PUBLIC LAW BOARD NO. 7705

Brotherhood of Maintenance of Way Employees Division - IBT Rail Conference	)	
and	)	**Case No. 1**
	)	**Award No. 1**
Union Pacific Railroad Company (former Missouri Pacific Railroad Company)	)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Rail Pro Construction Co.) to perform Maintenance of Way Department work (flagging for a road crossing) at Mile Post 383.44 on the Laredo Subdivision on June 7, 2013 (System File UP972PA13/1587087 MPR).

2. The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required in Rule 9 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, Claimant W. Anderson shall '... now be paid for twelve (12) hours at rate of one and one half (1 ½) time per hour***' (Employes' Exhibit 'A-1')."

Background

On June 7, 2013 Lewis Energy ("LE") contracted with Rail Pro Construction Company ("RPI") for the services of an RPI employee to stop vehicular traffic (specifically LE's trucks) when there was a train approaching the crossing at Mile Post 383.44. A Form C was issued to the train crew indicating an RPI employee was located at the crossing. The RPI employee communicated by radio with the train crew, placed cones on the road and held a sign ("stop"). Prior to the LE - RPI contract, LE contracted with and paid the Carrier for a force employee to perform this service. At some point prior to June 7, 2013 the Carrier discontinued the contractual arrangement with LE due to unavailable force.

On June 11, 2013 the Organization filed a claim stating the Carrier violated the Scope Rule, Rule 1 (Seniority Datum), Rule 2 (Seniority Rights), Rule 9 (Contracting Out), Rule 20 (Advertisement of Positions) and Rule 29 by contracting with RPI to provide flagging services for oil field trucks at the crossing. The Carrier did not issue advance notice of its intent to outsource scope-covered work and it

failed to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its force as required by Rule 9 and the 1981 National Letter of Understanding ("LOU").

On July 23, 2013 the Carrier denied the claim stating, among other matters, that flagging is not scope-covered work and is not reserved exclusively to the Organization because employees from various crafts and classifications perform flag duties. UP states the Claimant never performed the duties of flagging vehicles through crossings.

On August 14, 2013 the Organization filed an appeal. Flagging is scope-covered work and recognized by the Carrier as such in the Letter of Agreement ("LOA") dated May 31, 2011 ("when necessary to establish positions to handle Form B train orders, flagging duties, flagging for contractors ... the utilized employee shall be compensated at the rate of Track Foreman"). As the Carrier has a regular and predictable need to perform flag work, it can be planned in advance with scheduling the force to perform this work. Claimant would have performed the claimed work but for the outsourcing undertaken in violation of Rule 9 and the LOU.

On August 23, 2013 the Carrier denied the appeal; it reiterated statements in its initial claim denial. As for the LOA, it created a rate of pay for the flagging foreman position but did not reserve the work for BMWED or restrict others from performing flag work ("It is also understood that this understanding will not in any way modify or affect the long-standing practices involving flagging operations"). Rule 9 and the LOU are not applicable for work that is not scope covered. BMWE failed to carry its burden of proof on rules violations. Regardless, Claimant endured no monetary loss as he received thirteen (13) hours of overtime on the claim date.

Conference convened on December 3, 2013 without resolution of the claim. The Carrier issued a post-conference letter dated April 2, 2014 wherein a statement from UP counsel notes the Carrier is not a party to the LE - RPI contract. The Organization's last-say letter dated May 6, 2014 reasserts the work is scope covered because BMWE has customarily and historically performed flag duties at crossings to protect Carrier property and personnel as well as ensure public safety. Supporting the Organization's position that the work is scope covered is the statement of an employee performing these duties on crossings throughout the Laredo Subdivision and the statement of the Director of Track Maintenance acknowledging the force performed flag work for the crossing at Mile Post 383.44 prior to the Carrier outsourcing the work to RPI. This shows the Carrier exerted ultimate control over the performance of this work and benefited from it.

Summary of the Organization's Position

The Claimant is regularly assigned as a Track Foreman - Flagging and provides track protection for persons (Carrier personnel or otherwise) occupying or crossing the Carrier's right of way. On June 7, 2013 the Carrier assigned an outside force (RPI) to provide flagging for oil trucks crossing the Carrier's right of way at Mile Post 383.44 instead of assigning the work to Claimant or any other BMWED employee. The force was willing, available and qualified to perform flag work on a regular workday, rest day or in an overtime status. The Carrier failed to notify the General Chairman of any reason for this contracting transaction and failed to undertake a good-faith attempt to discuss the transaction in conference. This violates the Agreement.

Specifically, the claimed work is reserved to the force by Rule 1 (Seniority Datum) and Rule 2 (Seniority Rights). The Scope Rule describes the classes of employees governed by the terms in the Agreement including classifications in the Track Sub-Department wherein employees within the classifications customarily perform all aspects of track repair, maintenance and construction work which includes flagging at road crossings.

For decades the force has performed flag duties on the Carrier's rail network. Numerous on-property awards confirm flag work as historically, customarily and traditionally performed by the force. For example, on-property Third Division Awards 41638, 42247 and 42250 concerned whether the Carrier properly assigned a BMWED employee to perform flag duties on overtime for a contractor. The Carrier did not assert flag work was not scope-covered. Rather the Carrier asserted it properly assigned flag work to the BMWED employee receiving the overtime assignment. Award 196 of Public Law Board 6402 addresses the issue in this claim. That is, the Track Foreman provided flag protection against train movement for contractors. These four (4) on-property awards confirm the force historically, customarily and traditionally performs flag work of a kind at issue in this claim.

Also supportive of the Organization's position is the LOA dated May 31, 2011 identifying flag duties, creating a classification (Track Foreman - Flagging) for flag work and establishing a rate of pay for this new classification. The LOA "serves as overwhelming proof that flagging work such as the type involved here is historically, customarily and traditionally performed by Maintenance of Way forces." The statement by the Director of Track Maintenance aligns with the Organization's position because the Director confirms that the force performed the claimed work at the crossing.

Pursuant to Rule 1 and Rule 2, employees with established seniority have the contractual right to perform this work. On-property Third Division Awards 4833, 4869 and 4888 held that the character of work reserved to the various classes of employees covered by the Agreement is that which they have traditionally and historically performed. Award 4833: "The general rule is that a Carrier may not contract with others for the performance of work embraced within the scope of a collective agreement" and "the Carrier has contracted with B&B employes for the performance of all the work that is historically and customarily performed by this class of employes."

These awards show that the measure for determining work reserved by the Agreement is whether such work is customarily and traditionally performed by the employees. Applying these awards in the context of Rule 1 and Rule 2 shows flag work is reserved to the force. In this regard, the work of the class belongs to those benefiting from the contract. As the claimed work is reserved to the force, the Carrier was required to assign the work to Claimant or other qualified employee and, in accordance with the LOU, was required to engage in good-faith efforts to increase the use of the force (reschedule work, assign overtime hours) rather than outsource work. In failing to assign the work to the force, the Carrier violated the Agreement.

The Carrier further violated the Agreement when it failed to provide advance notice for each contracting transaction and failed to conference for a good-faith attempt to reach an understanding as required by Rule 9 and the LOU. This violation is sufficient, by itself, to sustain the claim as occurred in on-property Third Division Awards 32338, 32862, 40085, 40965, 41052, 41054, 42157 to name a few. Rule 9 clearly states the General Chairman must be notified in advance prior to the contracting transaction. There is no unfettered right to contract out reserved work. The LOU requires that "the advance notice shall identify the work to be contracted and the reasons therefor." The Carrier failed to do so in this claim.

The Carrier also failed to conference thereby denying the General Chairman an opportunity for a good-faith effort to address force availability for performing the claimed work. Since the force has "at times performed the disputed work" the Carrier must comply with Rule 9 and the LOU.

Defenses advanced by the Carrier are without merit. For example, the Carrier asserts lack of proof that the claimed work was performed on the claim date but the arguments advanced by the Carrier to defend itself is tacit confirmation the work was performed as claimed. The argument of "exclusivity" is not applicable. The Organization is not required to prove an "exclusive" past practice of performing the claimed work. Recent arbitral precedent - - on-property Third Division Awards 28045, 30944, 38349 and 39301 among others - - establish "exclusivity" is not applicable in a contracting out claim. "Exclusivity" applies to a dispute involving the proper assignment of work between different classes and crafts among the Carrier's employees and does not apply to contracting-out disputes.

The Carrier asserts the LOU is not applicable. The LOU is a binding contract obligating the Carrier to "strictly adhere" to advance notice, good-faith conference and reducing the incidence of outsourcing and increasing the use of the force. On-property Third Division Award 29121 buried the Carrier's argument ("Carrier is not entitled to enjoy the fruits of the bargain without adhering to the assurance of its Chief Negotiator"). Twenty (20) arbitral awards involving UP confirm the LOU is viable, applicable and binding.

In addition to the Carrier's vacuous argument about the inapplicability of the LOU, its past-practice argument is without merit. The Carrier cannot establish the elements of a past practice enabling it to outsource this reserved work. The burden of proof to establish a past practice resides with the Carrier and it provided no evidence of a clear, long standing and consistent practice acquiesced to by the Organization to contract out the reserved work of flagging. Even if the Carrier could establish a past practice, it failed to satisfy its obligation under the LOU to reduce the incidence of outsourcing.

Having proven a violation of the Agreement by contracting out scope-covered work, the remedy to cure the violation is to compensate the Claimant for a lost work opportunity as this serves to protect the integrity of the Agreement. Whenever scope-covered work is improperly removed from an employee, there is a loss of work opportunity. There is no showing by the Carrier that Claimant performed work of an emergency nature on the claim date which precluded assigning flag duties to Claimant. On-property Award 15 of Public Law Board 7096, Award 6 of Public Law Board 7099 and Award 9 of Public Law Board 7101 show that a "fully employed" Claimant on the claim date is not a basis to deny a monetary remedy ("Once the Carrier assigned contractors' employees to perform the work, Claimant lost the opportunity to perform that work, whether on overtime or otherwise.") Third Division Award 39141 reinforces the "standard remedy in arbitration" for a contracting-out violation - - "[UP] must, in effect, pay for the work twice."

Summary of the Carrier's Position

The Carrier states that "flagging" is a broad term used to encompass, for example, directing train movement (often performed by the SMART-TD craft), controlling a Form B for the protection of employees and equipment working on the track structure as well as crossing protection by a signal-craft employee when a signal system is in disrepair. In this dispute, the claimed work did not involve right of way or track structure which BMWED employees have seniority rights to perform. Rather, the work

performed was to protect LE's equipment and personnel, particularly LE's large and slow moving oil-rig trucks.

The claimed work is not scope work and never has been considered as such. There is no wording in the Agreement reserving the disputed work to the Claimant nor does this work have a correlation with maintenance of way or the right of way. Flagging is not reserved to BMWED because, historically, flag work has been performed by different classifications and crafts.

Even if the work performed and claimed by the Organization was scope-covered, the claimed work was not performed at the Carrier's expense or for the Carrier's benefit. When the work is not performed at the Carrier's expense or for the Carrier's benefit, the work does not fall within the Agreement as it is unrelated to railroad operations. Third Division Award 37468 sets forth the criteria to be applied for determining whether work is related to railroad operations.

(1) Where the work, while perhaps within the control of the Carrier, is totally unrelated to railroad operations.

(2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operation of others on the Carrier's property and is undertaken at the sole expense of that other party.

(3) Where the Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

Applying the criteria to this dispute shows that the Carrier did not have control of the work as the claimed work benefited LE and LE compensated RPI for the work. Although the Carrier has an interest in public safety, this work was not related to maintenance of way or track structure of railroad operations because in the vicinity of this crossing there was no track work occurring, no switching operations or signal repairs underway. The safety benefits of this work inured to LE's trucks at all times. In this regard, the Carrier did not provide this service at the crossing prior to LE contracting with and paying the Carrier to provide it for LE.

The conclusion in on-property Third Division Award 37468 - - the "work at issue [constructing a shoofly due to building an overpass by a municipality] did not fall within the Scope Rule under review" - - is applicable in this case. An RPI employee using a radio to talk with the train crew and direct vehicles at a public crossing not controlled by the Carrier nor paid by the Carrier is unrelated to the maintenance of right of way and falls outside the scope of the Agreement. Other on-property awards support the Carrier's position such as Third Division Award 20644 ("work . . . not for the benefit of the Carrier, not performed at its instigation, not at its expense nor under its direction or control") and Third Division Award 40236 ("work . . . performed at the direction of Wisconsin Electric, which is a local public power company . . . done for the benefit of Wisconsin Electric and Wisconsin Electric was paying for it. The Board has ruled in the past that work pursuant to such agreements is not reserved to the Carrier's BMWE-represented employees.")

The claimed work is not reserved to the BMWED because there is no wording in the Scope Rule addressing flag work. As noted in on-property Third Division Award 29007, "the Scope Rule involved is a 'general' type of provision in that it does not specifically describe the work" and it "imposes a burden on

the Organization to prove that the work was reserved exclusively to them." Contrary to the Organization's position that the work is reserved to Claimant by the Agreement, on-property Third Division Award 41101 held that flagging has been performed by various classifications and is not reserved to the force by the Scope Rule. In other words, stopping a vehicle from entering a crossing is not exclusive to any craft or classification. The Carrier asserts that Third Division Awards 37959 and 42247 support its position that any qualified employee, whether covered by the Agreement or not, can perform flag work.

The LOA did not reserve flag work to the force; the LOA only created a rate of pay for a BMWED employee when performing flag work and it did "not in any way modify or affect the long-standing practices involving flagging operations." Thus, the LOA did not reserve to the force the work of communicating with a train and closing public roads to protect vehicular traffic. Since the work is not reserved to the force, Rule 9 (notice) and the LOU do not apply.

Given on-property Third Division Awards 37959, 41101 and 42247 sustaining the Carrier's position that flag work is not reserved under the Scope Rule to the force, the principle of *stare decisis* dictates that this claim should be denied. The cited awards show that the assignment of non-scope covered work has been addressed and resolved in the Carrier's favor. Following arbitral precedent on a settled issue is warranted in this claim.

In addition to *stare decisis*, the practice on-property establishes flag work as not scope-covered work for the force. The statement from the Director of Track Maintenance is unrebutted - - the force never performed this type of work - - talking by radio to a train crew and stopping vehicles at the public crossing - - until this situation arose where LE instigated an arrangement to compensate the Carrier to provide flag service to protect LE's trucks. The statement by an employee submitted by the Organization addresses flagging for oil field trucks on the Laredo Subdivision but does not address prior practice. This did not reserve the work to the force or bring it within the purview of the Agreement.

The burden of proof resides with the Organization to establish a violation of the Agreement. Specifically, the Organization alleges a violation of the Agreement with the RPI employee's use of a radio to communicate with train crews and control vehicles on a public road at a public crossing. To prove this violation, the Organization must establish the work is scope covered and reserved to Claimant. The Organization has not proven this work is reserved to it or performed by the force to the exclusion of all others. LE, a third party, compensates RPI for the services of an RPI employee to be placed on a public road to stop traffic when a train approaches. This contractual arrangement benefits LE. The Organization has not shown otherwise. The rules and evidence show that the Organization has not met its burden and, when that occurs, Third Division Awards 26033, 27851 and 27895 show that the claim must be denied.

Notwithstanding an unproven claim, the Organization's requested remedy is excessive and incorrect. There is no evidence that the RPI employee performed twelve (12) hours of work on June 7, 2013 whereas there is evidence that Claimant was fully employed on that date and received thirteen (13) hours of overtime. When there is no wage loss endured, the remedy is denied as noted in Third Division Award 32352. Furthermore, overtime is payable only when the work is actually performed (Public Law Board 3012, Award 1). Claimant did not suffer a loss of work opportunity or wages as he protected his regular assignment on the claim date and, thus, could not perform the claimed work on June 7, 2013.

Findings

Public Law Board No. 7705, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The claim was timely and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier's highest appellate officer.

This claim presents the situation whether the flag work performed by the RPI employee was related to the Carrier's railroad operations and, thus, falls within the purview of the Agreement. On-property Third Division Award 37468 set forth criteria to apply when determining whether work is related to railroad operations. The criteria are:

> (1) Where the work, while perhaps within the control of the Carrier, is totally unrelated to railroad operations.
>
> (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operation of others on the Carrier's property and is undertaken at the sole expense of that other party.
>
> (3) Where the Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

Undisputed is the Carrier's statement that it was not providing flag work at this crossing until, at some point prior to June 7, 2013, LE instigated an arrangement or contract with the Carrier to obtain flag services for the purpose of protecting LE's trucks. LE compensated the Carrier to have an employee of the force available to stop LE's trucks at the crossing when a train approached; LE controlled this work, bore the entire expense and benefited from the service. Flagging was not provided for the Carrier's railroad operations given that the Carrier was not providing it prior to LE initiating receipt of flag service to safeguard LE's equipment and personnel. The Carrier discontinued this arrangement or contract due to unavailable force (the Organization disagrees with this reason) whereupon LE contracted with RPI to flag for LE's trucks. LE incurred the expense for the benefit of flagging notwithstanding the derivative benefit on the Carrier's movement of trains without service disruption. Flagging services were provided by the RPI employee for LE's truck operations and not for the Carrier's railroad operations. This work, at LE's expense and control, benefited LE.

As quoted in Third Division Award 20644:

> In a long series of Awards going back to 1951, we have held consistently that work which is not for the exclusive benefit of the Carrier and not within the Carrier's control may be contracted out without violation of the Scope Rule (See for example Awards 5246, 6499, 13745 and 19718) [.]

Coinciding with the aforementioned award is on-property Third Division Award 40236 quoting Third Division Award 31234:

> This Board has consistently held that where work is not performed at the Carrier's instigation, nor under its control, is not performed at its expense or exclusively for its benefit, the contracting is not a violation of the Scope Rule of the Agreement.

Applying this precedent to the claim in this proceeding, the Board finds that the claimed work on June 7, 2013 was not performed at the Carrier's instigation, the claimed work was under LE's control, the claimed work was not at the Carrier's expense nor was it exclusively for the Carrier's benefit. Given these findings, RPI's performing the claimed work on June 7, 2013 does not constitute a violation of the scope rule within the Agreement. Therefore, the claim is denied.

Award

Claim denied.

Patrick J. Halter
Neutral Member

K. N. Novak

Katherine N. Novak
Carrier Member

Andrew M. Mulford
Organization Member

Dated on this 11th day of October, 2016

LABOR MEMBER'S DISSENT
TO
AWARD 1 OF PUBLIC LAW BOARD NO. 7705
(Referee Patrick Halter)

The Majority seriously erred when it determined that a contractor performing Maintenance of Way flagging duties on the Carrier's tracks and right of way did not violate the Agreement. As the violation is clear in this case, dissent is required for this palpably erroneous award.

The lead up to this dispute saw a third party needing to move oil trucks, equipment and personnel across the Carrier's right of way. For obvious reasons, slow moving oil trucks and equipment crossing the right of way poses a hazard to Carrier operations, property and personnel. A piece of oil equipment could become disabled on the tracks and be struck by a Carrier train or an oil truck could damage the right of way while crossing the tracks, thus causing a Carrier train to derail. In response to these dangers, the Carrier assigned an employe from the Maintenance of Way Department to protect its tracks and right of way. Specifically, an employe from the Maintenance of Way Foreman - Flagging classification flagged for the oil trucks and equipment as they crossed the right of way and ensured that there were no collisions. The flagman also ensued that the oil trucks and equipment did not damage the right of way or tracks. The flagman accomplished the work using tools, equipment and procedures employed by Carrier flagmen across the Carrier's rail network (i.e., holding a Form B or C track protection, track protection boards, radio communication with Carrier trains and dispatchers, etc.) Indeed, flagging work of this type is effectively standard, run of the mill Maintenance of Way work which has been performed by Maintenance of Way personal for decades and continues to be performed by Carrier Maintenance of Way forces.

At some point, the Carrier determined it didn't want to have a Maintenance of Way flagman work the position anymore and removed the flagman. Thereafter, the Carrier allowed a contractor to assume the very same track protection and flagging work. The contractor effectively stepped into the shoes of the Maintenance of Way flagman and provided track protection for Carrier tracks, right of way and personnel using the same tools, equipment and procedures mentioned above (i.e., Form B and C track protection, track protection boards, radio communication with Carrier trains and dispatchers, etc). The contractor was not employed because of some lack of skill, ability or qualification on the part of Maintenance of Way forces. To the contrary, the contractor was employed simply because the Carrier didn't want to use its own employees any further to protect its tracks, right of way and personnel.

Regardless of the fact that the flagging work is reserved to Maintenance of Way forces by the Agreement, the Carrier never provided proper advance written notification pursuant to Rule 9. The Carrier also prevented any type of conference to discuss the matter from occurring. Instead, the Carrier simply allowed a contractor to take over Maintenance of Way flag duties and exercise dominion and control over the Carrier's tracks, right of way and train traffic. This alone was sufficient grounds to sustain the claim.

The Carrier argued that a contractor providing track protection for Carrier tracks, right of way and trains was, somehow, not under its control and that it also offered no benefit to the Carrier. At the time the Carrier raised this contention it appeared to border on the surreal; flagging work is Maintenance of Way work, Maintenance of Way forces had performed identical flagging work for decades, Maintenance of Way forces were performing the flagging work prior to the contractor performing it and that the contractor was undisputedly working on Carrier property, controlling Carrier train traffic, and ensuring the vehicles and equipment crossing the Carrier's tracks didn't cause damage or cause a collision with a Carrier train. Regardless, the Neutral Arbitrator determined that the flagging work was not under the control of the Carrier and that the work did not benefit the Carrier. It is upon this flawed decision that the Organization must dissent.

Any notion that the subject flagging work was not at the Carrier's control, or, at a bare minimum, for its benefit is patently false. The record establishes that an outside contractor was provided flagging and track protection work where heavy and slow moving oil trucks and equipment needed to cross the Carrier's right of way. Slow moving oil trucks and equipment pose an open and obvious hazard to the Carrier's tracks, right of way and train traffic. This is made clear by the fact that had the contractor flagman not been present, then the Carrier's tracks, right of way and trains would have been unprotected and unsafe due to oil trucks and equipment fouling the tracks or damaging such. The record clearly establishes that the Carrier earned a benefit from the contractor's track protection duties (i.e., the safety and stability of its right of way and track structure was protected, the safety of Carrier personnel and equipment was protected and the Carrier was ensured that oil trucks and equipment did not foul or damage the track structure). To be clear, the Carrier unquestionably earned a benefit in this case.

The untenable nature of the Majority's decision is readily apparent when viewed in the light of other clear cut Maintenance of Way work. In this manner, crossings, crossing gates and other crossing related equipment clearly protects third parties (i.e., people crossing the tracks and right of way) as well as Carrier trains and equipment. Such equipment is frequently mandated by law, civil suit/liability, etc. Yet, the Carrier has not historically argued that such work is outside the Agreement, or, that a crossing required by state or federal law could be installed and maintained by contractors. Yet, in the instant case, the Majority has mistakenly found that the subject flagging warrants an exception. Upon any level of analysis, it is clear the Majority's position is unreasonable and leads to absurd results.

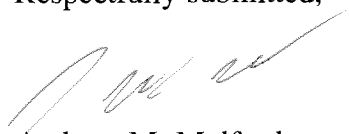
It must also be remembered that numerous Section 3 Boards have previously reviewed the Carrier's no control, benefit or payment defense found that it is extremely narrow and fact specific in application. Such awards make it clear that the exception is not meant to allow the Carrier to

side step its obligations under the Agreement - which is *exactly* what the Majority has allowed the Carrier to do here. It is important to note that several of the awards find that even where there is no willful violation by the carrier that a violation was nonetheless present as the carrier failed to properly discharge its duty to police and uphold the collective bargaining agreement. In this regard, we direct attention to Third Division Awards 24173, 25402, 26212, 28312, 32941, 35634, 37048, 37901 and **40929** (UPS) and Award 43 of PLB No. 6493.

The palpably erroneous nature of this decision is further confirmed by the conduct it authorizes. This award indicates that the Carrier may simply look the other way and allow third parties to perform Maintenance of Way work on its own property. In doing so, this award (incorrectly) holds that the Carrier will be assessed no liability. Obviously, this runs contrary to the Agreement, the long-standing arbitral precedent mentioned above and the notions of good faith and fair play as contained in the Railway Labor Act.

Based on the faulty reasoning described above, the Organization respectfully dissents.

Respectfully submitted,



Andrew M. Mulford
Employe Member

Carrier Member's Response
To
Labor Member's Dissent
Of
Award 1 of Public Law Board No. 7705

The Organization has presented a Dissent to Award 1 of Public Law Board 7705. After reviewing the Dissent, the Carrier was compelled to respond to ensure the facts of the matter were properly portrayed and the sound reasoning of the majority maintained.

To begin its Dissent, the Organization offers many supposals of potential hazards to the Carrier's operations and property. The facts of the matter were succinctly presented on the property and are undisputed. Lewis Energy (LE) had an issue with their large oil rigs becoming stuck on the train tracks as they were moving to and from their facility. To prevent their equipment from being stuck by trains, LE contracted with Rail Pro Inc (RPI) to provide protection of LE men and equipment from trains. Though everyday Union Pacific could and does have incidents that affect our crossings such as large semis getting stuck or cars running around gates, it does not put flaggers at every crossing across our system. Thus, exemplifying the fact the work was performed at the instigation, cost and benefit of LE. Per the criteria of **Third Award 37468**, the Board correctly held the work was not scope covered, and no violation of the agreement occurred.

The Organization raised several ancillary matters in its Dissent. First and foremost, it argues flagging is scope covered work. **Flagging is not scope covered work**. The Carrier cited awards within its submission to this point, see **Third Division Awards 42247 and 37959**. The awards cited by the Organization in support of its position addressed issues of seniority and assignment of overtime. The issue of scope was not addressed, therefore the awards cited by the Organization are determinative. Such awards merely show participation by BMWE in performing flagging duties, but not a reservation under the scope rule. Additionally, the Carrier would point to **Third Division Award 42247** cited within the Organization's own submission. It held, "*flagging work is not scope-covered work or work reserved to a particular classification*"

The second ancillary matter raised by the Organization is regarding crossing and crossing gates. Building, installing, repairing or maintaining a crossing was not at issue in this case. Flagging is separate and distinct from building or maintaining a crossing or crossing gangs. The facts of this matter were clear, no work was being performed by on tracks, crossing, or right of way. Therefore, such an analogy is grossing misplaced. Furthermore, the Organization makes reference to crossing gates. Crossing gates are associated with the Carrier's signal system and work related to such would not come within the scope of the BMWE agreement.

In its dissent the Organization attempts to muddy the facts of the case in an endeavor to reach a different conclusion. However, the facts are the facts. The Carrier did not contract out work. LE contracted with RPI to provide flagging protection for the safety of LE's men and equipment. As Award 1 states, "*the claimed work on June 7, 2016 was not performed at the Carrier's instigation, the claimed work was under LE's control, the claimed work was not at the*

Carrier's expense nor was it exclusively for the Carrier's benefit." The majority's decision was reasoned and supported by the record presented.

Respectfully submitted,

Katherine N. Novak
Carrier Member