BEFORE PUBLIC LAW BOARD NO. 6043

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

Case No. 136

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

1. The Carrier violated the Agreement when it used an outside contractor (Kraemer Construction) to perform the Maintenance of Way work of inspecting and repairing culverts across the Iowa Subdivision beginning on August 15, 2011 and continuing through September 7, 2011 (System File A111007/IC-BMWED-2011-00140 ICE).

2. The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with its plans to contract out the above-described work and failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Appendix C and Appendix C-1 (December 11, 1981 National Letter of Agreement).

3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimants H. Wilson, R. Boyle and T. Jackson shall each be compensated for eight (8) straight time hours and two overtime hours per day beginning on August 15, 2011 continuing through September 7, 2011."

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 during the period from August 15 through September 7, 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 customarily has been performed by Maintenance of Way forces, 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 Agreement's good-faith provisions relating to the reduction of subcontracting and the increase in the use of Maintenance of Way forces, 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 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 subcontracted the work of inspecting and repairing culverts along the Iowa Subdivision beginning in August of 2011. Therefore, this claim must be denied.

The Organization argues that it did not receive notice as required by the contract. However, the Organization eventually admitted that it did receive notice of the planned subcontracting. The Organization's claim acknowledges that the Carrier gave advance notice, and the parties met in a conference prior to the contracting out of the work.

With respect to the work that was performed, the record reveals that the Organization did not present any evidence that the work that was done by the subcontractor is exclusively reserved to the Organization-represented employees. Moreover, the Carrier contended that specialized equipment was needed in order to perform the work and the Organization failed to rebut that affirmative defense. The Carrier contends that the Claimants were not capable of operating the specialized equipment, and the Organization has failed to prove that they were able to handle the equipment that was needed to perform the work.

Since the Organization has failed to meet its burden of proof in this case, this Board has no choice other than to deny the claim.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

Ryan Hidalgo
ORGANIZATION MEMBER
DATED: July 24, 2018

CARRIER MEMBER
DATED: July 24, 2018

LABOR MEMBER'S DISSENT
TO
AWARD 136 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. From a reading of this award, the impression is given that the Organization argued that its members performed the work of inspecting and repairing culverts 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) dominate precedent across the rail industry, including this 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.

CLEAR CONTRACT LANGUAGE

The application of the so-called exclusivity test to contracting out disputes on this carrier 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:
>
> A. Track Subdepartment
>
> 1. Track Foremen
> 2. Assistant Foremen
> 5. Trackmen

"* * *

B. B&B and Paint Subdepartment

1. a. Foremen
   b. B&S Welders*
2. Assistant Foremen
3. Carpenters, Painters and Masons
4. Helpers
5. Bridgemen"

The word "customarily" simply does not equate to "exclusively". This Board's application of the so called 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 by the Agreement.

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 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:

"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 the so-called exclusivity test to contracting out cases.

CONCLUSION

In sum, the Majority's determination that the so-called exclusivity test applies to contracting out cases has a severely strained relationship with the Neutral Member's own prior findings as well as 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