PUBLIC LAW BOARD NO. 6399

CASE NO. 26
AWARD NO. 26

Brotherhood of Maintenance of Way Employes
Division - IBT Rail Conference

and

Norfolk Southern Railway Company
(former Norfolk & Western Railway Company)

Claimants: S. Adcock, R. Dunston, and J. Carpenter

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces (Bedford Movers) to utilize a skid steer, compaction roller and front end loader to smooth roadbeds and parking lots located on the Carrier's property at Portlock Yard in Chesapeake, Virginia and Lamberts Point in Norfolk, Virginia beginning on January 2, 2020 and continuing through January 13, 2020 (Carrier's File MW-BLUE-20-17-LM-118 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 2 above, Claimants S. Adcock, R. Dunston and J. Carpenter shall now each be compensated seventy (70) hours at their respective straight time rates of pay."

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that the Public Law Board 6399 has jurisdiction over the dispute involved herein and that the parties were given due notice of hearing thereon.

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

Between January 2, 2020 and January 13, 2020, the Carrier assigned outside forces (Bedford Movers) to utilize a skid steer with a specialized rake, a compaction roller, and a front end loader to smooth roadbeds and parking lots located on the Carrier's property at Portlock Yard in Chesapeake, Virginia and Lamberts Point in Norfolk, Virginia.

The Organization filed this claim on February 10, 2020, which was denied by the Carrier on April 9, 2020. The claim 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 work of utilizing equipment such as skid steers, compaction rollers, and front end loaders to smooth roadbeds and parking lots is typical Maintenance of Way ("MOW") work, which has customarily and historically been assigned to and performed by the Carrier's MOW forces and is contractually reserved to them by the Scope Rule (Rule 1) of the controlling Agreement.

The Organization contends that it need only show that the work is arguably within the scope of the Agreement to trigger the advance notification and conference provisions of the Carrier's violation. In addition, the Organization contends that the Carrier's failure to notify the General Chairman in advance of its plans to assign this work to outside forces was a violation of the Agreement and precluded the Organization from requesting a conference to discuss the Carrier's intent to contract out. Once the Organization presents a *prima facie* case, the burden shifts to the Carrier to prove that it did not improperly assign outside forces to the work.

The Organization contends that the Claimants were ready, willing, and qualified to perform this work and would have done so if only the Carrier had assigned them thereto. The Organization contends that the record contains unrefuted evidence that the subject work is contractually reserved to and has been customarily, historically, and traditionally performed by MOW employes, as recently as months prior to the instant claim.

The Organization contends that it is a well-established principle that a carrier's failure to comply with the advance notification and conference provisions of the Agreement requires a sustaining award. This applies to situations where the Carrier failed to issue a notice and when the notice is vague or otherwise erroneous.

The Carrier contends that nothing in the controlling Agreement prohibited the Carrier from contracting out the work, which has not been shown by the Organization to be within the scope of the BMWED Agreement. The Carrier contends that it may exercise its managerial prerogative to contract out, absent either (1) an express prohibition in the Scope Rule or other agreement language; or (2) through a demonstration by the Organization of a customary, regular, and traditional practice of a predominant performance by members of the craft.

The Carrier contends that the Scope rule here contains no language reserving any specific task to the members of the craft. Thus, in order to prevail, the Organization must demonstrate by competent evidence that the claimed work has "historically and customarily been performed by the Carrier's own Maintenance of Way forces."

The Carrier contends that here, no such evidence has been presented. The Carrier contends that although the Organization provided nineteen statements from current MOW employes, none of the statements supports the Organization's claim. While each described a multitude of tasks that have been performed by MOW employes, none attests to having performed smoothing roadbeds and parking lots on Carrier property with skid steers, front end loaders, and rollers. The Carrier contends that accordingly, the Organization has failed to carry its burden of proving that the Carrier violated the Agreement by contracting out such work.

In a claims matter, the Organization bears the burden of proving its *prima facie* case. It must prove that the work occurred as claimed, that the disputed work belongs to the employes, and is encompassed by the Scope Rule of the Agreement. The Organization contends that the work at issue here – smoothing roadbeds and parking lots – is customarily and historically performed by its members.

However, the Organization has failed to prove that the claimed work is within the Scope of the Agreement, or that it was customarily performed by MOW forces. While the provided statements address a myriad of tasks, including filling potholes, none specifically attests to having performed the work at issue here.

The Organization has failed to meet its burden of proving that the claimed work was customarily performed by the MOW forces. Therefore, it has not developed its *prima facie* case and the Board finds it unnecessary to address the remaining issues raised by the parties. The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

Scott M. Goodspeed, Carrier Member	Kathryn A. VanDagens, Chairman	David M. Pascarella, Employe Member

Dated: 2-23-2026