BEFORE PUBLIC LAW BOARD NO. 6043

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE
and
ILLINOIS CENTRAL RAILROAD COMPANY

Case No. 130

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

1. The Carrier violated the Agreement when it used an outside contractor (Happs) to perform the Maintenance of Way work of distributing ties with a grapple truck at or around Mile Post 10 at or near the Markham Yard on the Chicago subdivision beginning June 1, 2011 and continuing (System File A110727/IC-BMWED-2011-00103 ICE).

2. The Agreement was further violated when the Carrier failed to give the General Chairman proper advance notice, in writing, of its intention to contract out the work in question in accordance with Appendix C (Article IV of the May 17, 1968 National Agreement).

3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimant J. Anderson shall be compensated for eight (8) straight time hours and two (2) overtime hours per day beginning June 1, 2011 and continuing."

FINDINGS:

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it utilized an outside contractor to perform certain Maintenance of Way work beginning on June 1, 2011, rather than assigning this work to the Claimant. The claim also alleges that the Carrier further violated the Agreement when it failed to give advance written notice to the General Chairman of its intent to contract out this work. The Carrier denied the claim.

The Organization contends that the instant claim should be sustained in its entirety because the work at issue historically and traditionally has been assigned to the

Organization employees and is also reserved under Agreement Rules to the Carrier's Maintenance of Way and Structures Department forces, because the work at issue is reserved to Maintenance of Way and Structures Department forces in accordance with custom and practice, because the Carrier failed to notify the General Chairman in advance of its intent to contract out this work, because the Carrier failed to comply with the good-faith discussion provisions of the Agreement, because there is no support for the Carrier's defense, and because the Claimant is entitled to the monetary remedy requested. The Carrier contends that the instant claim should be denied in its entirety because the Organization has failed to meet its burden of proof, because the Carrier complied with the notice and conference requirements, because the Organization has failed to prove that the work at issue must be assigned to Maintenance of Way employees, because the Carrier was permitted to contract out the work in question, and because the requested remedy is unsubstantiated, excessive, and punitive.

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

This Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement when it contracted out work of distributing ties with a grapple truck at or around Mile Post 10 near Markham Yard in Chicago on June 1, 2011. First of all, although the Organization states that it did not receive notice, the record contains evidence that notice was sent to the Organization when records indicated that there were insufficient Carrier resources, equipment, and employees to perform the necessary work. (See September 23, 2011,

denial letter.)

It is also the Organization's burden to prove that the work that was carried out by the subcontractor is reserved exclusively for the Organization-represented employees. The Organization in this case did not demonstrate any exclusive ownership over that work. Moreover, the Carrier has shown that there were insufficient resources, equipment, and manpower to perform that short-term work and that there were no employees represented by the Organization who were on furlough that could be recalled to perform the work.

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

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: July 24, 2018

CARRIER MEMBER
DATED: July 24, 2018

LABOR MEMBER'S DISSENT
TO
AWARD 130 OF PLB NO. 6043
(Referee Meyers)

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise in futility because they are neither read nor considered by subsequent referees. This Organization does not belong to that school. For, to accept the theory that dissents are meaningless, is to necessarily accept the conclusion that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization Member of this Board is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this emphatic dissent. First, the Majority's finding that the on-property record in this case contains evidence that notice was sent to the Organization of the Carrier's intent to contract out the work that is the subject of this dispute is just flat out wrong. Second, from a reading of this award, the impression is given that the Organization argued that its members performed tie distribution work to the exclusion of all others, including contractors. Nothing can be further from the truth. The Organization argued that work of the character involved in this dispute had been customarily and traditionally performed by the Carrier's Maintenance of Way employes. Without offering a shred of reasoning or explanation, the Majority in this award applied the so-called exclusivity test to contracting out disputes in direct conflict with the: (1) black letter and spirit of the Agreement; and (2) the Neutral Member's own prior findings.

Consequently, this award is an outlier that should be afforded no precedential value and I am compelled to vigorously and emphatically dissent to it.

THE ON-PROPERTY RECORD CONTAINS NO EVIDENCE THAT A NOTICE WAS PROVIDED TO THE ORGANIZATION.

A review of the on-property handling in this case reveals that the Organization argued in its initial claim letter that no notice was given by the Carrier to the Organization regarding its use of contractors to perform the claimed work. In a claim form initiated by Carrier official D. Kelley on September 23, 2011, Mr. Kelley responded to the claim contending, without any supportive documentary evidence, that a notice allegedly connected to the claimed work was served to the Organization when records indicated there were insufficient resources, equipment, and employes to perform the necessary work indicated for this project. In response to Mr. Kelley's contention in this regard, by letter dated November 18, 2011, the Organization appealed the Carrier's decision to deny the claim asserting therein that the Carrier had not asserted good-faith efforts to reduce the incidence of subcontracting and increase the use Maintenance of Way forces to the extent practicable without at least the serving of a proper notice. The Carrier responded to the Organization's appeal by letter dated January 13, 2011 asserting again, without any supportive documentary evidence, that it was clearly indicated on the property that timely notice was served to the Organization. Under a subsequent letter to the Organization dated May 9, 2012, the Carrier confirmed claims conference between the parties on May 9, 2012 therein reiterating its bald contention that a notice was served to the Organization. By letter to the Carrier dated June 18, 2012, the Organization responded to the Carrier's May 9, 2012 letter asserting that

"*** Contrary to the Carrier's contention that a timely notice was served, absolutely, **NO** notice was given by the Carrier concerning the use of **contractors** during this incident and the Carrier has yet to produce such a notice referring to Happ's Construction. The Carrier has chosen to ignore this simple fact; consequently the Organization continues its pursuit of this violation." (Emphasis in uppercase and bold in original).

As can be seen from above, throughout the entire on-property handling of this case the Organization maintained its position that the Carrier failed to provide it with a notice of its intent to contract out the subject work and explicitly informed the Carrier within its June 18, 2012 letter that the Carrier had yet to produce a notice. Nowhere within any of its correspondence to the Organization did the Carrier ever produce such notice. Despite the uncontroverted fact that the Carrier failed to provide such notice in the record, miraculously the Neutral Member found that the record contained evidence that notice was sent to the Organization. The Labor Member is absolutely dumbfounded by the Neutral Member's determination **out of whole cloth** that evidence of a notice exists in the record in this case.

CLEAR CONTRACT LANGUAGE

Furthermore, the application of the so-called exclusivity test to contracting out disputes is in direct conflict with clear contract language in the Agreement. A review of the Agreement provision at issue here reveals the parties agreed that employes in each subdepartment will perform the work ***customarily*** performed in that subdepartment. That provision, Rule 2 SUBDEPARTMENTS & CLASSIFICATIONS, provides as follows:

> "**RULE 2. SUBDEPARTMENTS & CLASSIFICATIONS**
>
> Employees in each subdepartment will perform the work ***customarily*** performed in that subdepartment. The subdepartments and level of the classifications within such are defined as follows:
>
> * * *
>
> E. Machine Operator Subdepartment
>
> 2. Groups B and C Machine Operators
>
> Group B machines include: dragline, angle dozer, backhoe, bull dozer burro crane, front end loader, clam shell, mobile crane, pile driver, motor grader, ditch operator, Jordan ditch spreader, shield

> "bantam off-on track crane, multiple purpose loco-crane 66304, Brandt Truck.Group C machines include: electromatic tamper, multiple tamper, self-propelled ballast drainage car (head and wing operators), self-propelled CS-6 type chemical spray (head and wing operator), on track tamping jack, yard cleaner, grouting machine, self-propelled on track weed burner, chemical spray handled by work train (head and wing operators) boltmaster-jointmaster, ballast compactor, self-propelled brush cutter and ballast regulator."

The word "customarily" does not equate to "exclusivity". Applying the exclusivity test as the seminal test for whether or not this Carrier may be allowed to assign outside forces to perform work which is customarily performed by employes within the subdepartments and classifications provided in Rule 2 ***absolutely and unequivocally destroys*** Rule 2. Not to mention that it destroys the good-faith meeting requirements of the contracting out rule because the Organization could never agree to allow the Carrier to move forward with contracting out if doing so was going to bar the Organization from ever performing the work again. Indeed, applying the exclusivity test serves to destroy the entire collective bargaining agreement because it drains all work from the Agreement and all terms and conditions of the Agreement attach to the performance of work reserved under the Agreement.

Notwithstanding the foregoing, we must point out that during the on-property handling of this case the Carrier DID NOT argue that the Organization had the burden to prove that the work that was carried out by the subcontractor was reserved exclusively to Organization-represented employes. However, the Neutral Member injected such argument for the very first time in this case into his findings when this award was ultimately rendered. Such a finding has no valid basis in the record.

THE NEUTRAL MEMBER'S PRIOR FINDINGS

In addition to the foregoing, we must note that **THE NEUTRAL MEMBER** in the instant case **HAS PREVIOUSLY REJECTED APPLICATION OF THE SO CALLED EXCLUSVITY TEST IN CONTRACTING OUT CASES**. For example, in **2004**, the Neutral Member of this Board unequivocally rejected the application of the exclusivity test to subcontracting cases in Award 1 of Public Law Board (PLB) No. 6671 as follows:

> "*** The Carrier maintains that the exclusivity test applies here, meaning that the Organization can prevail only if it can prove that it has had exclusive rights to the work at issue, i.e., that its members performed this work in the past, to the exclusion of all others. The Organization argues that it need not show exclusivity, and that the proper test for determining whether the work at issue is Scope-covered

"is to demonstrate a general right to the work, absent the application of express or implied exceptions.

The Carrier's insistence that the exclusivity test applies here is unsupported by the parties' collective bargaining agreement, past Board decisions, and the evidentiary record. Neither the contractual scope rule nor any other evidence in the record establishes the existence of any provision indicating that work identified in the Scope Rule is protected only if a craft can prove exclusive rights to the work. In fact, the Scope Rule and Side Letter No. 2 refer to work 'being performed' by Amtrak forces, and neither provision ever indicates that covered work must be 'exclusively performed' by Amtrak forces. In addition, the overwhelming weight of the cited Board decisions indicates that the exclusivity test does not properly apply to disputes over the contracting out of work; instead, this standard has been applied to disputes between a single carrier's different craft employees. Accordingly, this Board finds that the exclusivity test does not apply to the instant dispute. We hold that the Organization need not show exclusive rights to the work at issue, but instead must demonstrate only that its forces historically have regularly performed carpet installation work of this scope and magnitude on or before January 1, 1987.

* * *

Although it certainly is correct that BMWE forces have not performed carpet installation work on a frequent basis, that is nothing more than a function of the nature of the work. Quite simply, the Garner does not need to have new carpet installed on a weekly or monthly basis, and it may not have a need for such work even over the course of several years. The fact that certain work is not performed on a frequent basis does not mean that it falls outside of the coverage of the Scope Rule. We find that based on this record, carpet installation work, however infrequently required and performed, has been regularly historically performed by BMWE forces, so this is Scope-covered work. ***"

Five (5) years after the issuance of Award 1 of PLB No. 6671, **the Neutral Member** of this Board issued Third Division Awards 39520, 39521 and 39522 in **2009** and ***again*** **concluded that EXCLUSIVITY DID NOT APPLY to contracting out cases.** For instance, the Neutral Member provided the following analysis in Award 39520 in regard to the so-called exclusivity test in contracting out cases:

"The Board reviewed the record and finds that the Carrier failed to give the General Chairman advance written notice of its plans to contract out the work that

"is involved in this dispute. Consequently, the Carrier violated Appendix No. 8, Article IV, of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding. Therefore, the claim must be sustained.

* * *

*** it is not necessary that the Organization in this case perform that work exclusively. Exclusivity relates to the Scope Agreement when two different bargaining units are contending for work and one bargaining unit contends that it has the exclusive right to perform that work. In this case, the work that is at issue was performed by an outside contractor and, therefore, the exclusivity argument is not relevant. It is only necessary for the Organization to show that BMWE-represented employees have performed this work on occasions in the past. ***

For reasons that remain unknown, however, in this instance the Neutral Member departed from his own previous decisions regarding the application of the so-called exclusivity test to contracting out cases.

CONCLUSION

In sum, the Majority's determination that the record contains evidence that the Carrier provided the Organization notice of its intent to contract out the subject work and that the so-called exclusivity test applies to contracting out cases has a severely strained relationship with the overwhelming precedent in the railroad industry. Therefore, this award can only be viewed in the future by a reasonably minded individual as palpably erroneous and should be afforded no precedential value.

Respectfully submitted,

Ryan Hidalgo
Employe Member