PUBLIC LAW BOARD No. 7708 CASE No. 2

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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES) | |
| DIVISION - IBT RAIL CONFERENCE | ) PARTIES |
| | ) TO |
| PACIFIC RAILROAD COMPANY (FORMER | ) DISPUTE |
| SOUTHERN 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 (Mobile Express Machinery Company) to perform Maintenance of Way and Structures Department work (replace steel air line) located at the Piedras Old Service Track between Mile Posts 1294 and 1297 on the Lordsburg Subdivision at El Paso, Texas on March 4 and 5, 2013 (System File RC-1359S-630/1584021 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 the aforesaid work and failed to make a good-faith effort to reduce the incident of contracting out scope covered work and increase the use of its 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) hours at his respective rate of pay for the work performed by the Mobile Express Machinery Company."

* * * * * * * * * *

On March 6, 2012, the Carrier, provided notice to the Organization of its intent to contract out work. In pertinent part, the notice states as follows:

> "This is a 15-day notice of * * intent to contract the following work:

> Location: LA Service Unit, Sunset Service Unit, Roseville Service Unit
>
> 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 years from the date the service order is conference".

Furthermore, the notice also provided that it is not to be construed as an indication that the work * * necessarily falls within the scope of your agreement; nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWR (the Organization).

At the Organization's request, a conference was held on March 23, 2012 to discuss the notice. By letter dated April 16, 2013, the Organization filed a claim on behalf of Water Service Foreman Fernando Edgar in which it alleged the following:

1. On March 4 and 5, 2013 employees of Mobile Express Machinery Company were utilized to replace a 1/2 inch steel air line, which connects to the air lines located at the Piadras Old Service Track between mile posts 1294-1297 of the Lordsbury Subdivision in El Paso, Texas.

2. The Water Service Sub-department personnel have always performed the work in dispute. In addition, the work has historically, customarily, and traditionally been performed by the Water Service Sub-department.

3. The Carrier violated the Agreement when it failed to make a good faith effort to reduce the incidence of subcontracting and increase the use of the [Organization] forces as required by Rule 59 * * and the National December 11, 1981 Letter of Agreement.

4. By utilizing a contractor to perform the work, the Carrier has caused the Claimant a loss of work opportunity and compensation.

In support of its claim that the work which the Carrier has contracted out is reserved exclusively to the Organization's employees, the Organization submits two (2) statements from the Claimant. In his

first statement dated October 10, 2012, the Claimant refers to the repairs of several swamp coolers, which are not relevant to the particular claim in this case.

In his second statement dated March 5, 2013, the Claimant states that since 1992 the Water Service Department has maintained the 1/2 steel pipe reels at the Piadras Fueling facility which Mobile Express, the subcontractor was utilized for repairs and to replace such pipe on March 4 and 5, 2013. In addition, the Organization has submitted various statements from employees, among which were uniform references to the Water Service Department that always performed the work in dispute.

However, the Carrier submitted various statements from Roundhouse Foreman Ruben Martinez, Manager of Mechanical Maintenance Stephen Mello and Foreman General Jim McCain, which stated that the work in question was not craft specific; that "all upgrades" have been done by contractors and that there has always been "a mix of people", not just water service personnel working on water/fuel and air related issues. Each of the supervisors had been employed by the Carrier for an extensive period of time -- between 16 and 34 years of service.

The statements submitted by the Organization and Carrier establish a strong mixed practice of contracting out the work in dispute. The Board is of the opinion that the Water Service Subdepartment employees as well as contractors have performed piping and plumbing related work which is claimed by the Organization to be reserved exclusively to its employees.

There is no language in the Agreement that reserves the work of replacing steel air lines exclusively to the Claimant, or any employee in the Water Service Department. Clearly, the Organization has not met its threshold burden that the work claimed is within the scope rule.

It is undisputed that at the Carrier provided a 15-day notice of its intent to subcontract as required by Rule 59(a). The parties discussed the matter in conference. The Organization claims that the notice is improper because it fails to provide various details, including, for example, the exact locations of the work, the dates the work will be performed, a full description of the work to be contracted and the reason for contracting out the work. Rule 59 does not require the Carrier to provide specific details in its advance notice to subcontract. The Board

cannot add or write into the Rule specific requirements to be considered at the conference.

The function of the Board is to enforce the language agreed upon by the parties. See, e.g., *Third Division Award 32862.* It is not to revise the agreed upon language.

As the Board has previously established, the Carrier has a well established mixed past practice of contracting out various aspects of water service work, including but not limited to plumbing/pipe work that dates back to 1996. Moreover, the Organization has not identified terms of the Agreement which provide that the work is dispute, namely steel air lines, is reserved exclusively by the Organization employees.

Rule 59 (c), which is entitled "Preservation of Rights", reinforces the Carrier's right to contract out the plumbing/pipe work. The Rule, in pertinent part, provides that "Nothing in this rule, will affect the existing rights of either party, in connection with contracting out".

Further support for the mixed practice is based upon the May 14, 1999 letter, in which 30 files were identified to establish the historical practice of contracting out on the SPWL. A second letter to the Organization, dated July 23, 1999 summarized the documentation. These letters were never rejected by the Organization; nor has the Organization objected to the historical mixed practice of the work in dispute. See, e.g., *Third Division Award 40582 (SPW).*

The Berge-Hopkins Letter of December 11, 1981 is of no assistance to the Organization. In order for the Letter to be enforceable and binding upon the Carrier, the Organization was required to consider and agree to the Carrier's claims on productivity and work rules in exchange for the Organization's concerns with respect to subcontracting. The exchange of reciprocal obligations failed to materialize. Thus, the element of "mutuality" is lacking. This well established legal concept provides that if one party fails to satisfy its agreed upon obligation the other party is released from carrying out its obligation.

As a final observation with respect to the 1981 Berge-Hopkins Letter, the Organization failed to raise an objection when it received the Carrier's May and July, 1999 letters which provided evidence of the historical mixed practice of subcontracting. It is significant that the Organization failed to raise an objection based upon the 1981 LOU where it received the Carrier's 1999 letters. Consequently, the Organization's

claim that the 1981 LOU continues to be applicable, is seriously undermined

The Organization has alleged that the Carrier violated Rules 1, 2, 3, 5, 6, 12, 15, 26, 28, 59 and the December 11, 1981 Letter of Understanding. Clearly, the Organization has failed to provide probative and credible evidence to establish that the Carrier has violated the Rules alleged by the Organization. Referee Roukis stated in *Third Division Award No. 27896,* "As the moving party, the Organization must present evidence to affirm its position". No such evidence has been presented.

In *Division Award No. 28943, (1991)* Referee Wallin declared:

> In light of the foregoing it is not necessary for us to decide whether the December 11, 1981 Letter of Agreement applies to impose a good faith obligation in addition to Rule 52. We find the notice and meeting provisions of Rule 52 to be sufficient, in and of themselves, to establish such a requirement". [In lieu of Rule 52, the Rule applicable to the facts in this dispute is Rule 59.]

The Organization has provided unsupported allegations and rules which are not relevant to this dispute. The Board has concluded that the Organization has failed to provide probative and credible evidence to support its claim. In *Third Division Award No. 27895,* Referee Roukis stated "as the moving party, the Organization must present evidence to affirm its position". No such evidence has been presented.

AWARD

Claim denied.

HYMAN COHEN
Neutral Member

KATHERINE NOVAK
Carrier Member

Dated: 10/30/18

ANDREW MULFORD
Organization Member

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:

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| 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:

> "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