

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CSX TRANSPORTATION, INC.,)	
)	
)	
)	Plaintiff,
)	
v.)	Case No. 04-611 (RWR)
)	
NATIONAL MEDIATION BOARD,)	
)	
)	
)	Defendant.
_____)	

DECLARATION OF JAMES H. WILSON

I, James H. Wilson, hereby declare that the following is true and correct on the basis of my personal knowledge.

1. I am Director of Labor Relations for CSX Transportation, Inc. (“CSXT”). I have worked for CSXT or one of its predecessors for 24 years. I have worked in the Labor Relations or Human Resources Departments of the railroad for all but two years of that time. My responsibilities include administration of CSXT’s collective bargaining agreements with the Brotherhood of Maintenance of Way Employees (“BMWE”), including the June 1, 1999 System Agreement. I am also CSXT’s “highest designated officer” within the meaning of the Railway Labor Act for purposes of dealing with grievances filed by the BMWE. When a claim or grievance filed by the BMWE alleging that CSXT violated a collective bargaining agreement has been denied by CSXT at the first level of handling under the parties’ grievance procedures, the union can appeal that denial to me, as the highest designated official. If a conference between the parties fails to resolve the dispute and I deny the appeal, the union’s next step is to take the grievance to arbitration. I am familiar with the contracting out disputes between CSXT and

BMW arising since the June 1, 1999 System Agreement and have participated for CSXT in arbitration agreements with BMW establishing public law boards (“PLBs”) to arbitrate contracting out claims, as well as the arbitrations themselves. These PLBs include those that were cancelled by the April 7, 2004 order of the National Mediation Board that is the subject of this lawsuit. I have also been involved in efforts to settle contracting out claims filed by BMW.

2. The purpose of my Declaration is to respond to allegations in the Fifth Declaration of Roland Watkins describing events since the completion of briefing in this case, which the NMB contend warrant special treatment of this lawsuit.

3. I would begin by noting that Mr. Watkins’ allegations concerning more recent events and the alleged harm to BMW and the relationship between BMW and CSXT are apparently based on his conversations with the BMW. While according to Mr. Watkins’ Fifth Declaration he apparently has had numerous conversations with representatives of BMW in formulating his Declaration, Mr. Watkins did not contact me or anyone else at CSXT regarding his allegations.

4. Mr. Watkins states that a crisis has been building because of the growing backlog of contracting out claims waiting to be arbitrated. He recites in paragraph 6 of his Declaration that BMW has filed an additional 125 cases with the National Railroad Adjustment Board (“NRAB”). He also states that “BMW filed these 125 similar cases because CSX refused to agree ‘to hold the cases in abeyance’ pending a decision in the lawsuit before this Court.” Under the grievance procedures in the June 1, 1999 System Agreement, once the highest designated official, i.e., myself, has denied BMW’s final appeal of a grievance, BMW has nine months in which to take the matter to arbitration. Mr. Watkins alleges that CSXT has refused to waive this nine-month limit, presumably then forcing BMW to submit the case to arbitration. He is in

error. BMW has never requested CSXT to hold these cases in abeyance, which Mr. Watkins could have known had he checked with CSXT.

5. Mr. Watkins also misunderstands the industry custom for holding cases in abeyance. A carrier and union may agree to hold cases in abeyance while a case with identical facts and issues is arbitrated. They may then use the result of the arbitration of that case to determine how to resolve the cases held in abeyance without their arbitration. However, Mr. Watkins is in error that the contracting out cases filed by BMW are all “similar.” While they all involve the issue of contracting out, most turn on different facts and circumstances. The mere fact that these cases all involve subcontracting does not make them similar. Under Mr. Watkins’ logic, all Title VII employment discrimination lawsuits against an employer could be consolidated, because they all involved claims that Title VII was violated.

6. Mr. Watkins’ statement, in Paragraph 9 of his Declaration, that “[t]he procedure set forth in the [NMB’s] April 7, 2004, Consolidation Order at issue in this case would have resolved the subcontracting issue and would have eliminated the filing of these additional cases because the subcontracting issue would have been resolved” is simply untrue and demonstrates his failure to comprehend the nature and diversity of the contracting out claims. I would point out, too, that Mr. Watkins has no personal knowledge of these claims. His further statement that the arbitration by the “super” PLB that the NMB is attempting to force upon the parties will end the contracting out dispute by providing a template for the resolution of other contracting out grievances is equally untrue.

7. After the parties’ entered into the June 1, 1999 System Agreement, which replaced 13 other agreements, a dispute immediately developed between CSXT and BMW over CSXT’s right to contract out work covered by the scope rule of the System Agreement. CSXT took the

position in arbitration that the new scope rule was merely a recodification of the various scope rules in the 13 agreements replaced by the System Agreement and that CSXT could continue to contract out scope covered work in the same kinds of circumstances in which it historically had prior to the System Agreement. BMWWE took a radically different position, contending that CSXT completely gave up the right to contract out any scope covered work unless the BMWWE acquiesced. BMWWE has been filing a grievance every time CSXT serves notice of its intent to contract out work that arguably fell within the scope rule. In an effort to resolve this dispute, as has been described in this proceeding, CSXT and BMWWE entered into a March 21, 2002 agreement, in which they initially agreed to establish eight PLBs to arbitrate the first 61 of these cases. The common issue, the so-called “big issue,” was whether CSXT had, in the new scope rule, completely bargained away the right to contract out work listed in the scope rule. If the arbitrator agreed with CSXT that the new scope rule was not an ironclad prohibition on contracting out, as BMWWE contended, then each case would address the circumstances in which CSXT could contract out scope-covered work. If CSXT prevailed on the big issue, CSXT envisioned that standards for when CSXT could contract out would be developed on a case-by-case basis as arbitrators provided guidance on the reasons that would justify contracting out and the relative burdens of proof on CSXT and BMWWE.

8. The so-called big issue has been answered in CSXT’s favor in the first two PLB arbitrations. The Award of PLB No. 6508 issued by Arbitrator Douglas (the “Douglas” Award), dated October 7, 2003, rejected BMWWE’s claim that the scope rule barred all contracting out. However, Arbitrator Douglas also found that, under the language of the new scope rule, CSXT had a higher burden to justify contracting out of work covered by the scope rule in any particular circumstance, e.g., CSXT had to show a “compelling need” or “compelling reason.” Award

at 83, 94. He then applied this new standard to the eight cases before him. PLB No. 6508's award is quite lengthy (96 pages), so I have attached to my declaration as Exhibit No. 1 only excerpts showing the Arbitrator's conclusions.

9. The parties had previously settled the cases that would have been heard by PLB No. 6509. PLB No. 6510, which was not affected by the NMB's April 7, 2004 order canceling the other PLBs, issued its awards in January of this year. In the proceedings before PLB No. 6510, BMW had re-argued the big issue, repeating its contention that the new scope rule was a total bar to contracting out of scope covered work. In Award No. 1 of PLB No. 6510, issued January 5, 2005, Arbitrator Goldstein, the neutral member of the Board, followed the Douglas Award and rejected BMW's argument. He also agreed with CSXT that the standards for subcontracting were a showing, by clear and compelling evidence, of a business justification for the need to subcontract. He then applied this standard to the cases for which he issued awards. Some were in favor of BMW, some in favor of CSXT. Excerpts of Award No. 1, which is also lengthy (46 pages), are attached as Exhibit No. 2 to my Declaration.

10. These arbitration awards show that there is no basis for the claims in NMB's motion and the Fifth Watkins Declaration that the arbitration of 290 cases it is trying to force into a single PLB, PLB No. 6511, will provide a "template" to the resolution of future grievances, thereby making expenditures of the NMB's limited arbitration funds unnecessary." NMB Memorandum at 4. There is no need for a "template" now, because the Douglas and Goldstein Awards have already provided general guidance on how the new scope rule is to be applied. These awards confirm that CSXT has a right to contract out and state the general standard to be applied to determine if subcontracting was permissible in a given case. Applying these two precedents,

future arbitrations will review the facts of each subcontracting claim to determine if CSXT has met its burden to show the business necessity to subcontract.

11. Besides being unnecessary, the unprecedented procedures mandated by the NMB for the consolidated PLB cannot provide a “template,” or other guidance to the parties on when contracting out is, or is not, permissible, because, under the unique NMB-ordered procedures, the arbitrator does not issue any meaningful decisions on each claim. He is only to issue one page awards for each case, which just says who won or lost, with no findings of fact or explanation.

12. The individual discussion of each case in the awards of PLB Nos. 6508 and 6510, and the varying results in each, in which sometimes BMW prevailed, and sometimes CSXT, also proves CSXT’s point that the contracting out cases listed with the PLBs and NRAB are not all identical as NMB contends. Mr. Watkins also overlooks that each contracting out case can also have other issues, including procedural issues, such as whether one side or the other failed to act within time limits, the identity and number of proper claimants, and, if CSXT is found to have violated the collective bargaining agreement, the appropriate remedy.

13. Mr. Watkins is simply wrong that the NMB-ordered, consolidated PLB will eliminate the need for future arbitrations. BMW has adopted a strategy of challenging virtually every notice of contracting out that CSXT gives under the System Agreement, notwithstanding the Douglas and Goldstein Awards. This is apparently all part of a BMW strategy to try to stop contracting out, even though two arbitrators have now held that CSXT’s retains the right to do so. The NMB-ordered procedure will actually exacerbate the problem, because, as explained, the one-page awards to be issued by the consolidated PLB will not give any guidance to the parties, or future arbitrators, on when contracting out is or is not permissible. In the absence of such

guidance, BMWWE has nothing to lose by filing cases. They become like lottery tickets, with BMWWE hoping that some turn into winners.

14. There is also no basis for Mr. Watkins' contention that financial liability is created for the NMB every time the BMWWE files a case for arbitration with the NRAB. Thousands of cases are filed with the NRAB every year by more than a dozen unions and hundreds of employees in the railroad industry. Many of these cases are settled or withdrawn without ever being arbitrated. Moreover, all of the cases filed with the NRAB in a year are not arbitrated in the same year.

15. Mr. Watkins is also mistaken that the filing of numerous cases by BMWWE with the NRAB significantly increases the administrative costs of the NRAB, which the NMB must bear. The costs of the carrier and union members of the NRAB are, by law, paid by, respectively, the railroads and unions, not the federal government.

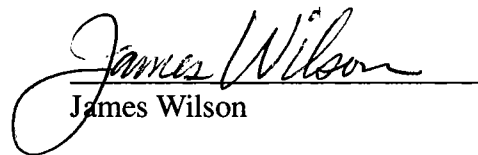
16. NMB has greatly exaggerated the costs of arbitrating the BMWWE contracting out cases. According to NMB's own records, the amounts charged by Arbitrator Goldstein are far less than those charged by Arbitrator Douglas (\$7,950 vs. \$18,600). Based on Arbitrator Douglas' charges, the NMB has assumed a cost of \$2,325 per contracting out case. There was never any basis for NMB's projected costs. But, now that the "big issue" has been resolved, it is clear that the costs of future cases will be far less. The NMB has confirmed that Arbitrator Goldstein charged \$3,750 for Case 1 of PLB No. 6510, which also addressed the big issue. But, he only charged \$4,200 altogether for the other six awards, which averages to \$700 per case, not the inflated \$2,325 projection argued by the NMB.

17. I would note that CSXT has offered previously to BMWWE to establish so-called "party pay" special boards of adjustment pursuant to the Railway Labor Act to hear contracting out cases. I made this proposal to Steve Powers, Assistant to the President of BMWWE. In "party

pay” arbitration, the carrier and union pay the costs of the neutral, not the federal government. By splitting the costs of the neutrals between CSXT and BMW, there would be no financial burden on NMB. And, the cases would be heard much sooner than if they are arbitrated by the NRAB. However, BMW rejected CSXT’s offer out of hand.

18. Finally, I disagree with Mr. Watkins that the pending cases are adversely affecting the relationship with CSXT and BMW. CSXT and its predecessor railroads have had a collective bargaining relationship with the BMW for more than 50 years. As one might expect, there are stresses and strains around various issues over the years. Any current strain over the contracting issue flows from the fundamental disagreement between CSXT and BMW over the extent of CSXT’s right to contract out under the June 1, 1999 System Agreement. What is needed to reduce the strain between the parties is a clearer understanding of CSXT’s right to subcontract under that Agreement. This will come about either through negotiations or by arbitration decisions that build upon the Douglas and Goldstein Awards and clarify the right to subcontract under the Agreement. The first two arbitrations have clarified some of the rights, but the NMB’s interference with other PLBs established by CSXT and BMW has stymied further clarification through subsequent arbitrations. The NMB’s April 7 consolidation order wiped out the cooperative efforts of CSXT and BMW to arbitrate these disputes and forced the BMW to file new cases with the NRAB.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
February 16, 2004.


James Wilson