PUBLIC LAW BOARD NO. 6915

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD

Case No. 39 A & B

STATEMENT OF CLAIM:

1. The Carrier violated Rules 13 and 22 of the Agreement when it assigned a non-agreement employe to provide track protection on the Waukesha Subdivision from Mile Post 81.9 to Mile Post 82.7 between 7:00 A.M. and 3:30 P.M. on September 6, 2008 (System File C-220-16/WC-BMWED-2009-00004).

2. The Carrier violated Rules 13 and 22 of the Agreement when it assigned a non-agreement employe to provide track protection on the Waukesha Subdivision from Mile Post 80 to Mile Post 82.7 between 7:00 A.M. and 5:00 P.M. on November 15 and 16, 2008 (System File C-220-17/WC-BMWED-2009-00002).

3. As a consequence of the violation referred to in Part 1 above, Headquartered Foreman Patrick Schumacher shall be compensated for eight and one-half (8.5) hours at the applicable headquartered foreman rate of pay at the applicable time and one-half rate of pay for this lost work opportunity.

4. As a consequence of the violation referred to in Part 2 above, Headquartered Foreman Patrick Schumacher shall be compensated for a total of twenty-two (22) hours, eleven (11) hours each for both November 15 and 16, 2008, at the applicable headquartered foreman rate of pay at the applicable time and one-half rate of pay for this lost work opportunity.

FINDINGS:

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the controlling Agreement on September 6, November 15, and November 16, 2008, when it assigned a non-Agreement employee, instead of the Claimant, to provide track protection on the Waukesha Subdivision. The Carrier denied the claim.

The Organization initially contends that the Claimant is fully qualified to obtain and provide track protection, and he routinely does so as part of his daily assignment. The Organization asserts that the Carrier required someone to provide track protection on the Claimant's rest days of September 6, November 15, and November 16, 2008. The Organization argues that instead of calling and assigning the Claimant to this rest-day overtime service in accordance with Rule 22, the Carrier violated Rule 13 by assigning this work to individuals having no seniority or work rights under the Agreement, and who apparently were unknown to the Engineering Department management personnel.

The Organization emphasizes that the Carrier's sole defense in this matter was its assertion that the work at issue was not exclusively reserved for employees within the applicable scope rules of the Agreement. The Organization points out that the Carrier has not identified either individual who provided track protection as a Carrier employee, and the Carrier actually denied knowledge of who these individuals were. The Organization suggests that the only conclusion that can be reached is that these two individuals were employed by outside forces. The Organization submits that the Carrier's violation of Rule 13 therefore is obvious and inescapable.

Addressing the Carrier's "exclusivity" defense, the Organization asserts that the Third Division repeatedly has held that the proper application of the exclusivity doctrine is to disputes over the proper assignment of work between different classes and crafts among the Carrier's own employees, not to disputes involving outside contractors. These many Awards represent evidence of the Board's consistent recognition that exclusivity should not enter into disputes involving the use of outside forces to perform Scope-

covered work. In accordance with these Awards, the so-called exclusivity test has no application to disputes over the contracting out of work, but it does properly apply to disputes involving the assignment of work between classes and/or crafts of Carrier employees who arguably may have a contractual right to perform such work.

The Organization submits that because this claim involves the use of outside forces to supplant the use of existing forces for overtime work, there can be no doubt that the appropriate remedy is at the overtime rate. The Organization argues that the Carrier never has disputed the requested remedy in this matter, so there can be no doubt that the Claimant is entitled to the full requested remedy for the loss of overtime work opportunity.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization must show that it has exclusive right to the work of flagging under the Agreement. The Carrier asserts that the work of flagging and/or providing protection is not specifically mentioned, or even implied, in the Agreement's Scope Rule. The Carrier argues that even if such work were specifically mentioned or implied, Rule 13K reserves to the Carrier the right to contract out any work within the scope of the Agreement.

The Carrier maintains that in the instant case, the primary contractor was responsible for making arrangements with another contractor that would provide for personnel to fulfill the primary contractor's need for flagging and on-track protection. The Carrier submits that, contrary to the Organization's position, this was not a situation

in which non-Agreement flagmen were used only on weekends to deny overtime opportunities.

The Carrier points out that the project in question began during early August and continued through late November 2008. The Carrier asserts that for the duration of the project, track protection for the contractor(s) was provided almost exclusively by non-Agreement, contractor-provided personnel. The Carrier further submits that it does not use its own forces to provide flag protection for contractors because those forces are utilized for other Carrier projects and often are not available to flag for contractors.

The Carrier contends that although is has the right to use Agreement employees to flag, and frequently does, the Carrier is not under any contractual obligation or mandate to do so. The Carrier insists that the Organization is fully aware that contract flagmen have been and are extensively used on any number of occasions and projects on this property. The Carrier points out that although it has no obligation to do so, the Carrier has and continues to utilize Agreement employees to flag where practicable.

The Carrier asserts that the Organization has not met its burden of proving that the Agreement was violated, or that the cited rules are even relevant to the issue in dispute. Pointing to the Organization's position that non-agreement persons were used to deny an overtime opportunity to the Claimant, the Carrier emphasizes that the Claimant was not sent home from work, nor were his duties or position supplanted by a contractor. The Carrier insists that contractors were used to provide flag protection every day, not just on the Claimant's rest day as implied by the Organization.

The Carrier argues that if that were the intended application of Rule 13N, then the

clear language and obvious intent of Rule 13K would be rendered completely meaningless. The Carrier maintains that no remedy is due in this matter because the Organization has failed to meet its burden of proof and there is no evidence of a violation of the Agreement.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

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

This Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement on the three days that it had a subcontractor provide its own track protection. Therefore, the claim must be denied.

The Organization is correct that the Carrier has used its member employees to perform flag protection duties. However, there is no requirement that the Carrier only use its own employees represented by the Organization to perform flag protection duties. Rule 13, Paragraph K, gives the Carrier the "unilateral right to contract out work within the scope of the Agreement . . ." The record reveals that the Carrier contracted out some work and it made arrangements with another subcontractor to provide the flagging protection. The subcontracted project began in August of 2008 and continued until November of that year. Although it is true that the Claimant had been called in to perform flagging duties on several occasions, there was no requirement that the Carrier call him in to provide the flagging duties on the dates mentioned in the claim.

It is fundamental that the Organization bears the burden of proof in cases of this kind. The Organization has failed to meet that burden in this case. Therefore, the claim must be denied.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: Sept 17, 2010

CARRIER MEMBER

DATED: Sept. 17, 2010