

PUBLIC LAW BOARD NO. 6399

**CASE NO. 59
AWARD NO. 59**

**Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference**

and

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

Claimants: M. Montgomery, J. Days, M. Campbell, J. Maynard, and T. Kegley

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 cleaning ballast on the Columbus District, on the Lake Division, beginning on August 1, 2016 and continuing until the matter is resolved (Carrier’s File MW-FTW-16-197-LM-927 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 M. Montgomery, J. Days, M. Campbell, J. Maynard and T. Kegley shall now each be compensated for seven hundred and twenty (720) hours worked by the outside forces, to be paid at their applicable rates of straight and overtime 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 Board 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. Beginning on August 1, 2016, the Carrier assigned outside forces to run NS992603, manufactured by Kershaw, to clean ballast on the Columbus District on the Lake Division.

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. By letter dated August 26, 2022, the parties agreed to choose/list this case as "lead case" to dispose of multiple claims relevant to issues centered around this dispute.

The Organization contends that the work of cleaning ballast has customarily, historically, and traditionally been performed by Maintenance of Way ("MOW") forces and is contractually reserved to the Carrier's MOW forces in accordance with Rule 1 of the Agreement, Scope. The Organization contends that the Carrier cannot deny that its MOW forces routinely perform the work of cleaning ballast.

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 Carrier must notify the General Chairman as far in advance as is practicable, but in no case less than 15 days in advance of its intent to do so and enter into good-faith discussions with the General Chairman upon request. There is no dispute that the Carrier did not notify the General Chairman of its intention to use outside forces to perform the work of cleaning, in violation of Appendix F.

The Organization contends that the Carrier's argument that the outside contractors were using specialized equipment is without merit. The Organization contends that the claimed work was completed by a machine owned by the Carrier. The Organization contends that equipment that performs the same work, cleaning ballast, but on an accelerated basis, does not relieve the Carrier's responsibility to assign this work to its own forces.

The Organization contends that the Carrier's assertion that it has historically used contractors to operate this alleged "specialized" ballast cleaner without notice and without claim since 1984, does not alter the fact that this Scope-covered work was assigned to outside contractors without notice.

The Organization contends that the Carrier must fully compensate the Claimants for the loss of opportunity to perform Scope-covered work when it was assigned to outside contractors and failed to provide advance notice to the General Chairman.

The Carrier contends that the Organization has failed to show that the Carrier has violated the Scope Rule of the July 1, 1986 N&W-Wabash BMWED Agreement when it engaged the services of outside contractors to operate the Carrier's Kershaw high production ballast machine. The Carrier contends that the Scope Rule is a "general" Scope Rule, such that the Organization can show that this

work is reserved to its members only by establishing that the work has been customarily, historically, and traditionally performed by members of the MOW craft.

The Carrier contends that the Organization has presented no evidence that the work of operating this specialized equipment has ever been performed by the MOW. The Carrier contends that the self-propelled machine does much more than the simple cleaning of ballast. It also excavates the entire track structure, shapes the ballast along the right of way, sweeps the ties, removes and discards debris into rail cars, and replaces the ballast.

The Carrier contends that in 1984, it notified the Organization that it would use contractors exclusively for ballast excavation cleaning and replacement work with new, specialized, self-propelled machinery. The Carrier contends that since then, outside contractors have operated this machinery on the property with the full knowledge of the Organization and virtually without objection. The Carrier contends that the Organization appeared to have conceded the specialized nature of this equipment when it recognized that no MOW employees have been trained to operate the Kershaw machine.

There is no dispute that the work took place as alleged or that the Carrier did not provide advance notice of the use of outside contractors to the General Chairman. The Carrier contends that the work here is not Scope-covered, as it has not customarily or historically been performed by the Organization's members.

Although the self-propelled Kershaw machine may more efficiently perform ballast excavation and cleaning, each one of the steps it performs has been customarily performed by the MOW. It is well-settled that the equipment which is utilized does not alter the work, although it may alter the method of performing the work. SBA 000 Award 932, *citing* Third Division Awards 20703, 25934, and 28486. The claimed work is Scope-covered. As the Carrier provided no notice of its intention to use contractors, the Agreement was violated.

Typically, a make whole remedy would be ordered at this point, but the record clearly shows that since 1994, the Carrier has assigned this work to outside forces, without objection by the Organization. The Carrier contends that it was entitled to rely on the Organization's acquiescence to its past practice.


The Organization began filing claims for this work in 2012. At that point, the Organization repudiated any alleged acquiescence to the practice. The mutual acceptance of the past practice, if it ever existed, could no longer be presumed. However, while the Board agrees that the Carrier must now notify the General Chairman in writing of the intended contracting out of this work, as required by Appendix F, we do not find a monetary remedy appropriate under these unique circumstances.


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



Adam Gilmour, Employee Member

Dated: April 8, 2024