BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 176

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2018-00024
Claimants: S. Johnson, M. Barnes, R. Hughes,
K.Tikkanen, J. Lane, T. Kauther, J. Miesbauer

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated Rules 1 and 13 of the Agreement when it supplanted its existing workforce in an effort to deny an overtime work opportunity for its Maintenance of Way forces, by assigning non-agreement employes to perform the duties of repairing, dumping ballast, inspecting and cleaning up a collapse of the railroad grade embankment, on the Superior Subdivision, at approximately Mile Post 468.1, commonly identified as Steelton Hill on October 15, 2018 and continuing through October 17, 2018 (Carrier's File WC-BMWED-2018-00024 WCR).

2. As a consequence of the violation referred to in Part 1 above Claimants S. Johnson, M. Barnes, R. Hughes, K. Tikkanen, J. Lane, T. Kauther and J. Miesbauer, shall be compensated at their applicable rate of pay for thirty-five (35) hours at the applicable time and one-half rate of pay, to also include double-time rates of pay, worked by the non-agreement Stack Bros. employes performing the work in question."

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

The Organization maintains that numerous Rules govern this claim. Rule 1 provides for the Scope of work and recognizes that that work generally recognized as Maintenance of Way work would remain Maintenance of Way work. The work at issue was usual and customary work and therefore the work of the Maintenance of Way employees. Rule 13k provides that the Carrier cannot change the work generally recognized as belonging to Maintenance of Way employees, yet the Carrier did. Rule 13L provides the expectations of the parties and what must be met by the Carrier. Rule 13M prohibits supplanting overtime opportunities for Maintenance of Way employees.

The Organization claims that Organization-represented forces were available to perform this work. The Organization maintains that the Carrier defense is not persuasive. The question is whether Organization forces were available and not whether there was specialized equipment. The Carrier could have obtained the special equipment for the Organization-represented employees to operate.

The Organization's November 2, 2018 correspondence includes:

> The Claimants are regularly assigned to the Superior Section, and are fully qualified to perform the duties that are the subject of this claim. However, beginning at 1500 on October 15, 2018 and continuing through 0200 hours on October 17, 2018, the non-agreement employees performed the work of repairing, dumping ballast, inspecting and cleaning up a collapse of the railroad grade embankment, on the Superior Subdivision at the approximately Milepost 468.1, thereby denying the existing workforce overtime opportunities and instead assigned that work to the non-agreement employees who work for Stack Bros. as well as CN management non-agreement employees.
>
> During the time frame that this claim is referring to, the non-agreement employees performed a plethora of duties that are ordinarily and customarily performed by the Claimants such as, but not limited to, dumping ballast, inspecting the track, clearing debris and rock from the track, loading and unloading dump trucks, operating dump trucks, operating loaders, obtaining track authority to protect the track as well as general laboring duties.

The Carrier contends that there was a need for specialized equipment that the Carrier does not keep in inventory and available to Organization-represented forces. The specialized equipment required specialized knowledge to operate, and outside forces were used to provide that service on the specialized equipment. The catastrophic event

occurred when the embankment was washed out and immediate repairs were needed. Specialized equipment was needed and supplied by the outside forces after a sudden, unforeseen event brought all Carrier transit on the line to a halt. The Carrer continues there was no loss of work opportunity for the Organization forces and that they retained full employment.

Rule 1 provides:

> These rules shall be the agreement between the Canadian National Railway Company (former Wisconsin Central Ltd.) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of bridges, culverts, buildings, and other structures, tracks, fences, and roadbed, and shall govern the rates of pay, rules and working conditions of such employees. This paragraph shall neither expand nor contract the respective rights of the parties, nor infringe upon the contractual rights of other railroad crafts in effect on the date of this agreement.

Rule 13 Paragraph N provides:

> The Company will not use the provisions of this rule to use outside contractors in a way that would supplant the use of the existing workforce during off hours and on rest days in an effort to deny the existing workforce overtime opportunities. This commitment does not require the company to call individuals from another location to perform work in lieu of using an outside contractor.

The Carrier handling of the claim indicated first that there were no outside forces used to perform the work and second, that the outside forces performing the work were doing so because they had specialized equipment.

The Carrier admitted that outside forces were doing the work. The question is whether that was a violation of the Agreement. The evidence shows that there was an embankment collapse and that Maintenance of Way employees were on scene performing work to repair the embankment. Track equipment was used by outside forces because it was unavailable in the local inventory.

Claim denied.

Patrick Crain
Carrier Member

Adam Gilmour
Organization Member

Brian Clauss
Neutral Member

Dated: December 20, 2023

EMPLOYE MEMBER'S DISSENT
TO
AWARDS 173 AND 176 OF PUBLIC LAW BOARD NO. 7566
(Referee Brian Clauss)

In these cases, I must dissent to the Majority's findings. Here, the Majority ruled that the Carrier was permitted to contract the disputed work to outside forces based on an erroneous and unproven assertion that the work somehow required specialized equipment which was not immediately available to the Carrier.

Rule 13N of the parties' Agreement firmly states that the Carrier will not use the provisions of Rule 13 in a way that would supplant the use of the existing workforce during off hours and on rest days in an effort to deny the existing workforce overtime opportunities. The records very clearly establishes, and it is furthermore not disputed by the parties, that the Carrier's own Maintenance of Way forces regularly perform this exact work as part of their regular assignments using ordinary Carrier-owned equipment. As such, it is clear that the Carrier supplanted its workforce when it contracted the work to outside forces in these cases under an alleged need for specialized equipment.

Moreover, the records are entirely void of any evidence that would suggest that the disputed work was somehow in response to any sort of emergency condition and/or situation. In fact, the Carrier makes no emergency assertion whatsoever. The Majority stated that "[T]he Carrier responds that a catastrophic event occurred when track washed out and immediate repairs were needed. ***" However, this is simply not true and is easily disproven by a simple review of the records. The on-property handling of the claims contain no mention of an emergency or "catastrophic event" of any kind. In fact, the only time the word "emergency" is ever used is within the Organization's submission wherein we affirm that no "emergency" defense was ever raised by the Carrier and that the work was of a non-"emergency" nature. Furthermore, the word "catastrophic" does not appear anywhere within the records and instead only appears once within the Carrier's submissions, which were written well after the closing of the records, within a sentence that does not assert that the disputed work arose due to an emergency condition or situation.

In rendering its decisions, this Board is limited to the on-property record of each case, and it is improper to speculate on events which may or may not have occurred and which are outside of the written record. The Majority erred when it considered an emergency defense by the Carrier which was neither raised nor proven anywhere within the on-property handling of the claims.

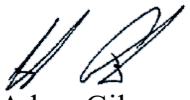
Even if special equipment remained as an exception to Rule 1-scope (which it does not) there is no probative evidence that the Carrier's own equipment was not fully capable of accomplishing all of the subject work or that the Carrier made a reasonable attempt to rent or lease the necessary equipment and, therefore, the Carrier is precluded from relying on a specialized equipment defense.

In fact, in our appeal letters dated January 8, 2019, the Organization challenged the Carrier's assertion that the work required specialized equipment not already possessed by the Carrier in that no evidence or documentation had been provided to establish as much. Nevertheless, the Carrier failed and refused to provide any evidence to support its position whatsoever. Numerous awards including National Railroad Adjustment Board (NRAB) Third Division Awards 18447, 28724, 36932, 37047, 37677, 41106 and Award 73 of PLB No. 5606 have established an arbitral precedent that when the Carrier fails to comply with a reasonable request for specific documentation, it does so at its own peril. The record of the instant cases are entirely void of any documentary evidence which would establish that the disputed work required any equipment other than what was already in the Carrier's inventory and historically and customarily used by the Carrier's own Maintenance of Way forces to perform identical work to that of the disputed work in these cases.

While the parties' Agreement does contain certain circumstances under which the Carrier may utilize contractor forces, it contains no language whatsoever which would permit the Carrier to assign Scope-covered work to outside forces based on an alleged need for specialized equipment. It is beyond the scope of this Board to either augment or to ignore the plain language found within the parties' Agreement, and the Majority further erred in its analysis when it found that the Carrier was permitted to contract out the disputed work based on a reason that does not exist within the clear language of Rule 13 or anywhere else in the Agreement for that matter.

Moreover, even if the Carrier were able to rely on this specialized equipment defense (which it is not), the Carrier does not make the argument that it does not possess the necessary equipment. Rather, it merely states that it did not have the equipment "immediately available" at the time the disputed work occurred. Poor planning and mismanagement of resources by the Carrier does not therefore give it carte blanche to contract any and all work it sees fit to outside forces, nor does it stand to ignore the clear language of Rules 1 and 13 and allow for the Carrier to supplant its workforce.

For these reasons, I must respectfully dissent.



Adam Gilmour
Employe Member