BEFORE PUBLIC LAW BOARD NO. 6043

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

Case No. 132

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

1. The Carrier violated the Agreement when it used an outside contractor (Railway Services) to perform the Maintenance of Way work of thermite welding at or around Metropolis, Illinois on the Bluford Subdivision beginning on September 19, 2011 and continuing (System File A110923/IC-BMWED-2011-00152 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, Claimants E. Tripp and C. Beasley shall be compensated for eight (8) straight time hours per day at their respective rates beginning September 19, 2011 and continuing."

FINDINGS:

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement when it utilized an outside contractor to perform certain Maintenance of Way work beginning on September 19, 2011, rather than assigning this work to the Claimants. 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 and is

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 Claimants are 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 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 thermite welding work around Metropolis, Illinois, beginning on September 19, 2011. Therefore, this claim must be denied.

Initially, the Organization argues that the Carrier failed to provide notice and a conference prior to the contracting out. However, the record reveals that the Carrier did provide a notice when it determined that it had insufficient Carrier resources, equipment, and employees to perform the necessary work. Moreover, the record also reveals that the welding work involved was conferenced in August of 2011.

The Carrier has supported its case by pointing out that they had insufficient resources in order to perform the work and that no Organization-represented employees were furloughed at the time of the subcontracting. Finally, the Organization has shown that no Claimants lost any work, nor were there any damages incurred by any of the Claimants.

For all the above reasons, 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 131 OF PLB NO. 6043
AWARD 132 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 records in these cases contain 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 flat out wrong. Second, from a reading of these awards, the impression is given that the Organization argued that its members performed welding 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, these awards are outliers that should be afforded no precedential value and I am compelled to vigorously and emphatically dissent to them.

THE ON-PROPERTY RECORDS CONTAIN NO EVIDENCE THAT A NOTICE WAS PROVIDED TO THE ORGANIZATION.

A review of the on-property handling in these cases plainly reveal that the Organization argued in its initial claim letters that no notice was given by the Carrier to the Organization regarding its use of contractors to perform the claimed work. In their denial letters dated October 3, 2011 and December 22, 2011, respectively, the Carrier responded to the claims 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 employees to perform the necessary work indicated for this project. In response to the Carrier's denials, by letters dated November 18, 2011 and February 13, 2012, respectively, the Organization appealed the Carrier's decisions to deny the claims 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 appeals by letters dated January 16, 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 subsequent letters 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 letters 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.

As can be seen from above, throughout the entire on-property handling of these cases, 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 letters 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 records of these cases.

CLEAR CONTRACT LANGUAGE

Furthermore, the application of the so-called exclusivity test to contracting out disputes is in direct conflict with the clear contract language. 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:
>
> * * *

"C. Welding Subdepartment

1. a. Foremen
   b. Lead welder
   c. Welders

3. Grinders
4. Helpers"

The word "customarily" simply does not equate to "exclusively". 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.

PRECEDENT ON THIS PROPERTY

In addition to ignoring the clear and unambiguous language in Rule 2 stipulating that employes in each subdepartment will perform the work *customarily* performed in that subdepartment, the Majority ignored well-reasoned precedent on this property proving that Maintenance of Way employes *customarily* perform welding work. For example, Award 5041 (Carter - 1950), ***rendered nearly sixty eight (68) years ago on this property involving the parties that are subject to this dispute,*** carefully examined whether or not welding work is reserved to welders and welder helpers covered by the Maintenance of Way Agreement and concluded:

> "**In January 1948, Carrier contracted with the Teleweld Company to perform rail end-hardening and cross grinding on Carrier's tracks between Jackson and Canton, Mississippi.** The work was completed in twenty days. **Claimants contend that the work belonged to track welders and welders**

"**helpers under the Agreement**. Claimants demand twenty days' pay because of Carrier's violation of the Agreement in farming the work to a contractor outside the scope of the Maintenance of Way Agreement.

The record shows that subsequent to 1931 the Carrier was able to purchase end-hardened rail for use in its tracks. The problem of end-hardening rail purchased from steel mills which did not perform that function and that which had to be built up as a matter of maintenance, was not solved to the satisfaction of the Carrier. It appears that Teleweld, Inc., developed an improvement for end-hardening rail by an electrical process. Carrier decided to contract with Teleweld, Inc., to end-harden a few miles of track that had not been so treated.

The Carrier contends that the end hardening of rail on the property is not welding and therefore not work reserved to welders and welders helpers under the Agreement. Whether or not the end-hardening of rail is actually welding is not material here. It is so considered in the railroad industry. We are of the opinion therefore that the end-hardening of rail on the property by whatever process employed is work reserved to welders under the Maintenance of Way Agreement.

Carrier urges that the electrical process employed by Teleweld, Inc., was a new development and that the contract was entered into solely to test its effectiveness. Carrier states that the process was patented and the Carrier did not have the machines necessary to the performance of the work.

The work of end-hardening rail belongs to welders under the Maintenance of Way Agreement. The record does not show that the machinery required was not obtainable or that it would have been unduly costly to have obtained it. It is not pointed out in the record why the machines could not have been operated by the employes classified as welders under this Agreement. **No attempt was made to handle the matter with the Organization to whom the work belonged. The work is not unusual in the railroad industry, in fact it continuously exists**. The fact that a new electrical process is to be used is not controlling unless it be shown that the employes entitled to it are not qualified to perform it, or that the equipment required was costly or rarely used. **Under such circumstances, Carrier is not justified in ignoring its Agreement with the maintenance of way employes or in farming the work out to those not within**

"**it**. The foregoing conclusions are supported by Awards 4671, 4701, 4765, 4784. A sustaining award is required."

Notwithstanding the fact Award 5041, cited by the Organization within its submission to the Board, held that welding work is reserved to and, thus, customarily performed by welders and welder helpers covered under the Maintenance of Way Agreement, the Majority failed to even acknowledge the award's existence, much less distinguish it or assail its reasoning and logic.

THE NEUTRAL MEMBER'S PRIOR FINDINGS AND PREVAILING INDUSTRY WIDE PRECEDENT

In addition to the foregoing, we must note that **THE NEUTRAL MEMBER** in the instant cases **HAS PREVIOUSLY REJECTED APPLICATION OF THE SO CALLED EXCLUSIVITY TEST IN CONTRACTING OUT CASES**. For example, in **2004** the Neutral Member of this Board unequivocally rejected the application of the so called exclusivity test to subcontracting cases in Award 1 of Public Law Board 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 Public Law Board 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:

AWARD 39520:

"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. ***"

In addition to the Neutral Member's own findings in prior contracting out cases, the Organization directed the Neutral Member's attention to NRAB Third Division Awards 29979, 31720, 31777, 32160, 32862, 35378, 37485, 39520, 39521, 39522, 39883 and 40506 within its submission to the Board which all maintained this Neutral Member's prior position with respect to the so called exclusivity test in the contracting out cases cited above. For reasons that remain unknown, however, the Neutral Member departed from his own previous decisions, as well as substantial industry precedent, regarding the application of exclusivity 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, these awards 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