BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 221

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2020-00009
Claimant: C. Pocrnich

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it supplanted its existing workforce in an effort to deny an overtime work opportunity for Mr. C. Pocrnich who was in furlough at the time of this violation by assigning two (2) non-agreement employes, who are employed by Rybak Companies, to perform the duties of snow removal, plowing and cleaning switches, in and around the Pokegama Yard in and around Superior, Wisconsin, on January 22, 2020, between 0600-1500 hours (Carrier's File WC-BMWED-2020-00009 WCR).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Pocrnich shall now be allowed pay at the applicable rate of pay for an equal proportionate share of all overtime man-hours worked by the nonagreement employes."

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 claims that the Carrier improperly subcontracted snow removal on the January date. Rule 13 governs subcontracting. The Rule is designed to prevent subcontracting except in certain situations. None of these situations exist and the

Carrier's defense is invalid. In its submission, the Organization asserts that the snow removal work is exclusive work of BMWE-represented employees:

> In this case, the Carrier failed to refute the fact that its Maintenance of Way forces customarily and historically perform the disputed duties on a regular basis as part of their typical job duties.

The Organization continues that any claimed emergency did not exist and that the defense of unavailable equipment is unconvincing. The Carrier moved equipment to other territories and ignored the need for snow removal equipment. The Carrier asserts a lack of equipment, but that is by Carrier design. The Carrier wants to then use the lack of equipment as an excuse for using subcontractors when BMWE-represented employees are available. Snow is a common occurrence during Midwest winters. The Carrier cannot abdicate responsibility to provide equipment by removing the equipment and then claiming snow removal equipment is unavailable. The Carrier should have recalled furloughed employees to perform the work.

The Carrier could have rented equipment like it has in the past. The Carrier cannot establish any exceptions to the Rule and the subcontracting was improper.

The Carrier maintains that Side Letter 12 controls. Side Letter 12 provides, in relevant part:

> It is not the intent of the Carrier to utilize outside contractors when qualified BMWED employees are furloughed and would otherwise be available for duty. Where practicable, the Carrier will commit to calling individuals from other locations to perform work, in lieu of using an outside contractor. It is understood that situations may arise where the use of outside contractors may be necessary while employees are on furlough due to, but not limited to: employees voluntarily electing to be furloughed and who are not on Rule 12C relief list, the proximity of the work does not allow for those furloughed employees to be recalled in a sufficient amount of time, <u>equipment is not available</u> and emergency situations.

The Carrier continues that multiple crafts have performed snow removal. Because other crafts also perform snow removal the Organization cannot establish that this work was exclusively work for BMWE-represented employees. The Organization cannot establish this fundamental element and the Claim must fail.

The Carrier denied the Claim in a letter dated February 7, 2020, which provides in relevant part:

> This was special equipment doing snow removal. The contractor had one speed swing and one loader, which worked along with our CN loader on this day. There were no contract laborers working, just CN laborers.
>
> As the claim states, "it is understood that situations may arise where the use of outside contractors may be necessary while employees are on furlough, due to . . . . , equipment is not available." All of our machines with CN employees were being utilized on this date. We did not have available equipment for others to use.

In later correspondence of May 15, 2020, the Carrier asserted that the work has been performed by other crafts. The Carrier also noted that Claimants were not furloughed for the start date in the Claim. The letter provided:

> In addition multiple other crafts have performed snow removal, including the TCU Ore Dock employee on the Wisconsin Central. This is shared work and not exclusive to the BMWED. The Organization has failed to provide any evidence to sustain their arguments that a violation of Side Letter 12 occurred.

The Organization responded in a letter dated May 21, 2020, containing the following relevant part:

> Furthermore, the Carrier asserts that "multiple other crafts" have performed BMWED work in the past and that this somehow validates this instant violation of the agreement. The Organization has and continues to file claims when "multiple other crafts" perform BMWED work such as the work in question in this situation, and will continue to do so when the Carrier violates the agreement.

The Organization's submission provides:

> The work involved in this case, i.e., snow removal, is specifically reserved to those employes within the Carrier's Maintenance of Way workforce in accordance with Rule 1 - Scope. In this case, the Carrier failed to refute the fact that its Maintenance of Way forces customarily and historically perform the disputed duties on a regular basis as part of their typical job duties.

This assertion is incorrect because the assertion is disputed. The Carrier's May 15, 2020, correspondence contested whether the work was exclusive to the BMWE-

represented employees. Establishing whether the work belonged to BMWE-represented employees is a predicate element to the Claim. If the Organization establishes that the work was BMWE-work and that the work was performed by subcontractors, then the Board can analyze the Carrier defense of unavailable equipment.

The Organization was made aware of the Carrier's position that the work was not exclusive. The Organization did not challenge the Carrier's position during the on-property handling of the claim, merely asserting that it would continue to file claims. As a result, the Carrier's position went unchallenged, and the Organization has not established that this is exclusive work for BMWE-represented employees or adequately refuted the Carrier's position regarding the application of exclusivity.

Claim denied.

Adam Gilmour
Organization Member

Steven Napierkowski
Carrier Member

Brian Clauss
Neutral Member

Dated: December 18, 2024