PUBLIC LAW BOARD No. 7708 CASE No. 8

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 (install new 4 inch diesel fuel hoses, sill protectors, and swivels) at the Piedras service track at Mile Post 1296 on the Lordsburg Subdivision in El Paso Yard, El Paso, Texas on December 20, 2012 (System File RC-1359S-609/1579285 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 for four (4) hours at his respective rate of pay."

On March 6, 2012, the Carrier, by letter, notified the Organization of its intent to contract. The notice of intent to contract, in pertinent part, is 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 parties conferenced the claim on November 5, 2013. It should be noted that the Carrier complied with Rule 59 (a) by providing sufficient notice of intent to contract out before the 15 day requirement.

In a letter dated February 5, 2013, to the Carrier, the Organization submitted a claim on behalf of Fernando Edgar, in which it alleged the following:

> "On December 20, 2012, two (2) employees of Mobile Express Machinery Company, were utilized to install new 4 inch diesel fuel hoses, spill protectors and swivels. The work was located at the Piedras service track. Milepost 1296 of the Lordsburg Subdivision, El Paso, Texas. The contractor employees worked a total of four (4) hours, 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 Machinery Co. employees and would have performed this work had the Carrier assigned him to do so.
>
> The Water Service Subdepartment personnel have always performed the work identified herein."

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 one has requested as a remedy that the Claimant,

> "be compensated ten (10) hours at his respective rate of pay for the work performed by the Mobile Express Machinery Company employees. Payment shall be in addition to any compensation the Claimant may have already received."

In support of its claim, the Organization submitted two (2) signed statements from the Claimant. In his first statement dated December 28, 2012, the Claimant states that his duties as a water service personal (sic) was to do plumbing work for the Railroad in Tx, NM, Az. In pertinent part, the Claimant goes on to state that "the Carrier knows that the 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. By depriving us of this work W/S will not hire any more employees."

There is no evidence of a record or invoice from Mobile Express performing work for the Carrier, for the time period referred to in the claim. Also, the concern by the Claimant is that the Carrier will not hire any more W/S employees. This concern is not relevant to whether the work in question is scope covered work.

The second statement from the Claimant, dated October 10, 2012 refers to "swamp coolers" and is beyond the scope of the claim in this dispute and thus, not relevant. The Organization also provided the Carrier with numerous uniform letters in which employees stated that they performed various types of work over an extensive period of time. In addition, the Organization submitted photos showing unidentified individuals according to the Organization, at a fueling facility.

The letters and photos submitted by the Organization hardly meets the required level of proof required to establish that the work in question historically and exclusively belongs to Water Service

personnel. Nor has the Organization directed the Board to any provision of the Agreement that the work is scope covered work.

The Carrier has established a historical mixed practice of contracting out the work in dispute. Reinforcement of the Carriers mixed practice is established by the May 14, 1999 letter to the then Organization's General Chairman Ray Ash.

The Letter sets forth 30 files divided into 24 subject areas, including "Plumbing". It was clearly expressed that the information memorialized the Carrier's past practice and would be utilized for future reference. Specifically, Section 22 of the May 14, 1999 letter documented the past practice of contracting out Plumbing Water Service Work" on the property. Further support for the past mixed practice is provided by Rule 59 (c), which in pertinent part, provides "Nothing in this rule will affect the existing rights of either party, in connection with contracting out".

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 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 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