

PUBLIC LAW BOARD NO. 6510

Case No. 1

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
VS.
CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM - EMPLOYEE:

- (1) The Carrier violated the Agreement when it assigned outside forces (Poole Paving) to perform Maintenance of Way work (paving and general cleanup work) at road crossing locations on the Cleveland to Indianapolis main line beginning on September 27 and continuing through November 5, 1999, instead of Messrs. R.K. Brenner, H.E. Francis, L.H. Peek, N. Bryson and M.R. Cain [Carrier's Files 12(99-1009) and 12-00-0138) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R.K. Brenner, H.E. Francis, L.H. Peek, N. Bryson and M.R. Cain shall now each be compensated for one hundred eighty (180) hours' pay at their respective straight time rates of pay.

FINDINGS:

The Public Law Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement; that it has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing held. At the hearing of this matter, the parties indicated that the Claimants had waived the rights of appearance and were therefore not present.

A. BACKGROUND

The parties entered into an Agreement, dated April 29, 2002, pursuant to Section 3, Second of the Railway Labor Act, as amended to establish the Public Law Board to resolve Eight cases. The National Mediation Board subsequently created Public Law Board No. 6510 as reflected in certain correspondence dated March 23, 2004. The undersigned was named to be the Neutral Member of the Public Law Board. A hearing was held at the offices of the National

Mediation Board in Washington, District of Columbia, on Wednesday, April 21, 2004, at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to present such evidence and argument as desired, consistent with the agreement that created the Public Law Board. The parties waived any oath that may apply to the Neutral Member of the Public Law Board.

This record reflects that after the above-noted hearing was concluded, in correspondence dated June 25, 2004, the parties agreed to the withdrawal of Case No. 7, so that currently pending for decision are Public Law Board No. 6510, Case Nos. 1-~~7~~6 and 8.

The parties have stipulated that the currently pending 7 cases, including Case No. 1, which is the specific case to be dealt with by this Opinion and Award, all involve the interpretation of the parties' June 1, 1999 System Agreement ("System Agreement"). As such, it is well-settled that the burden of proof must be satisfied by the party bringing the grievance, namely, in this case, the Organization. Accordingly, the Organization must prove by a preponderance of the evidence that its position is correct.

The parties have also stipulated that all 7 pending cases, including Case No. 1, the matter currently under discussion, involve the contracting-out of work to third parties despite the Organization's contention that the Claimants, all employees represented by the Organization, had an iron-clad right to perform the disputed work.

On the other hand, it is the position of the Carrier that the plain language of June 1, 1999 System Agreement explicitly contemplates contracting-out without the consent of the Organization. This is so, contends the Carrier, so long as it provided appropriate notice and conferred with the Organization pursuant to its applicable contractual commitments. Specifically, the Carrier maintains that under the 1999 System Agreement, the Carrier retained the long standing right to contract-out when a legitimate business need exists, judged by a test of reasonableness when all the surrounding circumstances are considered.

In analyzing the record, this Public Law Board emphasizes that the April 29, 2002 Agreement between the parties that established this Public Law Board limits its jurisdiction, as follows:

The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules and working conditions, nor shall it have the authority to add contractual terms or establish new rules.

Finally, this Public Law Board recognizes that the presentation of the 7 cases to it on April 22, 2004 was the third Public Law Board involving contracting-out under the June 1, 1999 System Agreement and "that scores of other similar disputes remain unresolved by the parties." (BMW and CSXT, Public Law Board No. 6508, p. 42, Neutral Chair, decided October 7, 2003).

This Public Law Board also notes that the intervening Public Law Board, presumably Public Law Board No. 6509 between these parties dealing with contracting-out under the June 1, 1999 System Agreement, resulted in the amicable resolution of all of the then

pending cases, so that the current Opinion and Award represents the first decision to be issued since the comprehensive opinion offered by Neutral Member Douglas in Public Law Board No. 6508 (hereinafter, the "Douglas Award").

The record further reveals that in the 7 now pending claims before this Board, including Case No. 1, the current matter under consideration, the parties raised several questions of critical importance with respect to the interpretation and application of the Douglas Award to the scores of pending claims between these parties involving issues of contracting-out under the June 1, 1999 Systems Agreement. Basically, the parties recreated the voluminous record presented to Referee Douglas regarding the history of contracting-out in the Railway Industry and between these parties in particular. The Organization vociferously contended that while it concurred in part in the Douglas Award, certain critical holdings made by Referee Douglas were "palpably erroneous" and should be specifically rejected by this Public Law Board Panel.

The Carrier, on the other hand, discerned several areas where it strongly disagreed with the findings of Referee Douglas, but, significantly, it stressed that unless the Douglas Award was "palpably erroneous" in its findings, it constituted binding precedence that should be followed by this Public Law Board in analyzing and determining each of the pending 7 cases, including Case No. 1, the case now being decided.

The Organization however has demanded that this Board revisit the Douglas Award. It is firm in its belief that certain critical findings to be discussed below should be rejected. The Carrier is equally firm in its belief that the Douglas Award is required to be followed in its entirety by this Board in the consideration of the 7 pending cases, and, particularly, Case No. 1, which is currently the subject of discussion.

The parties then proceeded to a discussion on the merits of Case No. 1, and also an analysis of several procedural issues raised by the Organization, the record evidence reveals.

In many respects, then, a primary focus of this Opinion and Award dealing with Case No. 1 must be the validity and precedential value of the Douglas Award. Additionally, all of the other arguments presented by the parties going to Case No. 1 will be discussed in the formulation of this Opinion and Award.

B. PERTINENT PROVISIONS

Agreement between CSX Transportation, Inc. and
Its Maintenance of Way Employees Represented by the
Brotherhood of Maintenance of Way Employees
Effective June 1, 1999

SCOPE

[Paragraph 1] 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 Employees, 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.

D. DISCUSSION AND FINDINGS

Four significant issues are raised by the parties concerning the seven cases currently pending before this Public Law Board which generally apply to all these claims, this voluminous record establishes.

The first concerns whether the Douglas Award is or is not palpably erroneous and whether its detailed findings and conclusions as to the meaning of the Scope Rule of the June 1, 1999 System Agreement confines this current Board.

The second issue concerns the level of proof the Organization must present, to validate its claim that a particular contracting out is of work covered by paragraph 2 of the current scope rule. Must the Organization prove more than whether or not the work at issue is mentioned in paragraph 2 as being reserved to its members?

The third concerns the level and specificity of proof necessary for Management to provide when it invokes affirmative defenses to a specific claim by this Organization under the Scope Rule that the Carrier's contracting out violated the System Agreement. In other words, whether the Carrier may present its specific defenses in what the Union has characterized as "boilerplate" fashion or whether the Douglas Award's "strict scrutiny" requirement is binding, so that, as a result, only specific reasons going to the actual given circumstances, as opposed to general conditions across a district or the entire Carrier, will suffice.

The fourth concerns whether the existence of a past practice, namely, whether contracting out of scope-covered work may occur under this Scope Rule based on the fact that it was commonly done by the Carrier before the subject Scope Rule came into effect.

The Organization asserts that contracting out is not permitted under the current Scope Rule for scope-covered work, absent consent of a General Chairman, because that is the plain and unambiguous meaning of the language negotiated by these parties in Paragraph 2 of this current Scope Rule. To the extent that the Douglas Award does not uphold that interpretation of the Scope Rule, it is palpably erroneous, the Organization also urges.

The Carrier insists that the Scope Rule is essentially ambiguous in nature, as was found to be true by the Douglas Award. It also argues that the core finding of the Douglas Award is that the Carrier has a right to contract out when a legitimate need exists to do so. The parties' intent, when the current Scope Rule is properly read, the Carrier insists, is that the ultimate review of the Carrier's right to contract out must occur in arbitration on a case-by-case basis.

The Carrier also strongly suggests that general proofs presented by it of the lack of sufficient manpower after the transfer of the Conrail assets, the special needs and equipment required in a specific contracting out situation or the failure of the Organization to prove that any Claimants had performed the disputed work in the past should require the denial of a claim, even under a strict application of the Douglas Award.

First, the majority of this Board finds that the Douglas Award is not palpably erroneous in its finding that the current Scope Rule is ambiguous on its face as to the critically important issue of whether or not contracting out of scope-covered work is permitted, absent consent by the Organization. The current Scope Rule establishes a comprehensive system to delineate the work that is to be performed by the BMWWE craft. The first paragraph identified, generally speaking, the basic work to be done by the craft.

As the Douglas Award notes, Section 2 then states, in the critically important clause in its first sentence:

"[t]he following work is reserved to BMWWE members ..."

As the Douglas Award also states, the term "reserved" has "a long history in the railroad industry as reflected in its presence in many prior collective bargaining agreements and by the special attention that it has received in many prior arbitration decisions." Douglas Award, at p. 43. Thus, it was not palpably erroneous nor even anything like a stretch in logic for the Douglas Award to conclude that the decision of the parties to include the term "reserved" reflected a "calculated and knowing decision to enhance the pre-existing strong presumption that bargaining unit members must perform the subsequently enumerated work." Id. at p. 44.

We hold as a consequence that the inclusion of the term "reserved" in Paragraph 2 of the Scope Rule represented the informed decision by the negotiators of the current System

Agreement to strengthen the current Scope Rule as to its application and meaning. The majority of this Board agrees that, among the possible range of variations and the wording of scope rules, the one chosen by Paragraph 2 of the current Scope Rule provides that only BMW members have a right to perform the enumerated work.

The parties do not dispute that Paragraph 3 contemplates covering situations of work assignments both intra and inter craft in nature. The intent of the parties is to deal with potential jurisdictional disputes by the reach of Paragraph 3, as the Douglas Award has indicated.

It is, of course, the potential and meaning of Paragraphs 4 and 5 that form the focus of this current dispute. As the Douglas Award interprets these paragraphs, with the exception of the emergency situations exclusion, the notice requirements in the fourth paragraph and the conference opportunity in the fifth paragraph of this Scope Rule provide "a rather clear, plain and well-established structure for the parties to follow when the possibility of contracting out may occur." Id. at p. 44.

The presence of these provisions, of course, is the logical foundation for the finding in the Douglas Award that an inherent ambiguity as regards contracting out exists between these two paragraphs and paragraph 2, the majority of this Board further finds.

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.

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 point is that paragraphs 4 and 5 cannot reasonably be read as merely doing that, as the Organization insists, because the comprehensive procedures contained in paragraphs 4 and 5 have a much broader and at the same time more precise reach. 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.

What intervenes between the contemplation of the possibility of a decision to contract out and the act itself is the required procedure of notice and a "meet and confer" conference. The very purpose of the conference is to discuss and develop the options and issues surrounding the contracting out. If there is then no amicable agreement on the contemplated contracting out, one way or the other, then paragraphs 4 and 5 say arbitration of the Organization's claim is the path open to it, while the Carrier may proceed to contract out the work pending the adjudication of the parties' dispute.

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.

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 BMW 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.

Based on the foregoing findings, it is difficult to understand the Organization's view that the current Scope Rule represents an absolute ironclad bar on contracting out. The impact of the inclusion of Paragraphs 2, 4 and 5 is therefore, as the Douglas Award holds, that contracting out is still permitted for scope-covered work under this Scope Rule. The "strict scrutiny standards" articulated by the Douglas Award however are proper and intended by the incorporation of the language of the second paragraph, including the word "reserved", the majority of the Board further reasons. From these determinations, it follows that the majority of this Board finds the Douglas Award a persuasive precedent as to the cases currently before it.

The second issue is what is the initial burden placed upon the Organization to establish a prima facie claim for a violation of the Scope Rule when scope-covered work is contracted out? What the Douglas Award makes plain is that all that is necessary is proof that the specific work falls within the categories enumerated under Paragraph 2 as reserved to members of this Organization. That is what the term "reserved" suggests, the majority emphasizes. The Carrier then must show that it has complied in all respects with the notice and conference provisions of the Scope Rule, namely,

Paragraphs 4 and 5, as supplemented by the applicable National Agreements, we further find.

These findings, however, do not fully resolve the dispute. The fact that the Organization may not strike but must proceed to arbitrate claims over contracting out does not mean that management merely has an obligation for giving timely notice and then affording the Organization an opportunity to meet and confer in a conference format over the contemplated contracting out. Fulfillment of the Carrier's obligation under the current scope rule requires substantially more of the Carrier, the majority holds, as was clearly indicated by the teaching of the Douglas Award.

The Organization and those claimants affected by the contracting out decision of the Carrier have a right to grieve the subcontracting. The Organization and these claimants cannot effectively grieve unless they are made aware of the business justifications for contracting out, the reasons why management has invoked its ability to contract out in the specific instance, the majority further finds. And, as the Douglas Award also holds, the reasons presented by the Carrier at the conference on the property must not be merely boilerplate or generalized reasons.

Persuasive specific evidence must be presented from the Carrier that "a compelling reason exists to contract out the disputed work". To deny the Organization such reasons is to deny it and claimants their right under the grievance procedure to maintain a credible challenge against management's actions. That