

PUBLIC LAW BOARD No. 7708 CASE No. 10

|                                |   |         |
|--------------------------------|---|---------|
| BROTHERHOOD OF MAINTENANCE OF  | ) |         |
| WAY EMPLOYEES                  | ) |         |
|                                | ) | PARTIES |
| vs.                            | ) | TO      |
|                                | ) |         |
| UNION PACIFIC RAILROAD COMPANY | ) | DISPUTE |

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Mobile Express Machinery Company) to perform routine Maintenance of Way Water Service Sub-department repair work (replace and install fuel nozzles on fuel stands) at fueling stations located between Miles Posts 1295 and 1297 on the Lordsburg Subdivision on May 23 and 24, 2012 (System File FC-1259S-460/1573087 SPW).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out said work and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of Maintenance of Way forces as required by Rule 59 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 F. Edgar shall now be compensated twelve (12) straight time hours and four (4) overtime hours at his respective straight time rate of pay".

On March 6, 2012, the Carrier, by letter, notified the Organization of its intent to contract, as follows:

SUBJECT: This is a 15-day notice of our intent to contract the following work:

SPECIFIC WORK: Provide all labor supervision, materials and equipment necessary for plumbing, pipe work and other work as it relates to water service work. The notice will last for two (2) years from the date the service order is conference.

LOCATION: LA Service Unit, Sunset Service Unit, Roseville Service Unit.”

The notice informed the Organization that while the Carrier was available to conference the matter, it asserted that the work to be performed by the contractor was not necessarily scope covered work. Per the Organization’s request, a conference was held on March 23, 2012 to discuss the notice.

On May 23, 2012 and May 24, 2012 employees of Mobile Express, were assigned to make repairs by installing new fuel nozzles on the fuel stands at the fueling stations located between Mile Post 1295 and 1297 on the Lordsburg Subdivision, City of El Paso, Texas. The contractor’s employees each worked a total of twelve (12) straight time hours on May 23, 2012 and four (4) overtime hours on May 24, 2012, in the performance of this work. A review of the 2012 Seniority Roster will show that the Claimant is fully qualified with the skills necessary to perform the work performed by the Mobile Express employee(s) and would have performed this work had the Carrier assigned him to do so.

The Organization went on to allege that the work of installing new fuel nozzles at the fueling stations has historically, customarily and traditionally been performed by the Water Service Subdepartment. These contracted employees have and are invading \* \* the Claimant’s scope of covered work, and work opportunity. The Organization requests that at the Claimant be compensated 12 straight time hours and 4 overtime hours.

In support of its claim, the Organization submitted two (2) statements from the Claimant. On May 23, 2012, the Claimant alleged that the Carrier utilized a contractor to make repairs to El

Paso 196 service track, repairing and replacing diesel nozzles. He alleged that all plumbing work has always been maintained by W/S personal (sic). By using a contractor, the Claimant alleges that W/S will never hire another employee to help with the workload.

In the Claimant's second statement, dated May 30, 2012, he claims that his duties of water service personal (sic) he was to do plumbing work for the Railroad in Tx, NM and Az. On May 23, 2012, according to the Claimant, the Carrier utilized Mobile Express to make repairs by El Paso round house service track Piedras St., repairing and replacing fuel nozzle. This work, the Claimant alleges has always been maintained by the Water Service Department. By using a contractor, the Carrier will not hire additional water service personal (sic) and in the future will use other crafts to do the water service work.

The Claimant's concern is that by utilizing Mobile Express to perform contracting work, the Carrier will not hire additional water service personnel. However, whether or not there are adequate personnel to perform work belonging to water service is beyond the power and authority of this Board. The bargaining table would be more appropriate to raise and negotiate such issues.

By is claim the Organization contends that the work in question historically and exclusively belongs to Water Service employees. However, no provision of the Agreement has been directed to the attention of the Board that the claimed work is exclusively restricted to the Water Service Department.

However, the Carrier's position in this dispute carries greater weight than the position of the Organization. At the outset, it should be noted that the Carrier provided timely notice of intent to contract out, not less than 15 days prior to the contracting transaction as required by Rule 59 (a). Moreover, the Carrier has a well established mixed practice of contracting out such work, which is authorized under Rule 59 (c). This rule provides that "Nothing in this Rule will affect the existing rights of either party in connection with contracting out".

Reinforcement of the Carrier's mixed practice is established by the May 14, 1999 letter to the then General Chairman Ash. The letter provided 30 files that listed various subject areas of contracting out, including Plumbing/Water Service work. The letter memorialized the Carrier's past practice, to which the Organization has failed to deny or raise an objection.


The Organization relies on the Berge-Hopkins Letters of December, 1981. Clearly, it has no force and effect. The LOU created reciprocal obligations which were not carried out. Accordingly, by the 1984 negotiations, the LOU lacked mutuality and no longer had any validity. It is of great weight that the LOU was not raised by the Organization when Chairman Ash received the May 14, 1999 letter of mixed practice by the Carrier.

The Organization claims that the contracting out by the Carrier violates Rules 1, 2, 3, 5, 26, 28, 59 and the December 11 LOU, which has previously been considered. Based upon the record, the Organization has failed to provide by the required preponderance of evidence that the Carrier violated any rules claimed by the Organization.

AWARD

Claim denied.

  
HYMAN COHEN  
Neutral Member

  
KATHERINE NOVAK  
Carrier Member

  
ANDREW MULFORD  
Organization Member

Dated: 10/30/2018

Dated: 10/30/18

**\*\*DISSENT TO FOLLOW\*\***

LABOR MEMBER'S DISSENT  
TO  
AWARDS 1 through 14, 18 AND 24 OF PUBLIC LAW BOARD NO. 7708  
(Referee Hyman Cohen)

The Majority erred on multiple accounts in these awards. That being said, one (1) error warrants further comment and review as it unquestionably confirms that the decisions are outliers, go against the expectations of the parties and qualify as being palpably erroneous. In this manner, the Majority's decisions hold that the December 11, 1981 National Letter of Agreement, also referred to as the Berge-Hopkins letter, is null, void and has no longer has any force in contracting disputes. Such a finding has no valid basis and goes against the clear terms of the Agreement, past practice on this property and numerous prior arbitral awards.

To be clear, the Majority's decisions do not align with more than thirty-five (35) years of Section 3 arbitration decisions, including numerous on-property decisions, that have applied the December 11, 1981 National Letter of Agreement. The following is a small sampling of the applicable awards on this Carrier which have recognized the validity and controlling nature of the December 11, 1981 National Letter of Agreement:

|   |                                   |
|---|-----------------------------------|
| Third Division Award 26212              | Initial Claim Filed in 1983       |
| Third Division Award 26770              | Initial Claim Filed in 1984       |
| Third Division Award 29121              | Initial Claim Filed Approx. 1989  |
| Third Division Award 29158              | Initial Claim Filed in 1986       |
| Third Division Award 29912              | Initial Claim Filed in 1989       |
| Third Division Award 30944              | Initial Claim Filed in 1986       |
| Third Division Award 30976              | Initial Claim Filed in 1990       |
| Third Division Award 31015              | Initial Claim Filed in 1990       |
| Awards 9, 11, 20 and 23 of PLB No. 6249 | Initial Claims Filed Approx. 1996 |
| Third Division Award 32865              | Initial Claim Filed in 1993       |
| Third Division Award 36292              | Initial Claim Filed in 1998       |
| Third Division Award 36517              | Initial Claim Filed in 1998       |
| Third Division Award 36964              | Initial Claim Filed in 1998       |
| Third Division Award 37720              | Initial Claim filed in 2000       |
| Third Division Award 37852              | Initial Claim Filed in 2000       |
| Third Division Award 38349              | Initial Claim Filed in 2001       |
| Award 6 of PLB No. 7099                 | Initial Claim Filed in 2004       |
| Award 13 of PLB No. 7100                | Initial Claim Filed in 2005       |
| Third Division Award 40922              | Initial Claim Filed in 2007       |
| Third Division Award 40923              | Initial Claim Filed in 2007       |
| Third Division Award 40929              | Initial Claim Filed in 2008       |
| Third Division Award 40930              | Initial Claim Filed in 2008       |
| Third Division Award 40932              | Initial Claim Filed in 2008       |
| Third Division Award 41048              | Initial Claim Filed in 2008       |
| Third Division Award 42225              | Initial Claim Filed in 2011       |
| Third Division Award 42231              | Initial Claim Filed in 2011       |

The aforementioned awards confirm that in the more than thirty-five (35) years since the parties executed the December 11, 1981 National Letter of Agreement, Section 3 arbitration panels have consistently and uniformly enforced the December 11, 1981 National Letter of Agreement. These arbitration panels have actually sustained claims based solely on the Carrier's failure to comply with the December 11, 1981 National Letter of Agreement. Obviously, awards spanning some thirty-five (35) years which apply the December 11, 1981 National Letter of Agreement as having full force (while rejecting the Carrier's position) stand as irrebuttable confirmation that the instant awards are palpably erroneous.

Before this Board the Carrier attempted to side step its contractual obligations by arguing that the December 11, 1981 National Letter of Agreement is a dead agreement due to some alleged unfulfilled reciprocal obligations. The Carrier's position is simply wrong. To be clear, Section 3 arbitral boards have consistently and repeatedly rejected this same argument by the Carrier over the past thirty-five (35) years. On this point, we invite attention to Third Division Award 40923, where veteran arbitrator W. Miller rejected the same arguments presented by the Carrier:

"The first question at issue is whether or not the vitality of the December 11, 1981 Letter of Understanding (Berge/Hopkins Letter) has expired because expectations by one party or the other may or may not have been realized. There was lengthy dissertation on the subject by the parties which set forth their respective positions. That record indicates that this argument has arisen on several occasions over the life of that Agreement sometimes boiling over into contentious debate. As that debate was waged, Neutrals continued to accept the fact that the Agreement was viable. As an example, Award 13 of Public Law Board No. 7100, involving the same parties to this dispute, issued a decision on March 4, 2009, without dissent by the Carrier, that the December 11, 1981 Letter of Understanding had been violated by the Carrier. Other Awards such as Third Division Awards 29121, 30066, 31015, 36292, 38349 and Award 6 of Public Law Board No. 7099 have also determined that the Agreement applies to this Carrier and on that basis the Board is not persuaded that the December 11, 1981 Letter of Understanding has lost its applicability."

Importantly, just a few years later, Union Pacific attempted the same misdirection regarding the December 11, 1981 National Letter of Agreement, but that time on property governed by the Southern Pacific Western Lines (SPW) Agreement (i.e., the property involved in the instant decisions). In Award 40932 (SPW), the Carrier's misdirection and attempts to side step its contractual obligations were properly rejected and it made clear that the December 11, 1981 National Letter of Agreement remained in full force and effect:

Labor Member's Dissent

Awards 1 through 14, 18 and 24 of Public Law Board No. 7708

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“A review of the record evidence indicates that the parties made the same respective arguments that they made in several other cases regarding the applicability of the December 11, 1981 Letter of Understanding and whether or not the Organization was required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. For the sake of brevity, the Board will not discuss those issues, but instead refers the parties to Third Division Awards 40922, 40923, 40929 and 40930 wherein the Board ruled on behalf of the Organization.”

To be clear, the Carrier presented this Board with nothing but conjecture to support its position that the December 11, 1981 National Letter of Agreement was no longer applicable. The Carrier's on-property correspondence in each case, as well as its the submissions to this Board lacked any evidence that the parties had mutually abandoned the agreement or other evidence which allows a reasonable mind to overcome the agreement language and the thirty-five (35) years' worth of past arbitral awards. Perhaps most importantly, the Carrier provided no comparable arbitral precedent to support its arguments.

The Majority's willingness to cast aside the December 11, 1981 National Letter of Agreement as being (miraculously and suddenly) inapplicable constitutes an absurd outcome which serves to invalidate these decisions. Indeed, these decisions are extreme outliers which are not based in fact or logic, go against the longstanding status quo of the parties and also against the consistent arbitral authority which has consistently affirmed the validity and application of the December 11, 1981 National Letter of Agreement since the agreement was executed.

For all the above-mentioned reasons, it is clear that the Majority erred in rendering its decision and that these awards are palpably erroneous. Therefore, I respectfully dissent.

Respectfully submitted,



Andrew Mulford  
Labor Member