AWARD NO. 17
NMB CASE NO. 17

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)**

Claimant: C. Horton

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces (Cleco) to perform Maintenance of Way and Structures Department work associated with the unloading and installation of rail as well as the cleaning up of scrap and various debris along the right of way, at various locations between Mile Post D 0 and Mile Post D 50, on the Pocahontas Division beginning on May 19, 2014 and continuing (Carrier's File MW-BLUE-14-41-LM-441 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, Claimant C. Horton shall now be paid the same hours as utilized by the contractor and that he be paid at the applicable straight time and overtime rate of pay."

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 Claimant has established and maintains seniority in the Carrier's Maintenance of Way and Structures Department. Beginning on May 19, 2014 and continuing, the Carrier assigned outside forces, Cleco, to perform routine maintenance, installing rail and general clean-up of the right-of-way (remove scrap ties and various metal debris) at various locations between Mile Post D 0 and Mile Post D 50, on the Pocahontas Division. The Carrier did not provide notification of this assignment to the General Chairman prior to its occurrence.

The Organization initially filed this claim on July 17, 2014. On October 17, 2014, during the on-property handling, the Organization claimed that the contractor had wrongly performed work reserved to the Claimant between May 19, 2014 and September 30, 2014, and presented spreadsheets showing the hours worked at Dismal, Virginia. The Organization characterized the claim as "continuing" as the work was ongoing. On December 16, 2014, the Carrier's HDO declined the claim. The parties conferenced on February 10, 2015, regarding the initial claim.

On February 9, 2015, the Organization submitted an additional time claim for the Claimant, for hours worked by the contractor at Dismal, Virginia between November 3, 2014 through February 4, 2015.

On June 29, 2015, the Organization submitted an additional time claim for hours worked by the contractor between February 5, 2015 and June 6, 2015 at Oakwood, Virginia, along with Daily Approval for Hourly Rated Contract worksheets. On August 6, 2015, the Organization submitted an additional time claim for hours worked by the contractor between June 8, 2015 and July 16, 2015 at Oakwood, Virginia, along with Daily Approval for Hourly Rated Contract worksheets. On December 9, 2015, the Organization submitted an additional time claim for hours worked by the contractor between July 20, 2015 and October 30, 2015, at Oakwood, Virginia, along with Daily Approval for Hourly Rated Contract worksheets. On March 2, 2016, the Organization submitted an additional time claim for hours worked by the contractor between November 2, 2015 and January 8, 2016, at Oakwood, Virginia, along with Daily Approval for Hourly Rated Contract worksheets.

The Organization contends that the Carrier's assignment of unloading and installation of rail as well as the cleaning up of scrap and various debris along the right of way to an outside contractor 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, unloading and installation of rail as well as the cleaning up of scrap and various debris along the right of way, has customarily and historically been performed by the Maintenance of Way and Structures Department employes and 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 because of the Carrier's failure to notify the General Chairman, it was deprived of the opportunity to engage in good-faith discussions with the Carrier for the purpose of attempting to reach an understanding concerning the Carrier's desire to contract out the subject work.

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.

The Organization contends that the Carrier's defenses must fail and its claim must be sustained and its member awarded a full remedy.

The Carrier contends that the Organization has failed to show that the Claimant is entitled to relief for all of the work and dates claimed by the Organization. The Carrier concedes that for the dates between May 19 and September 30, 2014, the contractor Cleco was performing work on the Carrier's property at the locations identified in the claim. The Carrier also concedes that the work identified in the claim, installing rail and removing ties and material, was Scope-covered work and that Cleco was used to perform that work without advance notice provided to the Organization.

However, the Carrier contends that with respect to the remaining dates and locations, the Organization has failed to meet its burden of proving a violation of the Agreement. The Carrier contends that weeks had passed during which Cleco was not on the Carrier's property and the record does not show what work was being done when it returned. With respect to the time claim for these additional dates, the only work referred to is "hauling rail" beginning on December 11, 2014, which was not mentioned in the initial claim.

The Carrier contends that this Board does not have jurisdiction to award the relief sought in the additional time claims, because the Organization failed to present substantial evidence regarding the nature of the work that was allegedly performed by a contractor after September 30, 2014. Furthermore, the Carrier contends, the Organization has failed to show that the additional time claims were related to the initial violation, either in work performed or location. The Carrier contends that this is nothing more than an attempt to simply extend the Carrier's liability, without any opportunity for the Carrier to avail itself of the usual and customary claims process to investigate the allegations of the additional work.

The Carrier contends that new and separate claims should have been filed for this additional work that allegedly violated the Agreement. But, it points out, at the time the new time claims were appended to the initial claim, the Organization could no longer file timely claims for this new work. The Carrier contends that whatever work was performed by Cleco after September 30, 2014, was not the subject of the claim before this Board.

This matter presents an unusual situation. At conference, the Carrier acknowledged its violation of the parties' Agreement by contracting out scope-covered work without advance notice to the Organization between May 19 and September 30, 2014. It agreed to compensate the Claimant for the lost work opportunity. But the matter proceeded to this Board because the Organization continued to file other time claims, seeking additional compensation for the Claimant.

The Carrier asserts that this Board has no jurisdiction to determine whether additional compensation is owed to the Claimant, because the Organization's attempts to "supplement" the initial claim are actually an improper expansion of the issue beyond that of the initial claim. The Carrier asserts that the later time claims were time-barred as coming too late under the parties' agreement. Further, the Carrier asserts that the Organization has utterly failed to meet its burden of showing the nature of the claimed work, or that it was in any way related to the work that occurred weeks earlier.

The Organization responds that the work in question was undisputedly scope-covered work and that it presented substantial evidence that the work was done by a contractor on the Carrier's premises without providing advance notice to the Organization. Thus, a sustaining award is in order.

In its initial claim, the Organization sought relief for the Claimant in regard to the Carrier's use of a contractor (Cleco) to perform the "unloading and installation of rail as well as the cleaning up of scrap and various debris along the right of way, at various locations between Mile Post D 0 and Mile Post D 50, on the Pocahontas Division beginning on May 19, 2014 and continuing." Although the claim is alleged to be "continuing" in nature, there is insufficient evidence that the additional work was, in fact, a continuation of the work addressed in the initial claim. The record shows a significant break in the contractor's work between September 30 and November 3, 2014, where the contractor was not on the Carrier's property. This fact alone would belie the application of a "continuing" liability theory.

Additionally, the initial claim does not address any work done at Oakwood, Virginia and it claims time for work done unloading and installation of rail as well as the cleaning up of scrap and various debris along the right of way. The record is insufficient to show that the additional time claims were also for this type of work. The Organization's amendments of the initial claim filed enlarged it to the point that the one presented to this Board is materially different from the one progressed.

This Board does find, however, that the Carrier violated the parties' Agreement by the assignment of outside forces (Cleco) to perform Maintenance of Way and Structures Department work associated with the unloading and installation of rail as well as the cleaning up of scrap and various debris along the right of way, at various locations between Mile Post D 0 and Mile Post D 50,

on the Pocahontas Division beginning on May 19, 2014 and continuing to September 30, 2014, without advance notice to the Organization.

To the extent it has not already done so, the Carrier is ordered to pay to the Claimant the same hours as utilized by the contractor between May 19 and September 30, 2014. No other relief is ordered.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is signed by the parties.

Kathryn A. VanDagens,
Chairman

Scott M. Goodspeed, Carrier Member

Zachary J. Wood, Employe Member

Dated: January 18, 2023