PUBLIC LAW BOARD No. 7708 CASE No. 6

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 work (replace and install fuel filters) in the 196 Pump House at Mile Post 1295 in El Paso, Texas on the Lordsburg Subdivision on August 14, 2012 (System File FC-1259S-474/1576993 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 three (3) 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, in pertinent part, 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 also informed the Organization that while the Carrier was available to conference the matter, the work to be performed by the contractor was not necessarily scope covered work.

By letter dated September 18, 2012, the Organization filed a claim on behalf of Water Service Foreman Fernando Edgar in which it alleged that the Carrier violated various provisions of the current Agreement, including "but not restricted to Rules 1, 2, 3, 5, 6, 12, 15, 26, 28, 59, and the December 11, 1981 Letter of Understanding, when the Carrier hired outside contractor, Mobile Express Machinery Company, to perform the duties normally performed by the Water Service Maintenance of Way Employees".

In its September 18, 2012 letter, the Organization claimed that employees of Mobile Express Machinery Company were assigned to replace/instal fuel filters in the 196 Pump House, Mile Post 1295 of the Lordsburg Subdivision, City of El Paso, Texas. Each of the employees worked a total of three (3) hours. The Organization further claims that the 2012 Seniority Roster will show that the Claimant is fully qualified with the skills necessary to perform the work performed by the Mobile employees and would have performed the work had the Carrier assigned him to do so.

In support of its claim that the work which the Contractor has contracted out is reserved exclusively to the Organization's employees, the Organization submits two (2) signed statements from the Claimant. In the first statement dated August 28, 2012, he disagrees with the Carrier utilizing Mobile to replace the fuel filters at

196 Pump House. He goes on to state that this type of work has been the past practice of the Water Service personal (sic) to maintain these facilities and perform all repairs, inspections and trouble shooting.

There is no documentation to support the Claimant's self serving vague statements.

Moreover, it is significant to point out that the Claimant is also concerned by the Carrier's use of contractors for another reason. He stated that by using contractors, Water Service will other another employee to help the employee in the department who will be unable to perform the necessary repairs. Perhaps, this comment by the Claimant explains the reason behind the claim brought by the Organization in this dispute.

In his second signed statement, dated August 10, 2012, the Claimant refers to "repairs to several swamp coolers in the Track Dept., Signal Dept., and Electrician Shop buildings". The statement by the Claimant is outside the scope of the claim filed by the Organization. Clearly, the claim is not relevant.

Neither the Organization, nor the Claimant has relied upon any provision of the Agreement that restricts such work -- replace and install fuel filters to the Water Service Subdepartment.

Moreover, the Organization has provided statements from Round House Foreman Martinez, Manager Mello and Foreman General McCain that the work in question was not craft specific and that at the type of work has been performed by various crafts as well as contractors. Thus, the work in dispute is not work exclusive to the Water Serve Department employees or any other craft. The supervisors have been employed by the Carrier for an extensive period of time -- between 16 and 34 years.

It is well established that the scope of the Agreement is general in nature. Accordingly, the Organization bears the burden of proving that its member has the right to the specific wok in question. Clearly, the Organization has not met its threshold burden that the work claimed is within the Scope Rule.

Furthermore, the Organization has failed to prove that the Agreement or any rules were violated due to the contracting out by the Carrier. As Referee George S. Roukis declared in *Third Division Award 27895:*

> "* * as we stated many times in prior Awards, we need concrete verifiable proof. (See *Third Division Awards 13741, 18515 and 18941).* As the moving party, the Organization must present evidence to affirm its position. The record herein is bereft of such needed probative substantiation and accordingly, we must deny the claim.

It is undisputed that pursuant to Rule 59 (a) the Carrier provided a 15-day notice of its intent to subcontract. The parties discussed the matter in conference.

The Organization requested various details including, for example dates of work, number of contractors employed, estimated time needed. Rule 59 does not obligate the Carrier to provide specific details in the notice. 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* 32861. It is not to revise the agreed upon language.

The Carrier has a well established mixed past practice of contracting out various aspects of water service work, including but not limited to repairing and maintaining air compressors. The work in question has been contracted out on a regular basis for a period of time without opposition from the Organization.

Rule 59 (c) which is entitled "Preservation of Rights" reinforces the Carrier's right to contract out the work in question. The Rule, in pertinent part, provides that "Nothing in this rule will affect the existing rights of either party, in connection with contracting out." Thus, on May 14, 1999 the Carrier served a letter along with thirty

(30) files evidencing the historical practice of contracting out on the SPWL. The Carrier then sent a second letter on July 23, 1999 summarizing the documentation. These letters were never rejected * * or denied by the Organization, see *Third Division Award,* 40582 (SPW).

The Organization seeks support for its claim from the December 11, 1981 (Berge-Hopkins) Letter. The Berge-Hopkins Letter did not resolve the issue of subcontracting. The Carrier's position was that their interests in addressing issues of productivity and work rules must also be considered.

Since the parties were unable to resolve their competing interests a national committee was created. However, the national committee was ineffective.

As set forth in Chairman Allen's letter dated April 17, 2003, to Mac A. Fleming, President of the Organization, "The bilateral process envisioned by the Berge-Hopkins Letter through the * * committee was viewed as a failure by both sides and was ultimately abandoned by both parties". By the 1984 round of negotiations, the process in the Berge-Hopkins Letter was discarded.

Clearly, reciprocal obligations are undertaken by both parties as evidenced by the Berge-Hopkins Letter and the events which followed. The obligations are based upon mutuality. When a party, whether it be the Organization or the Carrier ceases to carry out their respective obligations there no longer is mutuality. Accordingly, beginning with the 1984 round of negotiations, the Berge-Hopkins Letter containing the mutual obligation of the parties has no force and effect.

A further observation is necessary. The Berge-Hopkins Letter provides that the Organization believed it is necessary to restrict the Carriers' rights to subtract because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily". Thus, the focus of the Organization's position in the 1981 Letter is scope work exclusively reserved to its employees.

However, the Board concludes that work which involves a mixed past practice is not contemplated by the Berge-Hopkins Letter. This conclusion is supported by the Organization's failure to object or even raise a question with respect to the May 14, 1999 and July 13, 1999 letters from the Carrier. These letters set forth thirty (30) files evidencing the historical practice of contracting out on the SPWL. Had the Berge-Hopkins Letter been applicable in 1999, the Organization would have disputed the letters at the time. The silence of the Organization in 1999 is convincing evidence that at the Berge-Hopkins Letter has no application to the historical practice of contracting out.

Accordingly, Referee Wallin stated in *Third Division Award 28943:*

> "In light of the foregoing, it is not necessary for us to decide whether the December 11, 1981 Letter of Agreement applies to a good faith meeting obligation in addition to Rule 52. We find the notice and meeting provisions of Rule 52 to be sufficient in an of themselves to establish such a requirement. (Rule 51 is applicable to Rule 59).

Also, *Third Division Award 18654* by Referee Sickles is relevant.

> "Here, Carrier gave notice and conferred. Thus, there is no violation of the May 17, 1968 Agreement, nor do we find an actionable disregard of the December 11, 1981 Letter of Understanding."

Finally, the remedy requested by the Organization, to compensate the Claimant for three (3) hours of his straight time pay is not supported by the facts. Since the Claimant was employed during the period in question he lost neither work opportunity or suffered any loss of compensation. Thus, the claim for monetary loss by the Claimant is denied.

AWARD

Claim denied.

HYMAN COHEN
Neutral Member

KATHERINE H. 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