PUBLIC LAW BOARD NO. 7979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT RAIL CONFERENCE NORTHEAST SYSTEM FEDERATION (NESF)

Award No. 11
Case No. 11

AND

NORFOLK SOUTHERN RAILWAY CORPORATION (FORMER SOUTHERN RAILWAY COMPANY)

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STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (load and haul backhoe) from Tunnel, New York to Oneonta, New York on June 18, 2019 and from Oneonta, New York to Afton, New York on June 19, 2019 (System File NS-DHSNESF-2019-021/MW-HARR-19-47-LM-451).

2. The Agreement was further violated when the Carrier failed to notify the General Chairman of its plans to contract out the aforesaid work and failed to discuss the contracting out in to an attempt to reach an understanding as required by Rule 59 and the December 11, 1981 National Letter of Agreement.

3. As a consequence of the violations referred to in Part (1) and/or (2) above, Claimant M. Ives must be compensated for eight (8) hours at the applicable straight time rate of pay."

FINDINGS:

The Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties (PLB Agreement) and that Public Law Board 7979 has jurisdiction over the dispute.

The Carrier, Norfolk Southern Railway ("NSR"), purchased what are known as the Delaware and Hudson ("D&H") South Lines from Canadian Pacific Rail in 2015. Prior to the purchase, the territory was governed by a collective bargaining Agreement between the Organization, the Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference ("BMWED") and CP Rail. The Carrier was already a party to a collective bargaining agreement with BMWED on the territory referred to as "Southern proper," known as the BMWED-Southern

Agreement, effective October 1, 1972. In preparation for the Carrier assuming control of the D&H South Lines, the Carrier and the Organization entered into an Implementing Agreement on April 6, 2015. The Implementing Agreement provided that the existing BMWED-Southern Agreement would apply to the newly acquired D&H South Lines, effective September 19, 2015. Thereafter, the BMWED-Southern Agreement became the governing agreement for the Organization's membership performing work on the D&H South Lines. BMWED members on the former D&H South Lines continued to be represented by their previous Northeastern System Federation General Chairman, Dale Bogart, rather than the Southern System Chairman.

This dispute arose on June 18, and June 19, 2019, when the Carrier assigned outside forces (NMH/Wentz) to load and haul its backhoe. The work performed by the contractor included loading and hauling the backhoe from Tunnel, NY to Oneonta, NY and from Oneonta, NY to Afton, NY, on the D&H South region of the Carrier's Harrisburg Division. Claimant maintains seniority within various classes of the Maintenance of Way Department on the D&H South Lines. The Carrier did not provide advance notice to the Organization of its intention to have this work performed by outside forces. These facts are undisputed.

By letter dated June 28, 2019, the Organization presented a claim to the Carrier which was denied by letter dated September 3, 2019. The parties engaged in extensive discussion regarding this issue but were unable to resolve the claim on-property, so it is now properly before this Board for final adjudication.

The Organization's Position

The Organization contends that the Carrier has violated Rule 59 of the parties' Agreement by contracting out work that is within the scope of the agreement without providing advance notice to the Organization, thereby preventing the parties from conferencing regarding the claimed work. The Organization contends that Rule 59 is taken verbatim from Article IV of the May 17, 1969 National Agreement, found throughout this industry in numerous agreements involving BMWED. Rule 59 provides:

RULE 59. CONTRACTING OUT

(a) In the event carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

(b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

(c) Nothing in this Rule 59 shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith."

The Organization contends that the question of whether the claimed work is within the scope of the Agreement was already decided in the affirmative by on-property Third Division Awards 44121, 44122, 44123, 44124, 44125, 44126, 44127, 44128 and 44129, ("the Knapp Awards"), which interpreted this collective bargaining agreement.

The Organization acknowledges that it must show that the work is within the scope of the Agreement and reserved to Maintenance of Way forces in order to meet its burden of showing a violation of the Agreement. This test may be fulfilled by clear rules or by showing the customary and historical performance of the work by BMWED. The Organization contends that it has presented evidence showing that the claimed work is within the scope of the Agreement, including employee statements and the Carrier's statements conceding that the Organization's members have performed this work in the past. The Organization contends that it has shown that the BMWED's membership has historically performed this work on this property, confirming that it is within the scope of the Agreement.

The Organization contends that once it has shown that the claimed work is within the scope of the Agreement, the burden shifts to the Carrier to show that the assignment of outside forces was proper. The Organization contends that it was unaware of any alleged practice contrary to the clear and unambiguous language of the Agreement and thus, could not and did not acquiesce to it. The Organization contends that the Carrier's own evidence shows that the Carrier's negotiator said only that it was "well understood" that its practices on the Southern proper would apply to the D&H. The Organization contends that the Carrier has failed to show a binding mutually accepted past practice permitting the Carrier to assign outside forces to Scope-covered work without advance notice to the Organization. Furthermore, there is no question that the Carrier regularly assigned this work to BMWED-represented employes after the Agreement was negotiated.

Any misunderstanding as to the Organization's consent did not survive once the Organization filed claims for the disputed work. Further, the Organization contends that Third Division Awards 44121, 44122, 44123, 44124, 44125, 44126, 44127, 44128 and 44129, ("the Knapp Awards"), interpreting this collective bargaining agreement, expressly found that even if the Carrier had a practice of contracting out the work without advance notice to the Organization, that practice would not remove the work from the scope of the Agreement. Further, it is well established that continual violations of a collective bargaining agreement do not modify it.

The Organization contends that the Carrier was required to provide written advance notification of its plans to contract out the work not less than fifteen days prior to the contracting out transaction and to provide an opportunity for the Organization to request a conference. The Organization contends that the Carrier's failure to do so requires a fully sustained claim, including the specified monetary remedy. Once the Organization began filing claims objecting to the Carrier's contracting out without providing advance notice, the Carrier was on notice that the

Organization did not consent to this alleged past practice in contravention of the clear and unambiguous Agreement provision, and thus, a monetary remedy is appropriate.

The Carrier's Position

The Carrier contends that the central question presented is whether the claimed work, loading and hauling the backhoe over the road, lies within the Scope Rule of the October 1, 1972 Southern System Agreement between the Carrier and the BMWED. The Carrier contends that if this Board determines that such work is not within the scope of the Agreement, then the related issues of whether the Carrier was required to give notice of its intent to contract out the work and conference such notice with the Organization pursuant to Rule 59 of the Agreement are moot.

The Carrier contends that by its plain terms, Rule 59 only applies to work within the scope of the Agreement. The Carrier contends that the Organization has failed to demonstrate that the claimed work is covered by the Southern System Agreement scope rule. The Carrier contends that the Scope Rule is a "general" scope rule, which reserves no work or tasks to the BMWED and does not even contain the word "work."

Therefore, the Carrier contends, the Organization must present actual and sufficient evidence of a historical practice on the property that reserves the work in question to its members. The Carrier contends that the Organization has presented almost no evidence to show that the claimed work has historically and customarily been performed on the Southern System Agreement territory by members of the craft. The Carrier contends that the Organization has only presented employee statements from employees of the D&H South Lines who claim to have performed the work since adoption of the Southern System Agreement in 2015. The Carrier contends that this evidence is insufficient to establish that the work is within the scope of the Southern System Agreement.

The Carrier contends that the Southern System Agreement has been in effect since 1972 and has governed work on its covered territory for nearly 50 years. The Carrier contends that the record is devoid of any evidence that the work in question has ever been regularly and customarily performed by the Carrier's forces at any time during the 43-year period between 1972 and the assumption of the D&H South Lines into the Southern System Agreement in 2015.

Furthermore, the Carrier contends, it has presented overwhelming evidence in support of its affirmative defense that the work in question has been historically, regularly, and customarily performed by contractors and employees from other crafts when Carrier equipment is unavailable without notice to or objection from the Organization. Furthermore, despite the pendency of these claims, no dispute has been raised by the Southern System General Chairman regarding work performed by outside contractors on the Southern proper.

The Carrier contends that the entire Southern System Agreement was applied to the D&H South "except as otherwise expressly identified." This clear language expressed the parties' intent to apply every aspect of the Southern System Agreement, including all rules and practices. Therefore, the Carrier contends, this Board should conclude that all of the historical contracting practices existing under the Southern System Agreement as of 2015 conveyed to the D&H South Region, unless expressly excepted.

The Carrier contends that the Organization failed to show that when the Agreement was negotiated in 2015, the parties intended for a different practice to occur on the D&H South. The Carrier contends that this Board should reject the D&H General Chairman's argument that because he was not fully aware of the historical contracting out practice, he and the employes he represents should not be bound by it. The Carrier contends that nothing in the Implementing Agreement expresses an intent to depart from those historical practices or to omit the history from the D&H South Region. The April 6, 2015, Implementing Agreement reads, in part:

> **ARTICLE I**
> Section 1
> Upon seven (7) days' advance written notice by NSR to BMWED, the work on the D&H South Lines to be operated by NSR will be performed pursuant to the terms and conditions outlined in Article II of this Agreement.
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> * * *
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> **ARTICLE II**
> Section 1
> Upon advance written notice by NSR to BMWED, pursuant to Article I, Section 1, the current BMWED-SOU Agreement will be applied to cover maintenance of way work on the D&H South Lines, except as otherwise expressly identified herein. This application includes the current agreement in effect for Designated Program Gangs (DPG Agreement).
>
> Section 2
> Upon the date provided in the notice by NSR to BMWED pursuant to Article I, Section 1, the D&H South Lines will constitute a new separate and distinct D&H South Region covered by the current BMWED-Southern Agreement and the D&H South Lines will be included in the SE Zone for DPGs." (Bold and underscore in Original)

Discussion

Because Rule 59 only applies to contracting out work "within the scope of the applicable…agreement," the first question that must be answered is whether the claimed work, loading and hauling a backhoe over the road, is within the scope of the Southern System Agreement. The Scope Rule, Rule 1 of the Agreement, is general in nature:

> **SCOPE: RULE 1**.
> These rules govern the hours of service, working conditions and rates of pay of employees represented by Brotherhood of Maintenance of Way Employees employed in the seniority sub-departments in the Maintenance of Way and Structures Department as hereinafter identified in this agreement.

In the Knapp Awards, the Third Division wrote, "The standard for determining whether work is covered by the Scope Clause and subject to Rule 59 is whether the work is arguably within the scope of the Agreement." Numerous other arbitral awards have used this same standard. *See,*

Third Division Award 36514, citing another Third Division Award about which it wrote, "The Board held in that case that the work was arguably scope covered and that, at minimum, notice should have been provided to the Organization before contracting out." *See also,* Third Division Award 36966 (Work "was at least arguably scope covered due to 'mixed practice' and that, at minimum, notice should have been provided to the Organization before contracting out.")

In this case, both the Organization and the Carrier presented evidence showing that Maintenance of Way employes performed this work on the D&H South Region after the adoption of the Southern System Agreement. The Organization presented employee statements showing BMWED-represented employes performing work similar to that claimed here. Prior to the claims being filed, the Carrier asserted that it intended to require backhoe operators to have a CDLA license which would "reduce the need for a contractor to move a backhoe." Additionally, the Organization asserted, without rebuttal, that this work was performed by the Carrier's forces when the Implementing Agreement was signed in April 2015, when it became effective in September 2015, and continued in 2016. In response, the Carrier wrote,

> This matter concerns a contractor transporting equipment over public roads to the location where needed by Carrier forces. Such work is not and has never been exclusively performed by the BMWED on this property. Contractors, as well as transportation employees have historically moved Carrier's equipment throughout the system. The prompt movement of the equipment is crucial to the timely accomplishment of work. The Carrier did not have available equipment to transport the equipment to the locations where they were needed in a timely manner.

The Knapp Awards suggested that even if the record contained evidence of a long-standing practice of using contractors under the Southern System Agreement, "[s]uch a practice, if proven, would not remove the work from the scope of the Agreement. It would instead establish either a past practice or a mixed practice of scope-covered work being performed by outside forces, which could remove the notice requirement."

The Carrier asserts that because it has used contractors to perform this work for decades under the Southern System Agreement, the Organization cannot show that its members customarily and historically performed this work, thereby removing it from Scope coverage. But numerous Boards have made clear that exclusivity is not the proper test when work is claimed against outside contractors. In Third Division Award 37001, the Board wrote,

> In a contracting dispute of this nature, the Organization need not establish exclusivity to bring the work within scope coverage, but only that BMWE-represented employees have customarily and historically performed work of this nature at this facility.

In Third Division Award 36516 addressing a "mixed practice," the Board wrote, "If the Organization has established that BMWE-represented employees have, at times, performed the disputed work, then advance notice is required even if Organization forces have not performed the work to the exclusion of other crafts or contractors."

Here, by arguing that contracting forces have "overwhelmingly" and "predominantly" performed this work, the Carrier has acknowledged that its forces have nonetheless performed this work on the D&H South Region. In the on-property correspondence, Carrier officials wrote,

> While the Carrier cannot in good faith dispute that craft employees have also participated in some of the character of work at issue in these cases, it is well established that neither such participation nor the listing and possession of capable equipment bring the work within the scope of the Agreement where, as here, there is no express reservation of any work and there is a proven, decades-long historical practice of contractors performing all of the work on agreement property without notice.

But the percentage of work performed by BMWE-represented forces and contractors is not the determining factor. If the Organization can show customary and historical performance of the work by its membership, the work is scope-covered. The Organization has satisfied that burden.

The Carrier's final argument is that when the parties agreed to apply the Southern System Agreement to the D&H South Region, they also agreed to include its long-standing past practice of contracting out this work without advance notice to the Organization. The Organization responds that it never agreed to a practice contrary to the clear and unambiguous language of Rule 59. Further, it contends that the Carrier never provided notice that it expected this practice to apply in the new territory, thus undermining the Carrier's position that the Organization knowingly acquiesced to the modification of the provision.

A binding past practice has been described as the parties' mutual agreement that the practice is the way things "ought to be done." The factors to be considered in determining whether parties' actions have become a "past practice" have been identified as 1) clarity and consistency of the pattern of conduct, 2) longevity and repetition of the activity, 3) acceptability of the pattern, and 4) mutual acknowledgment of the pattern by the parties.[1] When, as here, one party seeks to modify clear and unambiguous contract language, it must present proofs sufficiently strong to show mutual agreement to the modification of the negotiated terms. In such a case, a modification is typically found only where the proponent can show a positive acceptance or endorsement of the practice, as opposed to a tacit agreement. "The establishment of a past practice that would take precedence over unambiguous contract language, in essence an unwritten revision of such language, would require an exceedingly strong showing by the Carrier of clarity, consistency and mutuality to establish such a practice." Third Division Award 42889.

The Carrier here first suggested that because General Chairmen from the Southern proper participated in the negotiation of the Implementing Agreement, the Organization certainly understood what the practice was under the Southern Agreement.[2] In the on-property correspondence, the Organization denied that anyone on its side was aware that the Carrier intended to utilize contractors without notice on the D&H South. In addition, according to the

[1] Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich.L.Rev. 1017 (1961).
[2] Because it is not the issue before this Board, nothing herein should be construed to be a finding regarding the practice asserted to be mutually agreed to in the "Southern proper" territory.

Organization, the Carrier initially stated its intent to hire additional BMWE-represented employes to man the territory. Even assuming that the practice of not providing notice in one territory was proven, a declaration that the Organization "certainly understood" falls short of demonstrating that the Organization recognized the practice and positively agreed that it would apply in the D&H South Region. In the Knapp awards, the Board found that the parties "had very different underlying understandings of the terms of their agreement." In other words, there was not a sufficient showing that both parties indicated their assent that the practice should apply in the new territory.

Furthermore, it is well-settled that a past practice is only as broad as the circumstances that gave rise to it. As a result, even assuming, without deciding that a past practice of contracting out BMWE work without advance notice was binding on the Southern proper territory, it would not be binding on the D&H South Region absent express agreement to extend it. An assumption that a past practice accepted in one territory will be binding on another territory is insufficient to show positive acceptance or endorsement. *Cf.,* 1991 SBA Award (LaRocco), where the Board found that the parties to a merger consciously rejected one rule in favor of another.

It is also worth noting that there appears to be no dispute that when the Southern System Agreement was first adopted on the D&H South Region, the Carrier did not use contractors for this work. BMWE-represented employes initially performed this work as they had done under the former agreement with CP Rail. As soon as the Organization became aware that the Carrier was using contractors without providing advance notice, it began filing claims, belying the Carrier's assertion that the Organization had agreed that the Carrier could subcontract without notification. At that point, the Organization repudiated any alleged acquiescence to the practice and the mutual acceptance of the past practice, if it ever existed, could no longer be presumed.

Whatever practice the Carrier has asserted in the Southern proper, the practice on the D&H South Region since its acquisition has been at most a "mixed practice." A review of the record shows that initially, BMWE-represented employes performed the work and that the Carrier has subsequently used both contractors and its own forces. As noted in the Knapp Awards, and numerous other Third Division Awards, "Exclusivity is not the proper test in determining whether advance notice is required." Third Division Award 36516. Here, the burden properly shifted to the Carrier to show that it was excused from providing notice to the Organization of its intention. The Carrier has failed to meet that burden.

Although the Carrier asserts that the parties expressly recognized in Rule 59 that the Southern proper practices would attach, the language of the Agreement is less clear than suggested. Section C reads, "Nothing in this Rule 59 shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith." Whereas the first sentence might be intended to imply that past practices would flow from one territory to the next, that meaning becomes obscured in light of the next sentence, which states that the *purpose* of Rule 59 is to *require the carrier to give advance notice,* hardly a recognition that the Organization had agreed to waive notice in nearly every case.

The final issue raised by the Organization is the appropriate remedy. The Organization contends that Claimants are owed a full monetary remedy to compensate them for the loss of the work opportunity, regardless of their employment status. The Carrier contends that it never intentionally contracted out work in the scope of the parties' Agreement. It points out that when it believes the work they intend to subcontract falls under the scope of the Agreement, the Carrier will provide notice to the Organization and will conference when requested. Thus, the Carrier says that it has not acted in bad faith.

Firstly, this Board notes that a monetary remedy was awarded in the Knapp Awards, decided in 2020. Just as there, the Carrier failed to provide notice to the Organization that it intended to contract out scope-covered work. Secondly, a compensatory remedy rectifies a contract violation. Bad faith is not required. We can see no reason to depart from the long line of Board decisions that award a monetary remedy to Claimants at their respective rates of pay equal to the actual number of hours of work performed by contractors.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is signed by the parties.

Scott Goodspeed	Kathryn A. VanDagens	Dale Bogart
Carrier Member	Neutral Member	Organization Member

Dated: May 19, 2022