PUBLIC LAW BOARD NO. 6399

CASE NO. 28
AWARD NO. 28

Brotherhood of Maintenance of Way Employes
Division - IBT Rail Conference

and

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

Claimants: J. Fraley and M. Edwards

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces (GREX) to perform Maintenance of Way and Structures Department work of distributing Carrier owned ballast at various locations in Montpelier, Indiana and New Hope, Ohio on the Carrier's New Castle District on August 7 and 12, 2019 (Carrier's File MW-FTW-19-118-LM-729 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 as required by Appendix 'F' of the Agreement.

3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimants J. Fraley and M. Edwards shall now each be compensated for all straight time and overtime hours worked by the outside forces on the cited claim dates at the Claimants' respective 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 and maintain machine operator seniority. On the dates giving rise to the instant dispute, the Claimants were working their regular assignments as rotary dump truck operators.

On August 7 and 12, 2019, outside forces (GREX) delivered ballast to various locations in Montpelier, Indiana and New Hope, Ohio on the Carrier's New Castle District, in preparation for capital program work.

The Organization filed this claim on September 30, 2019, which was denied by the Carrier on November 21, 2019. 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 distributing ballast to various locations on the Carrier's property is work that has customarily been performed by Maintenance of Way ("MOW") forces. The Organization contends that the Carrier's MOW forces routinely perform the work of distributing Carrier owned ballast and this work is reserved to the Carrier's MOW forces. In addition, the Organization contends that the Vice Chairman's statement in his final appeal letter that the disputed work has been performed by MOW employes for decades was unrefuted by the Carrier.

The Organization contends that because the work is Scope-covered, it may only be contracted out under certain conditions expressed in Appendix F to the Agreement. The Organization contends that the Carrier compounded its violation when it failed to notify the General Chairman, in writing and in advance and without asserting a good-faith effort to utilize MOW employes in the performance of the disputed work.

The Organization contends that while the Carrier raised an affirmative defense that the contractors were merely delivering the ballast after the Carrier had purchased it, referencing an alleged purchase agreement which included the delivery of the ballast, the Carrier failed and refused to provide any evidence of any such sales agreement, let alone one which would establish that delivery was included. As a result, the record contains absolutely no evidence to establish that any sales transaction occurred in this case.

The Carrier contends that under the applicable Scope Rule, the Organization must present probative evidence of a historic and customary practice of predominantly performing this character of work. However, the Carrier contends, there is no evidence in the record to support that allegation.

The Carrier contends that the ballast in question was not in the Carrier's possession or within its control until the vendor dumped the ballast onto the ground and that any right that the Organization had to handle the ballast did not attach until it was delivered by the vendor and became the property of the Carrier. Therefore, the Carrier contends, delivery by a vendor of ballast stone purchased by the Carrier with delivery included is specifically permitted pursuant to the May 25, 2009, Memorandum of Agreement, which reads,

> D. Ballast Delivery –
> Other than BMWED-represented employees may transport ballast purchased from a vendor for delivery from the vendor to a work site and the use of contractor to do so shall not constitute a basis for any time claims.

The Carrier contends that the Organization has failed to present any credible evidence that the work occurred as alleged. The Carrier contends that while the Organization alleged that the work involved the "distribution of Carrier-owned ballast," the Carrier has consistently maintained that the work involved the delivery of ballast from a vendor directly to work locations, which is specifically permitted. The Carrier contends that the photographic evidence presented by the Organization shows an example of the clear historical practice of the delivery of purchased ballast by contractors.

The Carrier contends that the Organization has presented, at best, a case in which the record contains a material dispute in fact as to what work occurred. The Organization contends that the vendor distributed ballast to various locations and has demonstrated that the work is within the scope of the BMWED Agreement. But if the work was only the delivery of ballast by vendors, the Organization has conceded that the Carrier has the contractual right to have purchased ballast delivered by outside contractors. The Carrier contends that the Organization never asked the Carrier to verify its assertion that the ballast was delivered by the vendor directly.

In its submission to this Board, the Carrier argued for the first time that the Organization had not presented evidence of a customary and historical practice of the MOW forces performing the disputed work. The Carrier consistently argued that the work of delivering ballast pursuant to a vendor contract was contractually permitted but never challenged the Organization's assertion that distribution of ballast was Scope-covered work. To the extent that the Carrier is arguing that the claimed work is not Scope-covered work, its argument must be rejected, as the appellate nature of our review precludes us from considering arguments not raised during the parties' on-property discussions.

This Board has previously found that delivery and distribution of ballast is customarily and historically Scope-covered work, except where the parties have permitted the Carrier to contract with a vendor to deliver materials, either by acquiescence or by express contract provision, as here. While the Carrier asserts that it was permitted to use contractors to perform the claimed work pursuant to the May 25, 2009, Memorandum of Agreement, it never produced evidence that this claimed work was the transport of ballast purchased from a vendor for delivery from the vendor to a work site. The record before the Board contains no documentation to support the Carrier's affirmative defense.

It is undisputed that no notice was given to the Organization before the claimed work occurred and the Carrier's only defense for not having done so was due to a vendor contract entered into under the auspices of the May 25, 2009, Memorandum of Agreement. Because the contract was not proven, the Claimants are entitled to a monetary remedy for the lost work opportunities. As the Organization has not presented sufficient proof of overtime hours, that portion of the claim is denied, but is sustained in all other respects.

AWARD

Claim sustained.

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.

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

Dated: 2-23-2026