected by its presence in many prior collective bargaining agreements and by the special attention that it has received in many prior arbitration decisions. The decision of the parties, who are among the most sophisticated practitioners in the field of labor-management relations, to include the term "reserved" therefore reflects a calculated and knowing decision to enhance the pre-existing strong presumption that bargaining unit members must perform the subsequently enumerated work. As a consequence, the informed decision by the parties to include the term "reserved" in the Scope Rule confirms the understanding by the parties to strengthen the Scope Rule. Thus the second paragraph of the Scope Rule clearly and plainly indicates that only BMWE members have a right to perform the enumerated work.
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> With respect to the present dispute, the Scope Rule, however, has two other particularly important paragraphs: the fourth paragraph and the fifth paragraph. With the exception of the emergency situations exclusion, the notice requirements in the fourth paragraph and the conference opportunity in the fifth paragraph of the Scope Rule also provide a rather clear, plain, and well-established structure for the parties to follow when the possibility of contracting out may occur. In this regard, the record omits sufficient persuasive evidence to prove that the language in the Scope Rule where the bargaining history as reflected in the record vested the General Chairmen with the sole authority to bar

the Carrier from contracting out work if the parties fail to reach an understanding concerning the contracting out. In agreeing to this overall approach, the parties did not adopt the notice and conference requirements as a mere inconvenience to the Carrier's Engineering Department or to the Carrier's personnel in employee relations. On the contrary, the notice and conference requirements constitute a central, material, and vital part of the delicate balance the parties have achieved to address the operational needs of the Carrier and the job preservation concerns of the Organization.

The possibility that contracting out may occur, on its face, contradicts the reservation of the relevant work to BMWE members as set forth in the second paragraph of the Scope Rule. The parties, however, agree to leave the fourth paragraph and the fifth paragraph intact and the first paragraph intact. The decision by the parties to proceed in this manner indicates that the parties may never be able to agree in a clear, comprehensive, and complete way about contracting out. As a result, the juxtaposition of the second paragraph, the fourth paragraph, and the fifth paragraph creates an internal ambiguity in the Scope Rule. By doing so the parties essentially have resolved one thing: they have developed a tolerance for ambiguity protected by ultimate arbitral review of the relatively few cases that generate an impasse.

This approach is somewhat analogous to the ongoing tension between the parties over many years about remedies for contract violations. Many arbitral decisions exist that struggle to determine whether claimants may receive a monetary award when the claimants were fully employed at the time of the contractual violation. In Award No. 21646 (1977) (Ables, Referee), the Third Division observed:

> The Organization is well aware of the decisions issued under Article IV, in which compensation was denied where the employes were employed in their

> regular job and suffered no loss of wages. This precedent was set in Award 18305 (Dugan) where the "sole employment" concept was established in which damages were denied even upon finding a violation of the agreement. But the Organization states that for over 40 years the question of damages has swung back and forth like a pendulum in a grandfather's clock. "The pendulum is now on the side of payment because of lost earning opportunities." Recent Award 19899 (Sickles) and early awards before the National Agreement in Article IV gives comfort to the Organization. In these cases compensation was awarded for failure to notify or discuss in accordance with the agreement.

(Award No. 21646 at 3.) The decision by the parties to use such powerful language in the second paragraph of the Scope Rule while continuing to include the notice and conference provisions in the fourth paragraph and in the fifth paragraph without any defined exceptions (other than the reference to emergencies) and without an explicit prohibition against all contracting out constitutes persuasive evidence that the pendulum is now further on the side of the Organization. This determination is further buttressed by the decision of the parties to refer to the National Agreement in 1968, 1981 and 1996 in appendix "M" of the June 1, 1999 System Agreement and to include the Strongsville Agreement in appendix "U" of the June 1, 1999 System Agreement.[1]

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[1]APPENDIX "M"

SUBCONTRACTING - NATIONAL AGREEMENTS 1968, 1981, 1996

ARTICLE XV - SUBCONTRACTING

Section 1

The amount of subcontracting on a carrier, measured by the rate of adjusted engineering

In short and if the Carrier has complied in all respects with the notice and conference provisions of the Scope Rule as supplemented by the applicable national agreements, the Carrier must demonstrate a highly compelling reason to rebut the very strong presumption that the work covered by the second paragraph of the Scope Rule will be performed by BMWE members. As a consequence of the

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department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock levy protection for a dismissed employee, subject to the responsibilities associated with such protection.

Section 2

Existing rules concerning contracting out applicable to employees covered by this Agreement will remain in full effect.

APPENDIX "U"
MAY 23, 1999 STRONGSVILLE AGREEMENT AND SIDE LETTERS
MEMORANDUM OF AGREEMENT
BETWEEN
CSX TRANSPORTATION, INC.
and its railroad affiliates
AND ITS EMPLOYEES REPRESENTED BY THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

. . .

Section 7 - In lieu of Article I, Section 1 (h) of the Arbitrated Implementing Agreement, the parties have agreed that three specifically identified projects on Conrail lines to be operated by CSXT may be completed with contractors, if necessary (See attached list of projects). Otherwise, the subcontracting provisions of the various collective bargaining agreements will govern any subcontracting that is proposed between the effective date of this agreement and "split date". Thereafter, the terms of the National Subcontracting Rule (May 17, 1968, as amended by subsequent national agreements) will govern subcontracting matters under the new CSXT System BMWE Agreement.

> **way the parties drafted and adopted the present Scope Rule, such a determination must be made on a case-by-case basis after strict scrutiny of the justification offered by the Carrier to support the need for contracting out Scope-covered work.** Any change to this arrangement is a matter for yet further collective bargaining, not arbitration.
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> In reaching these conclusions, it should be noted that the record contains extensive conflicting evidence about certain aspects of the bargaining history between the parties that resulted in the ultimate adoption of the Scope Rule and the other provisions of the June 1, 1999 System Agreement. After a thorough review of all this conflicting evidence about the bargaining history, no basis exists to resolve such purported misunderstandings, different perspectives, and overall disagreements referred to in the record. (Emphasis added)

The Carrier accepts the precedential effect of the decision of Public Law Board 6508 in the cases to which that Board applied its findings, Cases 1-8, and the precedential effect of that award in contracting out cases generally and the five cases that are the subject of the non-precedential decision of this Public Law Board 7094.

The Organization, on the other hand, argues, in part, that the award of Public Law Board 6508 was palpably erroneous. The Organization argues strenuously that Public Law Board 6508 went astray, when it found an internal contradiction within the language of the Scope Rule between the language of paragraph two that clearly establishes that the work enumerated in that extensive list is reserved to BMWE members and the procedural language in paragraphs four and five.

The Organization notes that since 1968, the Carrier alerts the Organization of work that the Carrier contemplates contracting out. It affords the Organization the opportunity to request, and upon making such request, the Carrier convenes a conference meeting over the proposed work to be contracted out. The Organization maintains there is no internal contradiction. The language of the Scope provision is not ambiguous. The General Chairmen of the Organization may approve or veto the Carrier's proposal to contract out work that is subject to the Scope language.

The Carrier maintains that the System Agreement contains no language

prohibiting its contracting out Scope work. Had the parties intended to bar subcontracting, they would have done so in clear language. The negotiators of the June 1, 1999 System Agreement would not have left to implication a bar of contracting out, a subject matter that has been the source of much litigation between these parties.

The parties placed in evidence Exhibits A-I, a series of exhibits that they agreed should be submitted in each subcontracting case. Much of that record pertains to the status of subcontracting before the completion of the Conrail "carveup" and immediately subsequent to the parties' agreement and the effective date of the June 1, 1999 System Agreement. Public Law Board 6508, the Douglas Board, and 6510, the Elliott Goldstein Board, had much of this historical evidence in their records.

For its part, the Carrier in Exhibit H of its submission, introduced evidence that in the year 2000, it provided the Organization with 636 notices of its intent to contract out; the Organization filed 388 claims. In the prior year, 1999, the Carrier issued 833 notices on which the Organization filed 331 claims. The Carrier introduces this evidence to demonstrate that in the year that the Agreement became effective, there was no substantial difference in the number of claims filed by the Organization over the Carrier's subcontracting. The thrust of this evidence, the Carrier maintains, establishes the understanding of the Organization at the very time that the System Agreement became effective that the Carrier could and did contract out. The Organization understood immediately upon the adoption and implementation of the System Agreement that there was no absolute ban on the Carrier's contracting out.

In addition, the Carrier notes that between 1994 and 2000, it purchased new equipment totaling $10,830,068, and that in 2001 and subsequently, it plans on spending $8,200,000 on equipment.

Although the Carrier maintains that the December 11, 1981 Berge-Hopkins letter's principal purpose was to establish a joint committee of the Carrier and Organization, the letter articulated a good faith effort by the Carrier to reduce contracting out and to use Maintenance of Way forces as much as practicable. The Carrier does not consider the statement of a good faith effort to reduce subcontracting to establish an enforceable contractual commitment.

The Organization introduced evidence that the commitment to reduce the incidence of subcontracting through the use of Maintenance of Way forces was and is an enforceable commitment. The NRAB awards 29823, 30977, 31867, 32699, 33439, 35047, 35337, 37831, 37832, 37833, 37834, 37835, 37953,37954, 37955, 37956 and 37985

enforced that commitment. The Organization claims that it has relied on the Berge-Hopkins letter in hundreds of claims. If anything, the June 1, 1999 System Agreement and its strong Scope language resulted in less of a need for the Organization to rely on the Berge-Hopkins letter. The Scope Rule continues in effect the effectiveness of the Berge-Hopkins letter since it is a national subcontracting rule.

Public Law Board Award 6510 addresses a key issue raised by the Organization in this case, as well. The Organization argues that the Douglas Board, Public Law Board (PLB) 6508, determined that there was an internal contradiction in the Scope language of the System Agreement and as a result of that internal contradiction it concluded that under certain circumstances the Carrier may subcontract out work covered by the specific language of the Scope Rule. The Organization argues that PLB 6508 decision was palpably erroneous. The Organization argues that this Board, which has no greater authority than Public Law Board 6508,[2] should not adopt the reasoning of Public Law Board 6508 that there exists an internal contradiction in the Scope language. The Organization raised the same issue before Public Law Board 6510 chaired by Neutral Member Elliott Goldstein. It was the very next Board established subsequent to 6508 that considered this Scope issue in the context of applying the System Agreement between these parties. The Organization argues that PLB 6510 should find the analysis of the Douglas Board palpably erroneous.

PLB 6508 issued its decision in 2003. Public Law Board 6510's award issued on January 5, 2005. It considered the argument posed by the Organization, here, that the decision of Public Law Board 6508 chaired by Neutral Member Douglas was palpably erroneous. The Goldstein Board engaged in a thorough analysis of the Douglas award. The majority in PLB 6510 concluded that the Douglas majority did not come to a palpably erroneous conclusion, when it found an internal contradiction within the Scope Rule. The majority in PLB 6510 found that PLB 6508 did not err when it found that the contracting out of work specifically referenced and covered by the Scope Rule is permissible without the approval of the Organization's General Chairmen. In its review and discussion of PLB Award 6508, the Public Law Board chaired by Neutral Member Goldstein noted with approval that the Douglas Board's interpretation of the term used in the beginning of the second paragraph of the Scope Rule "reserved" was "a calculated and known decision to enhance the pre-existing strong presumption that bargaining unit members must perform the subsequently enumerated work." (Public Law Board 6508 at page 43 and quoted above)

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[2]Public Law Board 6508's decisions have precedential effect. The decisions of Public Law Board 7094 have no precedential effect.

The Board chaired by Goldstein continues in its analysis and notes that unnumbered paragraphs four and five of the Scope Rule set forth a procedure to be followed by the parties when the Carrier contemplates contracting out certain work. Had the parties in their bargaining of the June 1, 1999 System Agreement intended to ban all contracting except that agreed to and permitted by the Organization's General Chairman, they would have said so specifically and clearly. In the absence of such a ban, Public Law Board 6510 concludes that the ultimate decision of the Douglas Board, Public Law Board 6508, was **not** palpably erroneous.

Public Law Board 6510 then proceeds to set out the burden shifting that results in the analysis of a contracting case. The Organization bears the initial burden of establishing that the work in question falls within the specific categories of work enumerated in paragraph two or, in the alternative, that the work in question has been historically and traditionally performed by BMWE members. When the Organization establishes its prima facie case through the evidence submitted on the property that the work in question is covered by the Scope Rule, the burden shifts to the Carrier to present evidence on the property that it has complied with the notice requirements, and upon request met with the Organization in accordance with unnumbered paragraphs four and five of the Scope Rule.

Under the analysis set out by Public Law Board 6508, the Board chaired by Neutral Member Douglas, notes that the Carrier's obligation does not end with its presentation of evidence at the property of its compliance with the notice and conference requirements set out in unnumbered paragraphs four and five of the Scope Rule. The Carrier must provide a business justification for contracting out the work in question. The reasons that the Carrier provides for its action in the evidence presented on the property cannot be merely boilerplate assertions of lack of equipment and/or manpower. The Carrier must present in the evidentiary record it establishes on the property that it has "a highly compelling reason to rebut the very strong presumption that the work covered by the second paragraph of the Scope Rule will be performed by BMWE members." Under the mode of analysis established by PLB 6508 "such a determination must be made on a case-by-case basis after strict scrutiny of the justification offered by the Carrier to support the need for contracting out Scope-covered work." Public Law Board 6510 concludes that this burden shifting analysis set out by the Douglas Board was not palpably erroneous.

Furthermore, Public Law Boards 6508 and 6510 establish that a past practice that work of a certain type had been contracted out may no longer support the continuation of such contracting out practice subsequent to and under the terms of the June 1, 1999

System Agreement. For example, one of the cases addressed by Public Law Board 6510 involved the contracting out of hot asphalt work. Prior to June 1, 1999, the practice in place supported the contracting out of such work. Public Law Board 6510 noted that past practice no longer served as a valid basis for contracting out that work.

This Board, PLB 7094 addresses the specific defenses and other burden shifting issues that arise out of the contracting at issue in Cases 1 through 5. Before analyzing and applying the principles set out by the Douglas and Goldstein Boards by applying the burden shifting analysis to the five cases placed before PLB 7094, we determine the issue raised by the Organization whether the analysis of PLB 6508 and 6510 are palpably erroneous.

What does it mean that a decision is palpably erroneous? It is well established that an arbitrator in an arbitration award may make an error in fact or in law and a reviewing court should not set aside the award issued. Whatever palpably erroneous means, it articulates a standard for reaching a conclusion different from a prior Board or Arbitrator based on a standard that is greater than the standard followed by a court that is charged with the responsibility of reviewing an arbitration award. In other words, a Public Law Board should follow a precedent setting award issued by a prior board unless the decision of the prior board is **palpably erroneous**. The term palpably erroneous suggests that the level of error is so great that it is easily perceptible almost to the point of touch. This notion creates a standard that requires that the later board avoid second guessing the first board and only avoid following the precedent set by the prior board if the determination of that board is so at odds with a reasonable interpretation of the governing agreement that it does violence to the language of the agreement that is subject to interpretation.

The first question that must be addressed is should this Board review the analysis of Public Law Board 6510 and its conclusion that the decision of Public Law Board 6508 was not palpably erroneous or, in the alternative, whether this Board should just review the decision in 6508, the first to analyze and apply the new contract language found in the System Agreement.

This Board reviews the System Agreement. This Board reviews the decision of Public Law Board 6508, its interpretation of the new contract language. That, after all, is the central issue in question. Once it is determined that Public Law Board decision 6508 is not palpably erroneous, there is no claim that the mode of analysis adopted by Public Law Board 6510 and the method it spells out for applying the Douglas Board decision is incorrect. By analyzing and determining whether the decision of Public Law

Board 6508 is palpably erroneous, this Board has the opportunity to address one of the Organization's main claims.

The Organization argues that the Scope language is clear and unambiguous. Consequently, there is no need to review bargaining history. It makes this argument despite dedicating a significant portion of its submission to the issue of bargaining history.

The majority in Public Law Board 6508 determined that there was an internal contradiction in the Scope language that created an ambiguity. Although the Goldstein Board concludes that the crux of the Douglas analysis was not palpably erroneous, this Board 7094 finds that even if one were to conclude that the language of the Scope Rule is not ambiguous but is clear, it would not result in any significant change in terms of the application of the Scope language. Public Law Board 6510 and Public Law Board 6508 both note that the Scope Rule and the balance of the 1999 System Agreement contain no clear statement banning contracting out. The Organization argues that the language only permits subcontracting when the Organization's General Chairmen consents to such contracting out. In this regard, the language of the agreement, particularly the Scope Rule, is quite clear. Neutral Member Goldstein observes in Public Law Board 6510 at page 36-37:

> Given the provisions of Paragraphs 4 and 5, the conclusion contained in the Douglas Award that subcontracting out was contemplated cannot be found to be palpably erroneous, the majority reiterates. If the parties had intended to totally prohibit contracting out by the Carrier, absent consent by this Organization, they could have said so. No such disclaimer is found, given the incorporation of Paragraphs 4 and 5 into the current Scope Rule. Nowhere did the parties state that the inclusion of Paragraphs 4 and 5 providing a notice requirement in the fourth paragraph, if contracting out was contemplated, and the offering to the Organization in that circumstance a conference opportunity by way of the fifth paragraph's terms, was to be considered "mere surplusage," we rule.

Public Law Board Award 6510 continues on page 37 to note that:

> The claim of the Organization that these two paragraphs

> merely represented, effectively, a "no strike clause" is also insufficient to explain the inclusion of these paragraphs, as drafted, the majority further holds. Had it been the wish of the parties to merely provide for a "no strike" provision when improper contracting out occurred, it would have been a simple matter to write those words into this procedure, the majority of the Board rules.

The majority in Public Law Board 6510 then goes on to conclude:

> The critical factor, in the majority's opinion, is that management was given the right to subcontract in at least some instances by the provision for a procedure when that happens, as the Douglas Award states.

The majority in Public Law Board 6510 continues to address the Organization's claim that paragraphs 4 and 5 provide a procedure that accords no substantive right to subcontract, at page 38, as follows:

> _____Thus despite the seeming limitation of these paragraphs to conveying merely a procedure for dealing with sub-contracting disputes, and not substantive rights, that statement cannot reasonably be taken as an absolute. From the standpoint of the entire application of the broadened Scope Rule in this System Agreement must be found permission for contracting out by the Carrier, without regard to the Organization's consent. The language of paragraphs 2 and 4 and 5, by necessary implication, means precisely that, the majority holds, as did the majority in the Douglas Award. Reading the Scope Rule as a whole, and to give all its provisions meaning, requires that conclusion, the majority again states.
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> Consequently, there is present in this strengthened Scope Rule a defined procedure which may be triggered by Management's contracting out. At the very same time, the second paragraph of the Scope Rule clearly indicates that only BMWE members have a right to perform the enumerated work, as already mentioned above. For the

> Douglas Award to conclude that the tension between these provisions resulted in an "intended ambiguity" certainly cannot reasonably be deemed palpably erroneous, the majority of this Board specifically holds.

The argument comes full circle. Whether one starts with the Douglas Award and its findings of an internal tension between paragraph 2, and paragraphs 4 and 5 of the Scope Rule and one concludes therefrom that the System Agreement contemplates subcontracting by management without the Organization's consent; or whether one concludes that the language of the Scope Rule is clear and unambiguous and that the listed work in paragraph 2 is reserved to BMWE members, but there is no specific ban on contracting out, the result is the same. There is no total ban on contracting because the language of the System Agreement contains no such ban. Consequently, the absence of a clear statement of a ban on contracting out yields the same conclusion that some contracting is contemplated under the System Agreement.

Furthermore, the extensive record of letters exchanged between the parties stretching over the period of May 2001 through 2003 inclusive of the affidavits of negotiators to the June 1, 1999 System Agreement sets out the perspective of each party in its many disparate facets that all come to the same conclusion that the Carrier maintains that the System Agreement does not contain a ban on contracting out and the Organization vehemently stresses that the Carrier may only contract out upon receiving the consent of the General Chairmen to do so. Public Law Board 6508 determined that dispute. Public Law Board 6510 and the majority of this Board, 7094 conclude that the determination and analysis of PLB 6508 was not palpably erroneous.

This Board, 7094, now turns to apply the principles articulated by Public Law Boards 6508 and 6510 to the specifics of Cases 1 through 5.

Case No. 1
Case No. 2

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

Case No. 1

1. The Carrier violated the agreement when it assigned outside forces (Gibbs Construction, Tamper Corporation and Railworks) to perform Maintenance of Way work (site preparation, drainage pipe installation, track and switch laying and related work) between Mile Posts PLE 10.0

and PLE 40.4 on the Baltimore Service Lane commencing on May 6, 2002 and continuing, instead of Baltimore Service Lane employes D. Tropea, W. Greer, B. Mason, J. Santiago, G. Vogus, T. Sochor, A. Frollini, R. Stull, F. Muscatello, L. Heard, J. Williams, R. Dauer, J. Wilson, E. Velez, B. Donnelly, J. Bradley, L. Vodennicher, C. Dobbins, E. Larson, T. Melvin, R. Nestler, J. Trisch, T. Sproat, M. Whitacre, and R. Fairbaugh [Carrier's File 12 (02-0686] CSX.

2. As a consequence of the violation referred to in Part (1) above, Claimants D. Tropea, W. Greer, B. Mason, J. Santiago, G. Vogus, T. Sochor, A. Frollini, R. Stull, F. Muscatello, L. Heard, J. Williams, R. Dauer, J. Wilson, E. Velez, B. Donnelly, J. Bradley, L. Vodennicher, C. Dobbins, E. Larson, T. Melvin, R. Nestler, J. Trisch, T. Sproat, M. Whitacre, and R. Fairbaugh shall now be compensated at their respective rates of pay for an equal proportionate share of all hours (straight time and overtime) worked by the outside forces in the performance of the aforesaid work commencing May 6, 2002 and continuing.

3.

Case No. 2

1. The Carrier violated the agreement when it assigned outside forces (Railworks and Marta) to perform Maintenance of Way work (track, switch laying and related work) between Mile Posts PLE 10.0 and PLE 40.4 on the Baltimore Service Lane commencing on May 13, 2002 and continuing, instead of Baltimore Service Lane employes P. Burns, R. Brumley, H. Korn, T. Mattie, T. Koon, A. Colecchi, F. Hone, L. Silvestre, L. Stillo, M. Stasik, M. Hixenbaugh, M. Galiyas, S. Kenney, Jr., E. Keffer, Jr., T. Pierce, W. Davis, T. VanSickle, S. George and D. Habrat [Carrier's File 12 (02-0687)].

2. As a consequence of the violation referred to in Part (1) above, Claimants P. Burns, R. Brumley, H. Korn, T. Mattie, T. Koon, A. Colecchi, F. Hone, L. Silvestre, L. Stillo, M. Stasik, M. Hixenbaugh, M. Galiyas, S. Kenney, Jr., E. Keffer, Jr., T. Pierce, W. Davis, T. VanSickle, S. George and D. Habrat shall now be compensated at their respective rates of pay for an equal proportionate share of all hours (straight time and overtime) worked by the outside forces in the performance of the aforesaid work commencing May 13, 2002 and continuing.

BACKGROUND

CASES 1 AND 2

Case 1
Carrier File 12 (02-0686)
BMWE File PROPEAA 302

Case 2
Carrier File 12 (02-0687)
BMWE File BRMULEIA 102

The claim as stated in Case 1 reads:

> This claim is for all hours at claimants' straight time, time and one half and double time rates of pay from May 6, 2002 thru and continuing until this work is completed, when the Carrier violated the Scope, Rule 1, Rule 3, Rule 4, of our June 1, 1999 Collective Bargaining Agreement, the 1981 National Agreement, when it called and used (25) twenty-five employees of an outside contractor known as Gibbs Construction, Tamper Corporation and Railworks, to perform the claimants' work at PLE MP 10.0 and PLE MP 40.4 on the Baltimore Service Lane. (This claim was postmarked June 3, 2002and quoted from the Carrier Submission for Docket No. 1)

The claim as stated in Case 2 reads:

> This claim is for all hours at claimants' straight time, time and one half and double time rates of pay from May 13, 2002 thru and continuing until this work is completed, when the Carrier violated the Scope, Rule 1, Rule 3, Rule 4, of our June 1, 1999 Collective Bargaining Agreement, the 1981 National Agreement, when it called and used (19) nineteen employees of an outside contractor's known as Marta and Railworks to perform the claimants' work at between PLE MP 10.0 and PLY MP 40.4 on the Baltimore Service Lane.

Both claims were filed on the same day, July 3, 2002, and both were denied on August 30, 2002.

OPINION

The Award in Cases 1 and 2 is governed by paragraph 8 of the Agreement between these parties establishing Public Board 7094, in that:

> The parties agree that the awards rendered by this Board shall have no precedential value and that each award shall affirmatively state that the award has no precedential value and shall not be referred to by either party in any other case.

Although initially, the Organization raised an issue concerning the Carrier's failure to provide proper notice of the work to be contracted out, the Carrier established at the property that it issued three notices concerning the work involved at MP PLY 16.8 - PLE 43.3 (02-0686 TROTEAA 302 - Case 1 originally filed on behalf of 25 employees.) The Organization withdrew the claim of Muscatello who was under medical supervision during the period in question.

The notices for the work provided by the Carrier are dated March 25, May 16 and June 24, 2002. The Board concludes that the Carrier properly noticed the Organization of its intent to contract out the work that involves the laying of some 30 miles of track, the installation of 6 switches, trenching along the way for proper drainage, the retirement of old and laying of concrete ties.

The Organization bears the initial burden of proof. It must demonstrate that the work at issue falls within the Scope language. The Organization has met this burden. The Scope language reads in material part as follows:

> The following work is reserved to BMWE members: all work in connection with the construction . . . dismantling of tracks in the operation of the Carrier in the performance of common carrier service on property owned by the carrier. This work will include rail switches and, switchpoint, frogs, tie, bolt installation and removal . . . welding, grinding, burning, cutting; track and switch undercutting; cribbing between ties; covert installation; . . . distribution and collection of new and used track, bridge and building material; . . . and maintenance and any other work customarily or traditionally performed by BMWE represented employees. . . . It is also understood that this list

is not exhaustive.

In its March 25, 2002 notice the Carrier indicates that the following work will be subcontracted out for the reason stated under reference number 3041-12-02-12 (BA) :

> This letter will serve as notification of the Carrier's intent to contract to level 61,248 LF of road bed after track retirements on the Pittsburgh Subdivision Three Rivers East/West Seniority Districts, between milepost PLY 16.8 and PLE 43.3 Pittsburgh, PA. The proposed start date is September 1, 2002.
>
> The Contractor will provide the equipment with operators to perform this work. Carrier does not have the equipment or skilled forces available from active or furlough to complete this work in the required time. . . . This work has historically been done using contractors. Carrier anticipates approximately 20 man-days to complete this project. (Carrier Exhibit A-1) (Organization Exhibit Attachment 5 to Employes' Exhibit G-6A Sheet 1)

The Carrier issued a second notice dated March 25, 2002 under reference number 12-02-02-08. It reads, as follows:

> This letter will serve as notification of the Carrier's intent to Contract the following work to be performed on the Pittsburgh Subdivision three Rivers East/West Districts, between milepost PLY 16.8 and PLE 43.3 Pittsburgh PA.
>
> Furnish/Install 50LF of 36" PCMP one location open cut method
> Furnish/Install 1,390 LF of 24" PCMP 29 locations open cut method
> Furnish/Install 10 LF of 18" PCMP one location open cut method
> Furnish/Install 155 LF of 12" PCMP two locations open cut method
> Furnish/Install 170 LF of 24" steel pipe three locations jack & Bore method
> Furnish/Install 100 Square yards asphalt paving
> Furnish/Install three catch basins

> Contractor will provide essential equipment (i.e. excavators, dump trucks, rollers, graders, dozers, compactors, paving machines). Carrier does not have the equipment or skilled forces available from active of furlough (sic) to complete this work in the required time. . . Carrier anticipates approximately 175 man-days required to complete this project. (Attachment 1 to Employes' Exhibit G-3A sheet 1) and Carrier Exhibit F-Docket 2)

The Organization through its General Chairman Perry K. Geller, Sr. responded by letter dated April 1, 2002 to the March 25, 2002 notice(s) in which he opposed the contracting out and requested a conference.

On May 16, 2002 the Carrier issued the following notice to the Organization. In material part the May 16 notice states as follows:

> This letter is notification of the Carrier's intent to contract to have installed 68,904 concrete ties, build 10.5 miles of new track, assemble and install 6 switches complete, install seals and flash-butt welds, remove 45,408 TS of track, undercut track, bulldoze and restore drainage and remove one bridge. This project will encompass an area of the Pittsburgh Subdivision between milepost PLY 9.1 and PLE 41.3, Pittsburgh, PA. The proposed start date is on or about May 31, 2002.
>
> Contracting this work is necessary by fact the Carrier does not own a concrete tie machine, nor have the forces with the expertise of equipment to complete this work. The equipment P-811, Harsco concrete construction machine) is not available for lease without operators. In addition, Carrier forces are working other equally important projects that cannot be deferred; therefore, they are not available to perform this work. However, CSX Service Lane Work Team's will surface all track and the Carrier will hire 15 additional employees to supplement this project. Contractor will provide the essential equipment . . . Carrier anticipates approximately 1150 man-days to complete this project. There are no furloughed employees on the Three Rivers Seniority District.

Wilson, the Carrier's Senior Director Labor Relations suggested a conference date for May 29, 2002 on this contract. General Chairman Geller, by letter dated May 21, 2002, opposed the contracting out of this work. Geller noted that:

> The Carrier has strangled BMWE forces through attrition and refused to hire and train new employees. Now it is contended that the Carrier does not have sufficient BMWE manpower to perform maintenance of way work.

On June 24, 2002 the Carrier issued the following notice which in material part states as follows:

> This letter will serve, as notification of the Carrier's intent to Contract for in-track insulated joint installation on the Pittsburgh Subdivision on three (sic) Rivers East/West Seniority Districts, between milepost PLY 16.8 and PLE 43.3 Pittsburgh, PA. The proposed start date is July 9, 2002.
>
> The contractor will provide the equipment with operators to perform this work. This is a special process developed by contractor to rework insulated joints in track. Carrier does not have the equipment or forces available from active or furlough to complete this work in the required time. CSX forces will provide a flagman to protect track. This work has historically been done using contractors. Carrier anticipates approximately 120 man-days to complete this project.

Senior Director Labor Relations Wilson set July 3, 2002 as a conference date should the Organization desire to meet and confer over this contract. (Carrier Exhibit C-1) By letter dated June 28, 2002 the General Chairman Geller stated the Organization's opposition to this contracting out.

In the March 25 and May 16 notices, the Carrier sets out general and what the majority of the Board finds to be boilerplate defenses/justification for contracting out this work. With regard to the Carrier's claim that it did not have sufficient employees, the Organization argued at the property that there are 1300 employees assigned to seniority districts in the Baltimore Service Lane. Furthermore, in its letter dated August 18, 2003, as part of the record developed on the property, the Organization noted that

in 1986 there were 149 trackmen in the West seniority district and 71 in the East Three Rivers Seniority District. The Three Rivers East and West districts' trackmen fell to 80 in the West district and 36 in the East district by 1992. By 2003, that number fell to 29 in the West and 23 in the East seniority district. The Organization punctuates its argument that the Carrier has failed to maintain sufficient forces to perform maintenance of way work. The defense of inadequate forces should not be available to the Carrier. The majority of the Board agrees.

The Carrier argued at the property that there exists a past practice in the Three Rivers East and West seniority districts to contract out projects of this magnitude, the laying of concrete ties and track and the installation and reworking of switches. PLB 6510 noted, with the adoption of the System Agreement with its expanded Scope language, the assertion of the existence of a past practice will no longer serve as a defense to a contracting out claim. It does not serve as an effective defense to the Organization's claim nor does it serve to justify the Carrier's action to contract out the work noticed in the 2-Notices dated March 25, 2002.

In its May 16, 2002 notice, the Carrier establishes that it does not own the P-811 Harsco concrete tie equipment and it cannot lease that equipment without an operator. The Organization did not effectively rebut this evidence. The Carrier asserts that since it is proper to contract out the operation of the concrete tie equipment, the P-811 Harsco with an operator, therefore, it is appropriate that the remainder of the work be contracted out, as well. There is no requirement that the Carrier piecemeal the work.

The Organization complained at the property that the Carrier did not provide the contractual 15-day notice for the work referenced in its May 16 notice. The contractor started the work referenced in the May 16 notice on May 13. The May 16 notice does not conform to the contractual 15 day requirement. The Board finds that providing notice on May 16 for work that began on May 13 and convening a conference on May 29 for work already in progress reduces the contractual notice provision to a nullity. The violation of the 15-day notice requirement is sufficient to justify the Organization's claim.

Furthermore, with regard to the 2 projects subject to the March 25 notices and the May 16 project, the Carrier failed to establish the defense of lack of availability of qualified Trackmen through compelling evidence that withstands strict scrutiny. The record establishes the availability of a large number of Trackmen in the Seniority Districts comprising the Baltimore Service Lane, who would be available for these projects. The record in this matter developed at the property does not reflect the date

on which the three contracts were actually completed. The Carrier hired 15 additional Maintenance and Way employees for this entire project. The Carrier maintains that the work could not be completed in a timely fashion. The Board is unaware of the final date the noticed work was completed.

The Carrier failed to establish the need to contract out the work in question at the level of the evidentiary standard articulated by PLB 6510. The Carrier failed to present compelling evidence of a need to contract out the work covered by both March 25 notices and the May 16 notice.

The Carrier's June 24, 2002 notice, established that the contractor developed a special process for the installation of these switches. The work in question needed to be done in this manner. The Organization was unable to effectively rebut this evidence. The Board concludes that the Carrier, therefore, has met its evidentiary burden and established through compelling evidence the need to contract out the work subject to the June 24 notice. In this regard, the Carrier's contracting out this work did not violate the System Agreement.

Duplicative Filing

The Carrier issued four notices: 2-dated March 25; 1-dated May 16, and 1-dated June 24. The Organization filed its claims concerning these notices on July 3, 2002. The Carrier argued for the first time at the Arbitration hearing that the 2-claims are duplicative. The Carrier claims the Board lacks the jurisdiction to determine the second of the two cases. At the Arbitration hearing, the Organization responded that the Carrier's claim raises a procedural rather than a jurisdictional issue. In as much as, it was not raised at the property, the Carrier waived this claim.

The Organization argued at the Arbitration hearing that Claims 1 and 2 are not pyramided one on the other. Claim 1 pertains to road bed work in preparation for the laying of 30 miles of track. Claim 2 pertains to the laying of that track. In addition, there are different claimants for each claim.

The Board agrees with the Organization's analysis. Claim 1 was filed on behalf of 25 employees, primarily assigned to the Three Rivers West Seniority District (Carrier Docket Case 1- 12-0686 Tropeaa302). Claim 2 (12 02-0687 BRMU LEYA102) was filed on behalf of 19 employees assigned to the Three Rivers East Seniority District. Each of the segments of the work were the subject of different notices. The Carrier processed both claims at the same time, in the same manner. The allegation that these claims

should have been processed in some other fashion is procedural in nature. The claims are not duplicative. The Claims reference the same overall project. Each covers different contracts covering different segments of a large project. The Board concludes that the Carrier's objection to the procedure followed by the Organization was waived, when it was not raised at the property.

SUMMARY

In the above analysis, the Board concludes that the Carrier violated the language of the Scope provision by contracting out the work specified:

1) in the March 25 notice that involved the leveling of 61,248 LF of road bed after track retirements on the Pittsburgh Subdivision Three Rivers East/West Seniority Districts, between milepost PLY 16.8 and PLE 43.3 Pittsburgh, PA.;

2) in the other March 25 notice, the installation of PCMP pipe of various lengths in preparation for the laying of track;

3) in the May 16 notice the installation of 68,904 concrete ties, the building of 10.5 miles of new track, the assembly and installation of 6 switches complete, the installation of seals and flash-butt welds, the removal of 45,408 TS of track, that includes the undercut track, bulldoze and restore drainage and remove one bridge. It encompassed an area of the Pittsburgh Subdivision between milepost PLY 9.1 and PLE 41.3, Pittsburgh, PA. The Board finds the Carrier liable due to its failure to provide the Organization with timely notice for this work.

The Board concludes that the Carrier did **not** violate the Scope provision, instead it established by compelling evidence the need to contract out the work referenced in the June 24, 2002 notice the in-track insulated joint installation on the Pittsburgh Subdivision on Three Rivers East/West Seniority Districts, between milepost PLY 16.8 and PLE 43.3 Pittsburgh, PA.

REMEDY

The Carrier stated at the Arbitration hearing that it no longer contests the Board's fashioning a compensatory remedy should the Board conclude that the Carrier's contracting out violated the Scope provision of the System Agreement. Consistent with PLB Awards 6508, 6510, and NRAB Award 35337, this Board fashions a compensatory award to preserve the integrity of the System Agreement. Since the

claimants were otherwise employed during the time that the contracted work projects delineated in (1), (2) and (3), above, were performed by the various contractors, the Board does not award premium pay for the work so performed, even though some of the work was performed by the contractors' own employees at premium times and rates.

To retain the integrity of the Agreement, the Carrier shall compensate the 44 Claimants in the East and West Three Rivers Seniority Districts at their appropriate rate, at straight time rates, pro rata for the amount of time, man-hours equivalent, worked by the contractors' employees as billed by the contractors to perform the work involved in these claims.

AWARD

With the exception of the Claim associated with the June 24, 2002 Notice, the claims in Cases 1 and 2 are sustained in accordance with the Findings. The Claim associated with the June 24, 2002 Notice, Claim 2, is denied.

NON-PRECEDENT DECISION OF
PUBLIC LAW BOARD NO. 7094

Case 3
CSXT File No. 12 (04-0128)
BMWE File No. H513014200
DORAZIOC203
NRAB Case No. 05-3-165

STATEMENT OF CLAIM:

1. The Carrier violated the agreement when it assigned outside forces (Northeast Trenching Company & Enviro-Com Construction Company) to perform Maintenance of Way work (saw cutting concrete and asphalt, remove soil and rip rap, excavate trench, remove/install pipe, install new catch basins, repair existing catch basins and related work) in connection with upgrading Station wastewater pretreatment system at the Collinwood Yard Diesel Terminal in Cleveland Ohio beginning October 13, 2003 and continuing, instead of Great Lakes Service Lane employes, J. D'Orazio, S. LaCavera, G. Pongonis, R. Zinni, F. Hoyt, P. Shea, R.

Sheridan, A. Colarusso and P. Massari [Carrier's File 12 (04-0128) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimants J. D'Orazio, S. LaCavera, G. Pongonis, R. Zinni, F. Hoyt, P. Shea, R. Sheridan, A. Colarusso and P. Massari shall now each be compensated for all straight time and overtime hours expended by the outside forces in the performance the aforesaid work beginning October 13, 2003 and continuing.

BACKGROUND

The Carrier contracted this large project to upgrade the wastewater pretreatment system located at the Collinwood Yard Diesel Terminal and to segregate storm water at this yard. The Carrier acquired this facility in the Conrail carveup. Upon acquisition of the Collinwood Yard, it became clear to management that the aging wastewater treatment facility required extensive replacement and upgrade. The Carrier contracted, on a turnkey basis, to have this extensive renovation work completed. This project held some priority, because of the possibility of civil penalties that may have been imposed had illegal emissions seeped into the ground or flowed from and out of the yard.

The claimed work is but a small portion of the totality of the project. Most of the work to be completed by Carrier forces would require close coordination between the contractor and the Carrier. Much of the work involved electrical and sheet metal work that does not fall within the Organization's scope of work. The Organization argued at the property that it did not seek any of the work not covered by the Scope rule delineated in the June 1, 1999 System Agreement.

The Carrier provided notice of this project to the Organization by letter dated June 27, 2003. By letter dated July 1, 2003, General Chairman Geller requested a conference. A conference was held on July 9, 2003. The Carrier amended the original notice by letter dated September 24, 2003. In the amended Notice, the Carrier removed certain work initially listed as work to be performed by the Carrier's forces. Under the amended Notice this would be contracted out. It asserted lack of available manpower in that its forces were otherwise engaged as the reason for the September 24, 2003 amendment to the Notice. The Organization requested and a conference was held concerning the amendment on October 9, 2003.

The Carrier presented compelling evidence that the work in question is but a small part of a much larger project. Consequently, it need not piecemeal the project in

order to have BMWE forces perform work on the project that would arguably be subject to their work jurisdiction. The Carrier cites the NRAB Award No. 36716, Nancy Eischen Referee, and NRAB Award No. 30633, Gil Vernon referee. In both cases, the claimed work by the Organization constituted but a small part of the total project. The Boards denied each of the two claims based on the principle that the Carrier need not piecemeal a project to provide work to the Organization's members.

There is one segment of the project that from the evidence presented is separate from and preliminary to the larger project of trenching and replacement of pipe associated with the upgrade of the wastewater facility and the segregation of storm water at the Collinwood Yard. Originally, the Carrier had noted that its forces would perform this segment of the work in its original notice dated June 27, 2003. The Carrier anticipated that the entire project would utilize 7200 man-hours to complete the project. The list of the work contracted that the Carrier attached to the notice exceeds two pages.

On September 24, 2003, the Carrier amended the June 27 notice to delete the statement that the Carrier "will remove unused track of the North side of the truck dock located at the West end of the Diesel Locomotive Shop." Initially, the Carrier planned to have its forces perform this work. However, due to lack of available Maintenance and Way employes, the Carrier decided to add this work to the work contracted out.

OPINION

The Award in Case 3 is governed by paragraph 8 of the Agreement between these parties establishing Public Board 7094, in that:

> The parties agree that the awards rendered by this Board shall have no precedential value and that each award shall affirmatively state that the award has no precedential value and shall not be referred to by either party in any other case.

The Board concludes that this segment of the work, the removal of track at the North side of the truck dock located at the West end of the Diesel Locomotive Shop is sufficiently segregated from the main project, the upgrade of the wastewater treatment plant and segregation of storm water that it is independent of the large project and at most preparatory to it. The reason for the subcontracting was the unavailability of employees. The Organization submitted a study completed in 1999 of staffing levels of

Maintenance and Way forces that indicates that the Carrier has not maintained its forces at a level sufficient to address the maintenance projects in this area including the Collinwood Yard. NRAB Award 4765 and more recently, PLB 6508 and particularly 6510, establish that the Carrier must have compelling evidence of the need to contract out. The Carrier has not met that burden as to the unavailability of employees in relation to the removal of track at the West end of the Diesel Locomotive Shop. The Carrier could have planned its work in contemplation of the removal of track at the Diesel Locomotive Shop.

The Board concludes that the Carrier did not violate the System Agreement when it contracted to upgrade the wastewater treatment facility and segregate storm water. The preliminary work of removal of track is work that is preliminary to and not part and parcel of the overall contract. It only required coordination to the extent that it had to be done first. The Carrier did not provide compelling evidence that the work in question, the removal of the track, could not be done by Carrier forces on an overtime basis in a discrete and timely fashion. Accordingly, the Board concludes that the Carrier violated the System Agreement to a limited extent when it amended the notice to include the removal of track as part of the work to be performed by the contractor rather than by Carrier forces.

In the course of processing this claim at the property, the Organization requested copies of the contract between the Carrier and the contractor. The Carrier refused. At the last step at the property, the Carrier asserted that information would be made available if a violation of the agreement were found. The Carrier's refusal to provide the time cards for the contractors' employees prevented the Organization from checking the time worked by the Contractor's employees to perform the claimed work. More importantly, the request to view the contract between the Carrier and the contractor provides the information necessary for the Organization to determine the extent to which the contractor had to perform the work and in accordance with what schedule and the time frame in which the work had to be completed. Under Rule 24.i. the Carrier had a contractual obligation to provide this information to the Organization.

The Board determines that the penalty for failure to provide the Organization with the copy of the contract between the Carrier and the contractor in a timely fashion when requested requires redress. Frequently, such failure would result in the formulation of an adverse inference or finding of fact. In this case, clearly the scope and complexity of the work on most of this project does not fall within the jurisdiction of BMWE members. This conclusion is not dependent on the information that would result from the timely production of the contract requested by the Organization.

REMEDY

In the above discussion, the Board concludes that work preliminary to this project, separate and apart from it, was excluded from the work to be contracted out and was to be performed by the Carrier's forces. This work of removing track at the West end of the Diesel Locomotive Shop should have remained as work performed by BMWE members. Since all claimants were otherwise underpay and some received New York Dock benefits/compensation, the Board would have directed that the Carrier pay claimants at straight time rates. However, to address the Carrier's refusal to comply with Rule 24i and provide the Organization with the contract between the contractor and the Carrier, the Board determines that the Carrier pay Claimants at their appropriate rate, pro rata to the hours worked the Contractor's employees as billed by the Contractor, but at premium rates rather than straight time rates for the man-hours worked by contractor employees removing track from the North side of the truck dock located at the West end of the Diesel Locomotive Shop, less the sums paid to claimants who received New York dock compensation during the period in question.

AWARD

The above claim is denied, in part, in accordance with the findings set forth above. To the limited extent set out in the above Findings, it is sustained in part.

NON-PRECEDENT DECISION OF
PUBLIC LAW BOARD NO. 7094

Case 4
Carrier File #: 12(02-0209)
BMWE N.McGraf

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

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (road crossing renewal, rail welding and related work) between Mile Posts 0.0 and 0.7 at Stratford, Connecticut from November 5 through 30, 2001 [Carrier's File 12 (02-0209) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimants N. McGraf, P. Bessette, J. Rossman, E. LaPoint, J. Reighton, C. Shelton and K. Hoffman shall now each be compensated for one-hundred sixty (160)

> hours at their respective straight time rates of pay and forty (40) hours at their respective time and one-half rates of pay."

Jurisdiction of PLB 7094 for what is Case 4,. here:

By letter dated February 27, 2008, the parties agreed to transfer Carrier Case No. 12-02-0209 Claimant M. J. McGrath, et al. which was before P.L.B. No. 6628, as Case No. 1 to this Board, P.L.B. 7094 as Case No. 4. In addition, they agreed to transfer Carrier Case No. 12-04-1197, Claimant P. W. Stolpner, et al. that was listed with the N.R.A.B. No. 06-3-619 N.R.A.B. Docket No. MW-39818 to this Board 7094, as Case No. 5.

BACKGROUND

The Carrier provided notice to the Organization by letter dated October 11, 2001, Notice No. 3041-12-01-60 (AL) of its intent to contract out "the renewal of four grade crossings on the ZS Stratford industrial track between Mile Posts 0.0 and 0.7 at Stratford, Connecticut." The crossings are located at Avon Street, Moffit Street, Stag Avenue and Stratford Avenue. Seven contractor employees began to perform this work on December 27, 2001. The contractor's employees worked 160 straight time and 40 overtime hours in the performance of this work.

The Organization argues that the work in question, asphalt paving at crossings, is its work. It highlights the pertinent language of the Scope provision in the 1999 System Agreement that reads in pertinent part as follows:

> The following work is reserved to BMWE members: all work in connection with the construction, maintenance, . . . of tracks, . . . and other structures or facilities used in the operation of the carrier in the performance of common carrier service on property owned by the carrier. This work will include . . . road crossing installation and renewal work; asphalting of road crossings (unless required by outside agencies), . . . and any other work customarily or traditionally performed by BMWE represented employes.

The Carrier asserts two main defenses to this claim. It argues that the Carrier did not have personnel and equipment available to perform this work. Its second defense is that the track in question, which is part of a three mile segment, is not owned by the Carrier.

The Organization argues that the Carrier issued the notice and made the

arrangements for the contractor to perform this work. The Carrier inspects this segment of track and has in the past corrected the gauge of the track, when necessary.

OPINION

The Award in Case 4 is governed by paragraph 8 of the Agreement between these parties establishing Public Board 7094, in that:

> The parties agree that the awards rendered by this Board shall have no precedential value and that each award shall affirmatively state that the award has no precedential value and shall not be referred to by either party in any other case.

The parties established at the property that the three mile segment of track on which the four grade crossings are located and on which the paving work was done is owned by Amtrak. The track is regularly maintained by Metro North, a commuter rail. The state of Connecticut paid for the repair and paving work to the track. There is no dispute that the Carrier's track inspectors inspect this segment of track. The Carrier does not refute that it has replaced ties to bring the track into gauge. Nonetheless, the language of the Scope provision is quite clear. It states that the work reserved to BMWE members is related to "facilities **used in the operation of the carrier in the performance of common carrier service on property owned by the carrier**." (Emphasis added) The Organization has not met its burden of proof to establish that the rail in question is used by the Carrier, i.e., its trains use this track for the transport of freight. The Board concludes that the Carrier does not own the track in question. The System Agreement's Scope language, by its own terms, is inapplicable to this project.

AWARD

Claim denied.

NON-PRECEDENT DECISION OF
PUBLIC LAW BOARD NO. 7094

Case 5
File: 52-30-15026
CSXT File No. 12 (04-1197)
BMWE: P. Stolpner
NRAB Case 06-3-619

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned outside forces (Balfour Beatty Corporation) to perform Maintenance of Way work new track construction) at the Braintree Yard, Braintree, Massachusetts beginning on June 28, 2004 and continuing [Carrier's File 12 (04-1197) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimants P. Stolpner, R. Kenney, W. McVay, A. Bruscini, S. Falzone, J. McMahon, P. Kelly, M. Beauvais, T. O'Conner (sic), K. Nichols and R. Viereck shall now each be compensated at their respective and applicable rates of pay for all straight time and overtime hours worked by the outside forces in performing the aforesaid work beginning June 28, 2004 and continuing.

Jurisdiction of PLB 7094 for what is Case 5. here:

The claim dated August 19, 2004 was denied on July 29, 2005 by the Director of Labor Relations. The Director confirms a conference held on this claim on May 31, 2005. The General Chairman Hurburt requested and obtained a 60-day extension to file this case with the third division of the NRAB which was accomplished on December 1, 2006.

By letter dated February 27, 2008, the parties agreed to transfer Carrier Case No. 12-02-0209 Claimant M. J. McGrath, et al. which was before P.L.B. No. 6628, as Case No. 1 to this Board, P.L.B. 7094 as Case No. 4. In addition, they agreed to transfer Carrier Case No. 12-04-1197, Claimant P. W. Stolpner, et al. that was listed with the N.R.A.B. No. 06-3-619 N.R.A.B. Docket No. MW-39818 to this Board 7094, as Case No. 5.

BACKGROUND

By letter dated March 15, 2004, the Carrier through Notice 3041-12-04-03 (AL) notified the Organization, as follows:

This letter will serve as notification of the Carrier's intent to

> contract for construction of 2,325 feet of yard track and (4) no. 8 turnouts including sub-base and pre-ballast, in CSXT's Braintree Yard, Mile Post QMB 0.0, Braintree, MA.
>
> The Contractor will provide all labor and equipment such as backhoes, excavators, pay loaders, dump trucks, spikers, tampers and regulators to complete the construction. There is insufficient manpower and equipment on the Sudivision to perform this work. There is some urgency to complete the project as it is part of a MBTA (Massachusetts Bay Transportation Authority) track replication effort. All Carrier forces are committed to other critical programs work including rail defect removal, switch ties, surfacing, gauging and road crossing repair. It is anticipated that this project will begin on or about April 1, 2004 and will take approximately 14 weeks to complete.
>
> This is a large-scale project requiring a dedicated work force and is beyond the scope of basic maintenance. All track employees will be fully engaged in the performance of basic maintenance work in the area and will not be available for this major replication project. There are no furloughed employees on the Seniority District.

By letter dated March 19, 2004 the Organization responded objecting to the contracting of this work. Joining the Consolidated Rail System Federation was the Northeastern System Federation, both filing this claim dated August 19, 2004 on behalf of the eleven claimants.

Work on this project did not begin in April; it began on June 28, 2004. The Organization claims that the Carrier pay each claimant, man for man, for all straight time hours and any and all overtime hours that the claimant's respective rate of pay worked by the contractor's employees working on the project.

This claim involves a large project, the construction of 2,325 feet of yard track and four no. 8 turnouts including sub-base and pre-ballast in the Carrier's Braintree Yard in the Albany Service Lane Work Territory. The Carrier defends on a procedural basis that the claim is vague and indeterminate. The Board finds that the claim is for the work subject to the notice. It is sufficiently definitive. The Board dismisses the procedural defense asserted by the Carrier.

The Carrier's defense on the merits is based on lack of manpower and equipment. The Organization cites many third division awards on point that conclude that the Carrier has a responsibility to maintain sufficient forces to perform maintenance and way work, Award Nos. 4765, 4869, 6234 and 19268. With regard to the claim of unavailability of equipment, the Organization points to the December 11, 1981 Berge/Hopkins letter in which Carriers, including

CSXT, committed to make a good faith effort to lease equipment and thereby reduce the amount of contracting out. In this regard the Organization cites third division awards 29823, 35530, 35531 and 35532 that the Berge/Hopkins letter is an enforceable commitment.

The Organization argues that a project of this size required some time to plan. Initially the project was to begin on April 4. In fact it did not commence until June 28, 2004. The Organization alludes to the manpower deficiencies found by the Federal Railroad Administration. However, the Organization did not tie such deficiencies to the Albany Service Lane Work Territory.

The Carrier relies heavily on PLB 6508. Not only does the Carrier point to the precedential analysis of the Scope language discussed above, but more particularly it relies on the majority analysis in PLB 6508 of Case No. 6. Neutral Member Douglas concludes that the contracting out of the assembly and welding of two turnouts and the construction of yard track was justified in part due to a lack of equipment and manpower. The Carrier argues that the Douglas analysis, particularly in Case No. 6, recognizes that the traditional defenses to a contracting out claim of lack of manpower and equipment may be successfully asserted in a Scope case under the System Agreement. The Carrier relies on Special Board of Adjustment 1110, Award No. 123, which holds that if employees are not available to operate equipment, then the Carrier is under no obligation to lease that equipment.

OPINION

The Award in Case 5 is governed by paragraph 8 of the Agreement between these parties establishing Public Board 7094, in that:

> The parties agree that the awards rendered by this Board shall have no precedential value and that each award shall affirmatively state that the award has no precedential value and shall not be referred to by either party in any other case.

Perhaps more than the other four decided by this Board, the resolution of this case requires the full application of the Douglas award PLB 6508 and the application of the burden shifting analysis of PLB 6508 as amplified by the Goldstein Board, PLB 6510.

At the outset of the analysis, the Organization has well established that the work at issue the construction of track, pre-ballast and ballast and the operation of the equipment associated with the performance of this work is work reserved to BMWE members under the Scope language of the System Agreement. The burden now shifts to the Carrier to establish by compelling evidence, which in its role of reviewing the record established by the parties at the property, the Board will subject to strict scrutiny.

Non-Precedent Decisions of Public Law Board 7094

The Carrier argues that its employees were underpay and engaged in the performance of important maintenance work. From the Carrier's presentation, the facts of this Case No. 5, closely parallels Case No. 6 decided by PLB No. 6508. The Carrier quotes from the Douglas award, at page 83, as follows:

> As the Carrier's employees were engaged in performing other important work, the record provides sufficient evidence that the Carrier could not have rented or leased the necessary equipment or scheduled the work at a time when its own employees in the bargaining unit could have performed the work in a timely manner. Thus sufficient evidence exists in this particular instance that the Carrier had a compelling need to contract out the scope-covered work.

The Carrier asserts, here, that its forces were otherwise engaged in important maintenance work. They were not available to tackle a large project such as the Braintree Yard project which required a force dedicated to working on the project on a consistent basis. In this regard, the Carrier presented evidence of the time records of claimants for June and July 2004. Inasmuch as the project did not begin until June 28, the records for June are tangential to the Board's analysis. However, a review of the time records of the employees in July establishes that they worked many hours of overtime in that month. There is no assertion and no evidence to establish that any employees were on furlough. The inadequacy of staffing asserted by the Organization is without specifics as to the staffing level for trackmen and welders in the Albany Service Lane.

The Carrier asserted that the project was under time constraints, since it was part of a program of the MBTA to replicate track in the area. The three and one-half month delay between the notice and the commencement of the project does not support the Carrier's urgency argument.

The Board must confront the question of whether this evidentiary record, the highlights of which are stated above, presents compelling evidence of the need to contract this work out due to lack of availability of sufficient manpower to perform the work in question on a consistent basis. The Board has subjected the evidence presented to strict scrutiny as required by PLB Decision 6508 and 6510. The Board concludes that the Carrier has met this evidentiary burden. Claimants were working overtime; employees in this Service Lane were not on furlough.. BMWE members would not have been consistently available to perform a project of this scope . Accordingly, the Board concludes that the Carrier was justified in contracting out this project.

AWARD

Claim denied.

Non-Precedent Decisions of Public Law Board 7094

Summary of Awards Made by Public Law Board 7094 on a Non-precedent Setting Basis:

In paragraph 8 of the Agreement establishing Public Law Board 7094:

> The parties agree that the awards rendered by this Board shall have no precedential value and that each award shall affirmatively state that the award has no precedential value and shall not be referred to by either party in any other case.

The awards issued by Public Law Board 7094 in Cases 1, 2, 3, 4 and 5 conform to this agreement. None of the awards issued in Cases 1-5 have precedential value. These awards shall not be cited in any other case.

Cases 1 and 2 were decided according to the notices issued by the Carrier. The Board found a violation of the System Agreement when the Carrier contracted out work pursuant to the two notices dated March 25, 2002 and May 16, 2002 for the reasons indicated above. However, the Board denied the Organization's claim for the work specified in the June 24, 2002 Notice.

In Case 3, the Board concludes that the Carrier violated the System Agreement when it assigned the work for the removal of track preliminary to the construction of a large project to a contractor rather than its own forces. Otherwise, the Board found that the contracting out of this large project on a turnkey basis did not violate the System Agreement. Due to the failure of the Carrier to provide the Organization with a copy of the contract between the Carrier and the contractor when requested by the Organization, and in order to effectuate this contractual mandate, the Board requires the Carrier pay Claimants at premium rates for the time measured by the hours worked by the contractor's employees removing the track. To the extent that claimants were receiving New York Dock benefits, those benefits should be offset against the claims paid under this case number and award.

The Board denied the claim in Case 4 on the basis that the Carrier did not own the track on which the work claimed was performed.

In Case 5, the Board denied the claim. The Carrier presented compelling evidence that its forces were unavailable to perform the work associated with this large project at the Braintree Yard.

Sherwood Malamud, Neutral Member

Matthew J. Borzilleri, Carrier Member

Roy Robinson, Organization Member

Oct. 7, 2008