PUBLIC LAW BOARD No. 7708 CASE No. 9

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Bridge and Building Subdepartment employees to perform Water Service Subdepartment duties (use and maintenance of water cars) commencing on August 18, 2011 and continuing through August 25, 2011 instead of Water Service Subdepartment employees F. Edgar and R. Sias (System File T-1128S-512/1562798 SPW).

(2) As a consequence of the violation referred to in Parts (1) above, Claimant F. Edgar and R. Sias shall now be compensated for forty-eight (48) hours at their respective straight time rates of pay and for sixteen (16) hours at their respective overtime rates of pay."

On October 8, 2011, the Organization filed a claim on behalf of Fernando Edgar and Reynaldo Sias, in which it alleged that the Carrier violated various Rules, but not restricted to Rules 1, 2, 2, 5, 6, 8, 9, 10, 26 and 28 when the Carrier utilized employees junior in seniority of whom did not have Water Service Subdepartment seniority to perform Water Service duties.

Commencing on August 18, 22011 through August 25, 2011 from 7:00 a.m. to 3:30 p.m. each day the Carrier assigned and used junior in seniority B&B Subdepartment employees who have not established Water Service seniority to perform Water Service

Subdepartment duties. These duties required the use and maintenance of water cars while following the rail grinding train. The described water cars have high capacity water pumps that require maintenance and repairs before, during and after their use. It is a well established fact that the Water Service Employees have always performed this work. The Carrier further violated said agreement by refusing to allow Claimant Edgar's request to perform these duties.

Due to the Carrier's actions, the Organization further alleges that the Claimants lost a work opportunity. Their phones were in working condition to perform the work. The Organization requests that the Claimants each be paid 48 hours of straight time and 16 hours of overtime for work performed by employees from the B&B Subdepartment.

On October 21, 2011, the Organization filed a subsequent claim confirming the same allegations in the prior October 11 claim, but the dates that B&B performed the work was between August 25, 2011 through September 16, 2011, six (6) nights a week from 9:00 p.m. to 9:00 a.m. The Organization requests 206 hours at the overtime rate and 34 hours straight time for the work performed by the employees from the B&B Subdepartment.

In support of its position, the Organization's proof does not meet the level required to sustain its claim. The Organization failed to identify the employees whom allegedly performed the work. Furthermore, proof is lacking as to days or the hours of the employees who performed the work. In addition, the Organization failed to identify the specific locations where the alleged work was performed. The numerous statements and photos provided by the Organization do not address any alleged use and/or maintenance of water cars.

Moreover, based upon Manager of Bridge Maintenance John Tripp's statement, the water cars are part of the grinding train's consist and not the Carrier's equipment. Since the water cars are not part of the Carrier's equipment, the work would not belong to any of the Carrier's employees.

Also to be considered is Director of Bridge Maintenance Jamie Hills' statement which provides that the Carrier's employees have been supporting such grinders since at least 2007. The guidance from the Union Pacific Bridge Grinding Policy states that the Service B&B forces performs timely inspections when the Contractor's water truck is off the bridge.

The Organization has failed to refer to any provision of the Agreement that the Claimants have an exclusive right to provide fire protection and inspection or they had an agreement to maintain equipment not owned or operated by the Carrier. The Organization has failed to demonstrate that the claimed work is reserved by the Scope Rule.

Granted, the Organization provided statements alleging an exclusive past practice of fighting fires behind rail grinding cars. Such statements thus creates a dispute of facts. However, dismissal of the claim is warranted based upon *Third Division Award No. 33895,* when Referee Eischen stated:

> "The Board is confronted on this record with an irreconcilable conflict in material fact, set forth in diametrically opposed written statements from the two Primary witnesses. **In such situations of evidentiary gridlock, it is well settled that the Board must dismiss the claim on grounds that the moving party has failed to establish a prima facie case.** See *Third Division Awards 21423, 16780, 16450, 13330; Second Division Awards 7052, 6856; Public Law Board No. 4759. Award 3.* [Emphasis added].

Accordingly, the claim by the Organization is denied "on the grounds that the moving party has failed to establish a prima facia case.

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