PUBLIC LAW BOARD No. 7708 CASE No. 4

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 (Weaver Construction) to perform routine Maintenance of Way Water Service Sub-department work building drains, air lines, waterlines, sewer lines, waste water lines and related work) in connection with the construction of two (2) waste water plants between mileposts 1271-1278 on the Lordsburg Subdivision near Santa Teresa, New Mexico beginning on February 4, 2013 and continuing (System File RC-1359S-622/1581874 SPW).The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out the work referenced in Part (1) above and when it failed to make a good-faith effort to reduce the incidence of contracting and increase the use of its Maintenance of Way forces as required by Rule 59 and the December 11, 1981 National Letter of Agreement.

(2) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimant F. Edgar shall now be compensated for '... all the hours worked at his respective rate of pay for the work performed by the Weaver Construction employees. * * *' beginning on February 4, 2013 and continuing until said violation ceases.

On three (3) separate occasions, beginning on April 18, 2011, the Carrier provided 15-day notices to the Organization of its intent to contract out work. On April 18, the "specific work" set forth the following:

> "Contractor to provide all labor and materials to perform mass grading for Fueling Facility, Block Swap Yard, and Intermodal Facility, county roads construction and utility build in."

On August 18, 2011, the notice provided "specific work" as follows:

> "Furnish all labor, supervision, finish grading, county road work and paving, electrical, mechanical, structural and drainage work, buildings water, sanitary sewer, irrigation, equipment, tools, material and other items associated with construction of Strauss Fueling Facility, Block Swap Yard and Intermodal Facility".

The "location" of the work referred to in the April 18 and August 8 notices is "M.P. 1269 to M.P. 1281; Lordsburg Subdivision; Strauss, New Mexico.

The third 15-day notice of intent to contract work issued by the Carrier on March 6, 2012 provided "specific work" as follows:

> "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 fro the date the service order is conference".

By virtue of the written notices sent to the General Chairman, the Carrier has satisfied Rule 59 (a). These terms require that if the Carrier plans to contract out work within the scope of the collective bargaining agreement, the Carrier is required to notify the General Chairman not less than 15 days prior to the date of the contracting transaction.

The notices contained the admonition that while the Carrier was available to conference the matter, the work to be performed by the contractor was not necessarily scope covered work. At the Organization's request, a conference was held on March 23, 2012 to discuss the matter.

In filing its claim on March 19, 2013, the Organization alleged that at the Carrier violated the parties' Agreement on February 4, 2013 when it utilized Weaver Construction to "provide all plumbing work in the construction two (2) waste water plants * * includ(ing) the building of drains, air lines, sewer lines, waterlines and waste water lines amongst anything else needed to complete the building of the waste water plants". The Organization claimed that the work was exclusive to its members and deprived the Claimant of work opportunity and compensation to which he is entitled to by virtue of this seniority.

In support of its claim, the Organization has alleged that the Carrier violated Rules 1, 2, 3, 5, 6, 12, 15, 26, 28 and 59, and the Berge Hopkins December 11, 1981 LOU. The Organization seeks compensation for the Claimant, for all hours worked by the Weaver Construction employees, who performed "new pipe installations at 2 new pump houses".

In his second statement, dated 1-11-13, Claimant Edgar alleged that on January 7, 2012, the Carrier utilized J.P. Plumbing to remove and replace a water heater at the transportation trailer in the alfalfa yard in the El Paso Texas Railroad yard. In a subsequent statement dated 10-10-12, Claimant Edgar alleged that a contractor was utilized for "repairs made to several swap coolers in the Track Department, Signal Department and Electrician Shop buildings".

With the instant claim, it is alleged that the Weaver Construction employees provided all plumbing work in the construction of two (2) wastewater plants, which included the building of drains, air lines, sewer lines, water lines and waste water lines * *."

The Board acknowledges, statements from three (3) long tenured supervisors, Ruben Martinez, Stephen Mello and Jim McCain that the work in dispute is not craft specific. Furthermore, they state that upgrades have been performed by contractors; there has always been a mix of people, including machinist crafts, as well as contractors doing air, water and fuel related repairs; and that the work in question has never been designated as exclusively that of the water services.

The Board underscores that the Carrier has a mixed practice of utilizing a mixed force, including contractors to perform the work which is claimed. There is no language in the Agreement which reserves the work of installing new plumbing during the construction of new waste water treatment plants exclusively to the Claimant or any employee of the Water Service Department.

Such established mixed practice is recognized by Rule 59 (c) which, in pertinent part, provides that "Nothing in this Rule will affect the existing rights of either party in connection with contracting out". The Organization seeks assistance for its claim by attaching various uniform letters by employees who state that they have performed various types of work for a long period of time. Such statements merely establish that there has been a past mixed practice of either Carrier or contractor employees performing the type of work claimed. The photos attached by the Organization show unidentified persons at which the Organization has alleged was a fueling facility.

The Board directs special attention to the Claimant's "2-22-13" statement in which he claims that by using contractors to perform water service work, the Carrier will not hire any new water service employees; and is eliminating water service work by the Organization employees.

Thus, what is claimed is that the Carrier is using contracting out as a method of discriminating against the Organization; and such contracting out substantially prejudices the status and integrity of the Organization. A mere allegation is insufficient. Credible evidence by the Organization most be established to support its claim.

Furthermore, the Organization has failed to establish that the water service Department would have been adequately manned to perform the work of building two (2) waste water plants. The Carrier requires staffing for the normal daily operations but not for the extensive project in dispute.

Furthermore, the Carrier has submitted numerous service orders dating back to 1996 establishing contracting out work. Many of the service orders provide for the contracting out of plumbing/pipe work. In addition, the Carrier, by letter dated, May 14, 1999 provided a record of the Carrier's past practice of subcontracting across the territory of the former SPWL. The record consisted of 30 files, divided into 24 subject areas, including plumping/Water service work. Clearly, the Board concludes that the Carrier has had a vigorous past in practice for many years -- since at least 1996 of contracting out the work in dispute.

Turning to the Berge-Hopkins Letter dated December 11, 1981, the Board observes that at the LOU did not create a separate new contracting rule; it is dependent upon the application of Rule 59.

The 1980 LOU provided for a reciprocal obligation upon the Organization and a "willingness to continue to explore ways of achieving a more efficient and economic utilization of the work force". Events subsequent to the December 11, 1981 LOU established that the Organization failed to carry out its obligation.

Thus, in this dispute mutuality depends upon the parties fulfilling obligations in the future. The concept of mutuality fails to exist when one party does not satisfy its agreed upon obligation. As a result, under the concept the other party is released from carrying out its obligation.

Moreover, the parties in the LOU, in pertinent part, encouraged the parties locally to take advantage of the good faith discussions provided to reconcile their differences. However, the contracting out by the Carrier, as shown by the service orders since 1996 and the Carrier's notice dated May

14, 1999 of its practice of subcontracting, constitutes conclusive evidence that the 1981 LOU has no force and effect. The LOU may have been in effect for a few years after 1981, but by 1984, the next round of negotiations for the Carriers, it had no further application.

The Organization claims that the contracting out by the Carrier violates Rules 1,2, 3, 5, 26, 59 and the previously considered December 11, 1981 LOU. Based upon the record, the Organization has failed to prove by the required preponderance of evidence that the Carrier violated any of the Rules, claimed by the Organization.

AWARD

Claim denied.

HYMAN COHEN
NEUTRAL MEMBER

KATHERINE NOVAK
Carrier Member

Dated: 10/30/2018

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:

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