BEFORE PUBLIC LAW BOARD NO. 6043

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

Case No. 329

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

1. The Carrier violated the Agreement when it used an outside contractor (RWS Thermite Welders) to perform the Maintenance of Way work of distressing rail at various locations between Orleans Junction and Summit Junction on the McComb Subdivision beginning on June 13, 2011 and continuing through July 6, 2011 (System File A110725/IC-BMWED-2011-00099 ICE).

2. The Agreement was further violated when the Carrier failed to give the General Chairman 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 C. Watts, J. McKenzie, G. Smith and E. Moak shall each '. . . be allowed eight (8) straight time hours per day plus two (2) overtime hours at their respective straight time and time and one-half rate of pay for work between June 13, 2011 to July 06, 2011 which as the date of this claim thirty (30) days totals a maximum of $8412.00 and a minimum of $7,626.60 continuing forward at $280.40 and $254.22 per day until this violation is corrected'."

FINDINGS:

The Organization filed a claim on behalf of the Claimants, alleging that the Carrier violated the Agreement by using outside forces to perform Maintenance of Way work during the period from June 13 through July 6, 2011, and by failing to comply with the Agreement's advance notice provisions in connection with its plans to contract out the work at issue. The Carrier denied the claim.

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

because the work at issue is reserved to Carrier's Maintenance of Way and Structures Department forces, because the Carrier failed to comply with the Agreement's advance notice provision relating to its plans to contract out the work at issue, because there is no merit to the Carrier's defenses, and because the requested remedy is appropriate. The Carrier contends that the instant claim should be denied in its entirety because the Carrier complied with its notice and conference obligations, because the Carrier was permitted to contract out the work in question, because the Organization has failed to meet its burden of proof, 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 met its burden of proof that the Carrier violated the Agreement when it used an outside contractor to perform work of distressing rail at various locations between Orleans Junction and Summit Junction on the McComb Subdivision in June of 2011. The Carrier violated the Agreement by failing to give the Organization notice and then have a conference with the Organization to discuss the subcontracting that would take place in June and July of 2011. The Agreement is clear that when the Carrier intends to utilize outside forces to perform work that is normally performed by Organization-represented employees, it must give the Organization notice and then conference the matter before actually starting the work. The Carrier failed to do that in this case.

The Carrier argues that this work was part of an earlier contract that was already in place and, therefore, it did not have the requirement of issuing another notice and having

another conference. This Board disagrees. There was a significant amount of time between the original contract and the work that was performed in this case. In the spirit of the Agreement between the parties to discuss subcontracting before it takes place, this Board finds that the Carrier had a burden, under the rule, to issue another notice and have another conference to discuss the July work. It failed to do that.

Once this Board has determined that the Carrier violated the Agreement, we next turn our attention to the type of damages being sought by the Organization. The Carrier has shown, with sufficient evidence, that no employees lost any work as a result of this subcontracting. The named Claimants were fully employed throughout the time period and, therefore, although there was a violation of the Agreement, there is no basis for this Board to issue any damages to any employees. Any damages issued to the Claimants would be considered to be a windfall.

Consequently, this Board sustains part of the claim and denies part of the claim. The Carrier was in violation of the Agreement, but the Organization and the Claimants are awarded no damages.

AWARD:

The claim is sustained in part and denied in part. The Carrier violated the parties' Agreement by failing to issue a notice and hold a conference regarding the subcontracting, but the Organization and the Claimants are awarded no damages in

accord with the above decision.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: July 24, 2018

CARRIER MEMBER
DATED: July 24, 2018

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 329 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 to the remedy portion of the claim.

The Labor Member whole-heartedly concurs with the Referee's finding that the Carrier violated the Agreement in this case. However, the Referee's decision to reject the Organization's request for complete compensation is just plainly and simply wrong.

In this case, there can be little question that if the Carrier had not assigned outside contractors to perform the Maintenance of Way and Structures Department work at issue here, the Claimants would have performed the work. Hence, the inexorable conclusion is that the Claimants were damaged when they lost the opportunity to perform the work and receive the concomitant reparations.

Here, the Neutral Member of the Board is attempting to set a new standard to be required of the Organization to obtain a monetary remedy. It is as though the Neutral Member believes that this issue has not been visited in the past. Quite to the contrary, the Neutral Member was not ploughing virgin soil here as the Neutral Members's findings in this case ignore a long history of prior awards dating back to 1993 wherein this Neutral Member made monetary reparations to fully employed employes on no less than eight (8) separate Carrier properties employing standards at odds with the standards the Majority is attempting to foist on the Organization in this case. For instance, we direct the Majority's attention to Third Division Awards 29479, 29985, 32320, 34216, 35078, 35181, 36750, 39520, 39521, 39522, 39529, 39883 and 40506 wherein a monetary remedy was allowed by the Neutral Member of this Board for both an agreement violation and a lost work opportunity notwithstanding Claimants' fully employed status. A sample of these awards are as follows:

AWARD 29985:

> "With respect to the Carrier's argument that the Claimants were fully employed during the alleged violation period, the Carrier has failed to show that it could not have assigned the Claimants to perform the work in question by either rescheduling the work the Claimants actually performed or by allowing the Claimants to perform the work in question during overtime or weekend periods. In a situation like this, the Carrier bears the burden of showing that the Claimants were

"fully employed and could not possibly have performed the work in question. It has not done so."

AWARD 32320:

"The Carrier failed to present sufficient evidence to support its affirmative defense that it had sold the track materials in question. Since the Agreement applicable in this instance covers the work of removing track and appurtenances thereto, this Board must find that the Carrier violated the Agreement when it failed to notify the General Chairman of its intention to contract out the work. This Board finds that the work involved here, the recovery of track materials, was clearly connected with the Carrier's railroad operation and should have been performed by the Claimants.

This Board has held on numerous occasions that if the Carrier takes the position that it had sold the property, it must come forward and produce the contract. In this case, the Carrier failed to provide the documentation which may have defeated this claim. See Award 31521 and the cases cited therein.

Moreover, because the failure to assign the work to the Claimants resulted in a loss of work opportunities, the requested monetary remedy is appropriate."

AWARD 34216:

"It is clear from this record that the Carrier failed to notify the General Chairman of its plan to contract out the work involved here. In December of 1981, the Organization was assured by the Carrier that it would 'assert good-faith efforts to reduce the incidence of subcontracting' and that part of that would be advance notice so that the parties could discuss the effects of any subcontracting and see if in fact it could be avoided.

In this case, the Carrier did not even give the Organization the opportunity to discuss the matter. It simply hired outside forces to perform the work.

With respect to the remedy, the Board finds that the Claimants are entitled to the remedy requested. The Carrier has offered no proof that the work in question could not have been performed on overtime, nor has the Carrier proven that the Claimants did not suffer any monetary loss as a result of this improper action. Numerous Boards have held that where the Carrier fails to provide advance written

"notice and precludes a good-faith discussion at a conference, a violation occurs and the Claimants are entitled to be paid for the work."

AWARD 35078:

"Because the Carrier clearly violated the Agreement when it contracted out the work, the Board finds that the Claimants are entitled to relief. However, the Claimants requested time and one-half for the violation. The record reveals that the Claimants were working elsewhere at the time of this incident. As the Board has stated in many previous Awards, the Claimants cannot be allowed the punitive rate as a penalty when it is clear that they were performing work and getting paid at the time of the violation. Consequently, the Board orders that each of the Claimants shall be paid 40 hours at the straight-time rate.

AWARD

Claim sustained in accordance with the Findings."

AWARD 40506:

"The record contains evidence that the Organization-represented employees of the Carrier have performed similar, if not the same, work that was subcontracted in this case. The Carrier's failure to provide any advance notice to the Organization precluded the possibility of a good-faith effort to reach some understanding regarding the subcontracting. Because the Carrier failed to give the appropriate notice it did not satisfy its obligations under Rule 1(b) and the December 11, 1981 Letter of Understanding.

Once we have determined that the Carrier failed to comply with the Rule and that the Organization met its burden of proof, we next must turn our attention to the remedy sought by the Organization. In this case, the Organization appears to be requesting that the four named Claimants divide 930 man hours of pay between them. The Board finds that to be an excessive amount of relief with no basis. Clearly, the four Claimants are entitled to some relief; and it is evident that if the Carrier does not have to afford relief to those Claimants, the Carrier has no incentive to comply with the Rules in the future. Therefore, the Board orders that the Claimants each be awarded 20 hours of pay at the time and one-half rate for the missed work opportunity. It is true that it is not clear that those Claimants would have received that work opportunity; but the fact that the Carrier failed to meet

"with the Organization to discuss the subcontracting makes it impossible to make any determination in that regard. Some type of award must be made so that the Carrier will pay attention to the clear-cut notice provisions in the future.

AWARD

Claim sustained in accordance with the Findings."

Finally, within its submission provided to the Neutral Member the Organization cited the findings of Award 39141 wherein the Board held:

"It is well established that compensatory remedies have been awarded by numerous Boards in the past in order to preserve the integrity of the Agreement, notwithstanding arguments by the Carrier that the claimants were fully employed during the period at issue. The Board concurs with the reasoning set forth in those Awards. The result of such a remedy effectively requires the Carrier to pay twice for the same work. The Board notes that the Carrier is fully aware of such a consequence for its decision to contract out work, which work is subsequently determined to be scope covered work reserved to BMWE-represented employees. The Carrier specifically acknowledged so in its Opposition to Motion for Preliminary Injunction (Brotherhood of Maintenance of Way Employes vs. CSX Transportation, Inc., Case No. 3:00-cv-264-J-21B) which provides, in pertinent part, as follows:

'The standard remedy in arbitration is not, as BMWE suggests, to have work which was done by the contractor "redone with BMWE members." BMWE at 26. The standard arbitration remedy is that CSXT must, in effect, pay for the work twice. The arbitrator could order that CSXT pay BMWE-represented employes as if they had done the work in question.' (Employee's Exhibit R.)

Therefore, as a result of the Carrier's violation of the Scope Rule in this case, the Claimants shall each be compensated at their straight time rates of pay for an equal proportionate share of all hours worked by employees of the outside contractor in the construction of the office building at mile post QC 15.0 in Selkirk, New York. See Third Division Award 36092."

It appears that the Neutral Member has accepted and grounded his opinion upon the Carrier's assertion that the Claimants were "fully employed". The fact that the Claimants may

have been working on the claim dates is irrelevant under both the "damages" and "penalty" principles espoused by this Board. It is axiomatic that the employment status of the Claimants is meaningless under the penalty awards because they allow compensation to protect the sanctity of the Agreement irrespective of monetary losses by individual Claimants. The fact that the Claimants may have been working on the claim dates is also irrelevant under the damages awards because they are founded on a loss of work opportunity. The forty (40) hour work week provided for in the National Agreement establishes a minimum of forty (40) hours per week as long as positions exist. The fact that Claimants may have received that minimum payment during a claim period does not negate the fact that they lost the opportunity to perform the work in dispute during daily or weekend overtime or by having an extended work season for seasonal employes. The fact is, that the collective bargaining agreement specifically contemplates such work as is evidenced by the overtime rules, call rules and provisions governing work on holidays or during vacation periods. In recognition of these opportunities for extended hours or additional days of work, numerous awards have held that the so-called "full employment" of claimants is no bar to the awarding of monetary damages.

The above-cited awards clearly establish that so-called "full employment" is not a bar to finding and awarding monetary damages. Moreover, these same awards also establish that when work is improperly assigned to an outside contractor or even other employes who have no contract right to the work, this establishes a prima facie case for the Organization and the burden shifts to the Carrier to prove that the Claimants would have been unable to perform the work through the use of overtime, rescheduling, etc. In the instant case, no such showing was made or even attempted by the Carrier because no such showing was possible. The inescapable fact is that there is no reason the Claimants could not have performed the work at issue here on the claim dates. Hence, the Claimants suffered a loss of work opportunity.

It is transparently clear that arbitral precedent does not prohibit the sustaining of the monetary award in this claim. In fact, precisely the opposite is true. There is ample precedent from the Neutral Member's prior findings that mandate a sustaining award. Instead, in this case the Referee was dispensing his own brand of industrial justice based on his subjective notion of equity.

For all of these reasons, I emphatically dissent with respect to the damages finding in this award as it is palpably erroneous and should be afforded no precedential value.

Respectfully submitted,

R H

Ryan Hidalgo
Employe Member