PUBLIC LAW BOARD NO. 7979

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

Award No. 9
Case No. 9

AND

NORFOLK SOUTHERN RAILWAY CORPORATION (FORMER SOUTHERN RAILWAY COMPANY)

---/

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 (joint elimination) between Taylor, Pennsylvania and Nanticoke, Pennsylvania beginning on July 8, 2019 through July 18, 2019 (System File NS-DHS-NESF-2019-044/MW-HARR-19-102-LM-820).

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, Claimants R. S. Heuer, J. Franks, P. Gardepe, A. Stoker, C. Gill, F. Konosky, M. Stone and T. Anderson must be compensated for sixty-four (64) hours at the applicable straight time rates of pay and for sixteen (16) hours at the applicable overtime rates 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 July 8, 2019 through July 18, 2019, when the Carrier assigned outside forces (Welders and Welder Helpers from Railworks) to perform thermite and/or flash butt welding for joint elimination between Taylor, Pennsylvania and Nanticoke, Pennsylvania. The work performed by the contractor included cutting the rail, removing the rail with battered joint ends, replacing the rail with rail plugs, and then welding the ends of the newly installed rail to eliminate the defective and damaged joints from the plant. Claimants maintain 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 August 30, 2019, the Organization presented a claim to the Carrier which was denied by letter dated October 18, 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 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 the fact that the Carrier does not deny that Maintenance of Way employes perform this work and that it has assigned this work to BMWED-represented employees since adoption of the Southern System Agreement on this territory. 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 confusion 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"), which interpreted this collective bargaining agreement, also 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, thermite and/or flash butt welding for joint elimination, 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 no evidence 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 presented no evidence that employees on the D&H South Lines have performed the work since the D&H South was placed into the Southern System Agreement in 2015. The Carrier contends that the Organization has failed to meet its burden of proving 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 under the Southern System Agreement 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.
>
> * * *
>
> **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)

The Carrier contends that the Knapp Awards should not be regarded as precedent in this case, because they were decided on a procedural error, as the Third Division could not consider the complete record. The Carrier contends that the arbitrator clearly signaled that if the entire record could be considered, the outcome would have been different. Thus, the Carrier contends, those Awards should be limited to the cases addressed. Additionally, the Carrier contends that the Awards are palpably erroneous, bordering on irrational. The Carrier contends that the arbitrator circularly reasoned that the "standard for determining whether work is covered by the Scope Clause…is whether the work is arguably within the scope of the Agreement." Furthermore, the Carrier contends that the parties established this Public Law Board for the express purpose of having the matter decided on a complete record.

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,

thermite and/or flash butt welding for joint elimination, 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." Although the Carrier characterized this standard as "irrational," it is clear that 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.")

The Scope Rule here is general and does not expressly refer to the claimed work. While thermite and/or flash butt welding for joint elimination is "typical" Maintenance of Way work, the inquiry must focus on the historical and customary practice on this territory. Therefore, the Organization must show that its members historically and customarily perform this work on the D&H South Region after the adoption of the Southern System Agreement. It has presented assertions without supporting evidence that Maintenance of Way employees performed this work. On the other hand, the Carrier countered that it has a long-standing practice of using outside contractors to perform this work. Since the Organization bears the burden of proving that the work is in the scope of the Agreement, we must conclude that it has failed to prove its claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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

Dated: May 19, 2022