AWARD NO. 15
NMB CASE NO. 15

PUBLIC LAW BOARD NO. 6399

PARTIES **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION**

TO **-and-**

DISPUTE: **NORFOLK SOUTHERN RAILWAY COMPANY (FORMER NORFOLK & WESTERN RAILWAY COMPANY)**

Claimants: J. Frazier, W. Chaffin, T. Patton and C. Kitts

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way and Structures Department work of saw cutting road crossings and hauling away old asphalt for the purpose of crossing repairs at various locations on the Kenova District, not limited to N-568.8, N-569.2, N-569.8, N-570.0, N-571.0 and N-576.2, among others beginning on June 22, 2015 and continuing through July 24, 2015 (Carrier's File MW-BLUE-15-46-LM-600-NWR).

2 The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, in advance of its plans to contract out the work referred to in Part 1 above and when it failed to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces or reach an understanding concerning such contracting as required by Appendix 'F' of the Agreement and the December 11, 1981 National Letter of Agreement.

3 As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimants J. Frazier, W. Chaffin, T. Patton and C. Kitts shall now be compensated for two hundred fifty (250) hours each, paid to them at their applicable rate of straight and overtime rates of pay, for all hours worked by the outside forces."

FINDINGS:

The Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties and that Public Law Board 6399 has jurisdiction over the dispute.

The Claimants have established and maintain seniority in the Carrier's Maintenance of Way and Structures Department. On the dates giving rise to this dispute, the Claimants were assigned and working in their respective positions.

Between June 24 and July 22, 2015, the Carrier hired an outside contractor to perform paving work in connection with the rehabilitation of several highway road crossings at various locations on the Carrier's Kenova, West Virginia District. Beginning on June 22, 2015 and continuing through July 24, 2015, the Carrier assigned outside forces to perform the work of saw cutting road crossings and hauling away old asphalt for the purpose of crossing repairs at various locations on the Kenova District, not limited to N-568.8, N-569.2, N-569.8, N-570.0, N-571.0, N-576.2, among others. The Carrier did not provide notification of this second assignment to the General Chairman prior to its occurrence.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the Carrier's assignment of saw cutting road crossings and hauling away old asphalt for the purpose of crossing repairs violated the parties' Agreement, as this work has customarily, historically, and traditionally been performed by Maintenance of Way ("MOW") forces and is contractually reserved to them in accordance with Rule 1- Scope of the Agreement.

Rule 1, Scope, provides, in part:

> "RULE 1 - SCOPE
> These rules govern the rates of pay, hours of service and working conditions of all employees in the track sub-department and bridge and building subdepartment of the Maintenance of Way and Structures Department listed in this "rule, and other employees performing similar work recognized as belonging to and coming under the jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, but do not apply to supervisory forces above the rank of foreman."

The Organization contends that the disputed work, saw cutting road crossings and hauling away old asphalt for the purpose of crossing repairs, has customarily and historically been performed by the Maintenance of Way and Structures Department employes. Since the Carrier's Maintenance of Way forces routinely perform all work associated with saw cutting road crossings and hauling away old asphalt for the purpose of crossing repairs, the parties' Agreement clearly recognizes this work as belonging to and coming under the jurisdiction of the Maintenance of Way and Structures Department.

The Organization contends that the Carrier does not deny that the Organization customarily and historically performed the subject work. And further, that the parties have agreed that when the Carrier plans to contract out work coming within the Scope of the Agreement, it is required to notify

the General Chairman, in writing, as far in advance as is practicable of its plans to contract out the work. There is no dispute that the Carrier did not provide advanced notice of its plans.

The Organization contends that once it has shown the disputed work to be within the scope of the Agreement, the burden shifts to the Carrier to prove that it did not improperly assign outside forces to the work. Here, the Organization contends that the Carrier's defense, that the work was performed under the provisions of the parties' May 25, 2009 Letter of Understanding ("2009 LOU") is not dispositive of the claim. The Organization agreed that the Carrier could use outside contractors to perform paving work on the territory covered by the N&W-Wabash Agreement and that the notification and meeting requirements to the use of these contractors would not be required.

The 2009 LOU provides, in part:

> This is in reference to our February 13, 2009 discussions concerning pending disputes under the current July 1, 1986 NW-Wabash Agreement, as amended, the proper application of certain provisions in a uniform manner across the Eastern, Western, and Northern Regions, and settlement of the associated claims that have been filed, in connection with these respective disputes. We agree that the respective issues are resolved as follows:
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> B. Paving-
> Commencing on January 1, 2009, the Carrier has the right at its sole discretion, on a case-by-case basis, to use either a contractor or Company employees to perform paving work. When the Carrier chooses at its managerial discretion to use a contractor to perform paving, there is no requirement for advance notice in accordance with Appendix F and the use of contractors to pave shall not constitute a basis for any time claims.
>
> All claims involving paving are withdrawn, including but not limited to Case 5 of PLB 7272, Case 156 of SBA 1048 and any cases that are being held in abeyance. However, a monetary settlement will be made in consideration of all of the pending claims in Case 5 of PLB 7272, Case 156 of SBA 1048 and any cases that are being held in abeyance, or subsequent claims that have been appealed to Labor Relations that involve paving work performed prior to January 1, 2009, for which either the General Chairman has already discussed in conference or the nine month time limit has not expired. The payment rate will be based on 30 cents per dollar at the straight time rate for the man hours actually consumed by the contractor in paving work….

The Organization contends that the 2009 LOU expressly limited the Carrier to assigning to a contractor the act of "paving," that is, "(1) the laying or covering with material (such as asphalt or concrete) that forms a firm surface for travel, [or] (2) the act or technique of laying pavements, and nothing more than the "simple application or applying of pavement" (hereinafter referred to as "laying asphalt"). The Organization contends that the work otherwise associated with road crossing repair (e.g., crossing preparation and cleaning up old asphalt and debris) still remains scope-protected work and remains reserved to the Carrier's Maintenance of Way forces.

The Organization contends that the Carrier has failed to provide any evidence in support of its position that the term "paving" was intended to include the surrounding preparation and clean up. In contrast, the Organization contends, it has provided a multitude of employe statements clearly establishing that the Carrier's MOW forces have customarily and historically performed this work.

Finally, the Organization contends that it seeks the "standard remedy in arbitration" for contracting out in violation of a collective bargaining agreement. The Organization contends that the Carrier has never refuted the hours and remedy claimed.

The Carrier contends that its understanding of the term "paving work" is vastly different from the one held by the Organization. The Carrier contends that its understanding is supported by the parties' handling of prior claims on the property. Specifically, the Carrier argues that the Organization assented to give the Carrier the right to perform all "paving work" with contractors, in exchange for monetary payments to settle all of the then-existing claims involving "paving work."

The Carrier contends that it is clear that the parties intended to include all aspects of the paving process, including saw cutting the existing asphalt, laying new asphalt, protecting the crossing, and removal and hauling away of old asphalt and debris left by the paving process. The Carrier contends that because the Organization has a different interpretation of "paving work," the term is ambiguous and it is appropriate to consider the conduct of the parties following execution of the 2009 LOU.

The Carrier contends that the Organization has failed to present material evidence in support of its position that the term "paving work" was only meant to include the laying of a paved surface. The Carrier contends that the statement offered by the former General Chairman only reiterates the term "paving work" and offers no insight into what the parties meant by the term.

The Carrier contends that when the parties executed the 2009 LOU, they resolved numerous time claims, including not only claims involving the laying of paving surface, but also claims involving the "saw cutting of asphalt" and "hauling away of old asphalt." The Carrier contends that it would be absurd to interpret "paving work" in two different ways in the same LOU.

The Carrier contends that the Organization accepted payment for these claims and for several years afterward acknowledged the Carrier's right to use contractors to perform paving work, including the saw cutting and hauling away of old asphalt. As such, the Carrier contends, the parties' conduct demonstrates that they intended the term "paving work" to include more tasks than the simple laying of a paved surface.

The Carrier here does not challenge the Organization's assertion that the disputed work was customarily and historically performed by members of the BMWED. Numerous boards have found that tasks associated with paving have traditionally been performed by Maintenance of Way forces and is contractually reserved to them in accordance with Rule 1- Scope of the Agreement. Ordinarily, the Carrier would be obligated to provide to the Organization advance notice of and an opportunity to conference regarding its intention to use contractors to perform this Scope-covered work. There is no question that advance notice was not provided.

Instead, the Carrier has asserted that the parties' 2009 LOU gave it the contractual right to assign this scope-covered work to contractors at its discretion, without providing advance notice to the Organization. The Organization concedes that it agreed to the Carrier's right to use contractors to perform paving work but argues that the term "paving work" does not encompass the work performed here: saw cutting and hauling away of old asphalt. The Carrier responds that the term, "paving work" includes both the laying of asphalt and the associated preparatory and cleanup work.

Accordingly, resolution of this dispute depends on what the parties intended when they used the term "paving work" in the 2009 LOU. When the language of the parties' agreement is clear and unambiguous, this Board need look no further than the negotiated language agreed to by the parties. It is only appropriate to consider past practice or other interpretative aids when the provision is ambiguous. Here, however, the parties have both offered plausible interpretations of the disputed term, the very definition of an ambiguous term.

The Organization offered the statement of General Chairman Jed Dodd who negotiated and was a signatory to the 2009 LOU as evidence of the parties' intent. He wrote, in part:

> Item B of the May 25, [2009] Agreement dealt with the issue of contractors performing the paving work around maintenance of way road crossing work. In that portion of the Agreement the BMWED agreed that Norfolk Southern could use outside contractors to perform paving work on the territory covered by the N&W-Wabash Agreement and that the notification and meeting requirements to use these contractors under the N&W-Wabash Agreement would not be required. This agreement was limited to the paving work associated with the crossings and all other maintenance of way work associated with crossing work under the N&W-Wabash Agreement would still remain scope protected work.

Unfortunately, while his statement makes clear that all unreserved work would remain scope-covered, nothing further can be gleaned from his statement regarding what the parties meant by "paving work." This was the only evidence from the parties' bargaining history which was made part of the on-property record.

Arbitrators often turn to the parties' prior practice to interpret ambiguous contractual language on the basis that the most telling illustration of what the parties intended can be found in their own actions. The parties' intent is most often manifested in their actions. As stated in Third Division Award 2436,

> The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made.

Here, when the parties negotiated the 2009 LOU, they settled a significant number of outstanding time claims, with the Carrier paying out a percentage of the sought remedy in accordance with the terms of the 2009 LOU. A review of the 2009 settled claims reveals that many of the claims protested the use of contractors to perform preparatory and cleanup work associated with paving. The Organization was not solely claiming the work of laying asphalt. The parties summarized their resolution by using the term, "paving work" suggesting more than just paving, and this meaning is consistent with their actions at the time.

The Carrier points out that it would be absurd for "paving work" to have one meaning in the paragraph wherein the Carrier agreed to a monetary settlement for outstanding claims that involve paving work, but a different meaning in the paragraph giving it the right to use contractors for "paving work." To be sure, it is a commonly accepted principle of contract interpretation that where the parties use the same term in their agreement, it should be given a consistent meaning throughout. Typically, when they intend for a different meaning, they will use a different term.

Finally, the record contains no evidence of additional time claims for paving work performed by contractors, including preparatory and cleanup work, from the negotiation of the 2009 LOU until 2013. The parties' application of the 2009 LOU was consistent with the Carrier's position that they intended for the Carrier to have the discretion to also assign preparatory and cleanup duties associated with paving to contractors without advance notice to the Organization.

In other words, for a substantial period of time, the Organization appeared to agree with the interpretation of "paving work" urged here by the Carrier, which it now appears to reject. But the actions of the parties, both when the 2009 LOU was negotiated and afterward, support the Carrier's position that the term "paving work" was intended to include more than simply laying asphalt. The Organization has not successfully shown that its interpretation was the one intended by the parties, and thus the time claim for saw cutting road crossings and hauling away old asphalt for the purpose of crossing repairs must fail.

AWARD

Claim denied.

Kathryn A. VanDagens,
Chairman

Scott M. Goodspeed, Carrier Member

Zachary J. Wood, Employe Member

Dated: January 18, 2023