SPECIAL BOARD OF ADJUSTMENT

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT)
) Case No. 2
and)
) Award No. 1
UNION PACIFIC RAILROAD COMPANY)
)

Martin H. Malin, Chairman & Neutral Member
Andrew M. Mulford, Employee Member
Katherine N. Novak, Carrier Member

Hearing Date: June 1, 2018

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way Department work (crossing watchman/flagging duties) on the Del Rio Subdivision on February 9, 15-16 and 23, 2016 (System File UP644BT16/1654167 MPR).

2. The Agreement was further violated when the Carrier failed to 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 fifteen (15) days prior thereto regarding the aforesaid work and when it failed to assert good-faith efforts to reach an understanding and reduce the amount of contracting as required by Rule 9 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 E. Beza shall now be compensated for thirty-two (32) hours of straight time and sixteen (16) hours of overtime.

FINDINGS:

This Special Board of Adjustment upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

By letter dated March 10, 2016, the Organization submitted a claim alleging that on February 9, 15-16 and 23, 2016, Carrier assigned an outside contractor, Rail Pro Construction (Rail Pro), who "performed the Maintenance of Way work of flagman [at] MP 204.39 on the Del Rio Subdivision." Carrier responded by letter dated April 20, 2016, that the Rail Pro employee "provided protection for an independent third party working off track." Carrier denied that the work was covered by the Scope of the Agreement or that it was performed at the direction of Carrier or for Carrier's benefit or was paid for by Carrier.

Carrier maintains that the instant dispute is controlled by Public Law Board No. 7705, Award No. 1. The Organization disputes the applicability of PLB 7705, Award No. 1, urging that the records in the two cases are materially different. Our analysis begins with a review of PLB 7705, Award No. 1.

PLB 7705, Award No. 1, concerned a claim that Carrier violated the Agreement when it assigned Rail Pro to flag at a road crossing on June 7, 2013, at MP 383.44 on the Laredo Subdivision. As described by PLB 7705, the facts presented to the Board were:

> Undisputed is the Carrier's statement that it was not providing flag work at this crossing until, at some time prior to June 7, 2013, LE [Lewis Energy] instigated an arrangement or contract with the Carrier to obtain flag services for the purpose of protecting LE's trucks. LE compensated the Carrier to have an employee of the force available to stop LE's trucks at the crossing when a train approached; LE controlled this work, bore the entire expense and benefitted from the service. Flagging was not provided for the Carrier's railroad operations given that the Carrier was not providing it prior to LE initiating receipt of flag service to safeguard LE's equipment and personnel. The Carrier discontinued this arrangement or contract due to unavailable force (the Organization disagrees with this reason) whereupon LE contracted with RPI [Rail Pro] to flag for LE's trucks. LE incurred the expense for the benefit of flagging notwithstanding the derivative benefit on the Carrier's movement of trains without service disruption. Flagging services were provided by the RPI employee for LE's truck operations and not for the Carrier's railroad operations. This work, at LE's expense and control, benefitted LE.

The Board concluded that, because Carrier did not instigate the work, did not control it, did not pay for it and because the work was not for Carrier's exclusive benefit, the work was not Scope-covered. The record before PLB 7705 included a signed statement from Carrier Senior Trial Counsel Harding J. Rome, dated February 24, 2014. Mr. Rome's statement related:

> In the last several years, several catastrophic crossing collisions resulting in derailments and crew injuries have occurred at Union Pacific crossing. Some of these collisions were caused by energy companies, such as Lewis Energy, transporting heavy rig equipment over Union Pacific's main line. This slow moving equipment has difficulty clearing the tracks on the approach of a train and is also at increased risk of hanging up on the crossing.
>
> Lewis energy contracted with Union Pacific to provide a radio equipped employee

for the crossing. Lewis Energy agreed to compensate Union Pacific for the provided employee. After some time , Union Pacific became unable to supply employee for this purpose.

Consequently, Lewis Energy then entered into a contract with Rail Pros Inc to provide a radio equipped employee to control vehicular traffic at the crossing. Lewis Energy pays Rail Pros Inc for this service. Union Pacific is not a party to the contract between Lewis and Rail Pros Inc. Form C's are issued to alert Union Pacific crews of Rail Pros employees located at the crossings.

In the instant case, the claim alleged that Carrier has assigned Rail Pro to perform Scope-covered work. Carrier's denial contained the naked assertion that the Rail Pro employee "provided protection for an independent third party working off track." At no time during handling on the property did Carrier even name the purported third party. The only documentation that Carrier tendered during handling on the property consisted of the Rome statement and an email from a Carrier official dated October 25, 2013, which like the Rome statement, related to work performed on the Laredo subdivision long before the instant claim arose. Most significantly, in its post-conference letter, the Organization asked Carrier to provide the documentation on which Carrier relied for its contention that Rail Pro was engaged by a third party and not by Carrier.

The Organization's request for documentation was excessive and unduly burdensome. It read like a request to produce documents that would be filed under the Federal Rules of Civil Procedure. But this was a claim, not federal court litigation. Carrier was not obligated to respond point by point to the Organization's request but it was obligated to provide whatever basic documentation it possessed or notify the Organization that it did not have any documentation. During the hearing before this Board, Carrier agreed that there had to be some communication between the outside party and Carrier because the outside party was going to foul Carrier's track but the communication is not in the record and was not produced in response to the Organization's request, and from the record developed on the property we do not know the identity of the outside party that Carrier was claiming controlled the work at issue.

We agree with the Organization that the record in the instant matter is significantly different from the record before PLB 7705. In the instant case, the Organization alleged that Carrier assigned Rail Pro to perform Scope-covered work. Carrier's response never identified who it maintained controlled the work in question and Carrier failed to provide documentation that it did not control the work despite the Organization's request.

In numerous cases where a carrier maintained that it did not control the work in question because the property had been leased to a third party, boards have sustained claims where the organization requested a copy of the lease and the carrier failed to provide it. *See, e.g.* Third

Division Awards 20895, 28229, 28430, 31619,[1] 37047, 37677, 42996,[2] and 42325.[3] The authority holding that a claim should be sustained where a carrier has denied control over the work at issue but fails to produce documentation supporting that denial even though the organization has requested it are not limited to cases involving leases. For example, Third Division Award No. 28579 concerned the demolition of a building. Carrier claimed that it sold the building on condition that the buyer dismantle it. The organization requested written evidence of the sale but the carrier did not produce it. The Board sustained the claim. Similarly, in First Division Award No. 25973, a train was operated over the carrier's tracks by another carrier. The carrier maintained that the other carrier's operation of the train was in accordance with a trackage usage agreement and that it did not control the work. But the carrier failed to provide a copy of the trackage usage agreement when requested by the organization. The Board sustained the claim.

Carrier relies on Third Division Award No. 31313 in support of its position that the work at issue was not Scope-covered. In Award No. 31313, the State of Kansas and the City of Salina replaced a viaduct that crossed Carrier's main line. Carrier assigned flagging duties to Trainmen and the Organization filed a claim. The Board rejected the claim, reasoning:

> [T]he record does not sufficiently establish that maintenance of way work was being performed. The work on the viaduct over the Carrier's main line was performed by a contractor hired by the State of Kansas and the City of Salina. The record sufficiently establishes that the flagging duties here were only to guide trains past the construction site. Under the above test, because the "core" duties were only the piloting of the trains past the construction site and because it has not been sufficiently established by the Organization that other maintenance of way functions were being performed, the Carrier properly assigned the work to the Trainmen.

Third Division Award No. 31313, thus, did not involve a claim that Carrier violated the Agreement by contracting work that it controlled. Rather, it involved a dispute over whether BMWE-represented employees were entitled to perform the work to the exclusion of other crafts. It does not control the instant case.

Rule 9(a) of the Agreement provides, "In the event the Carrier plans to contract out work within the scope of this Collective Bargaining Agreement, the Carrier will 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." There is no dispute that Carrier failed to provide any notice to the General Chairman. There is also no dispute that Organization-represented employees have performed similar work numerous times in the past and that the

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[1]The undersigned Neutral Chairman of this Board was the referee in Third Division Award No. 31619.

[2]The Neutral Chairman of PLB 7705 was the referee in Third Division Award No. 42296.

[3]The Neutral Chairman of PLB 7705 was the referee in Third Division Award No. 42325.

parties have a specific letter agreement dated May 31, 2011, concerning the wage rate to be paid Organization-represented employees when performing this work. Although there is some authority requiring a showing that organization-represented employees exclusively performed the work in question, the weight of authority, and in our view the better-reasoned authority, does not require a showing of exclusivity to trigger the Carrier's obligation to give notice under Rule 9 and similar provisions of other agreements.

In light of the long line of authority discussed above, we conclude that Carrier's failure to even identify the third party who it claimed controlled the work and its failure to provide documentation in support of its position when requested by the Organization requires a sustaining award. We turn next to the question of remedy.

Carrier maintains that no monetary compensation is appropriate because Claimant was fully employed, indeed he worked overtime, on the dates in question. Here too, there is some authority supporting Carrier's position. However, we believe that the better reasoned authority and the weight of authority in contracting out cases finds it appropriate to make claimants whole for lost work opportunities even where they were fully employed on the dates in question. Accordingly, we shall sustain the claim.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.

Martin H. Malin, Chairman

Katherine N. Novak
Carrier Member

Andrew M. Mulford
~~Employee~~ Member

Dated at Chicago, Illinois, July 23 2018

LABOR MEMBER'S CONCURRENCE
TO
AWARDS 1, 2 AND 4 OF THE BMWED-UP FLAGGING ARBITRATION BOARD
(Referee Martin Malin)

I write to offer my concurrence with the Majority in the BMWED-UP Flagging Arbitration Board.

Awards 1, 2 and 4 (Cases 2, 3 and 4, respectively) properly affirm that crossing watchman and flagging duties have historically been Maintenance of Way work on this property.[1] The awards also confirm that flagging duties, including but not limited to flagging for Maintenance of Way forces and flagging for outside entities performing work within twenty (25) feet of the Carrier's tracks, is work that has been and remains within the *scope* of the Agreement, and, thus, qualifies as Maintenance of Way work under Rule 9 *and* falls under the contractual advance notice and conferencing provisions of Rule 9 and the December 11, 1981 National Letter of Agreement. The awards fully reject the argument that the December 11, 1981 National Letter of Agreement was inapplicable or did not apply to these disputes. Lastly, the awards affirm that an operative issue in reviewing the affirmative defense proffered by the Carrier is the Carrier's obligation to properly establish (with specific documents) whom instigated, controlled or benefited from the flagging work. The Majority, after considering the forceful and well-crafted arguments found within the Carrier's presentation to the Board, wholly rejected the Carrier's position that the Carrier properly allowed or otherwise assigned outside forces to perform Maintenance of Way flagging duties.

In conjunction with the aforementioned point, the Carrier and the Organization specifically created this Board to resolve numerous outstanding crossing watchman and flagging disputes. When creating the Board the parties confirmed the purpose of the Board by identifying it as "the BMWED-UP Flagging Arbitration Board" (the agreement governing the SBA is attached hereto by reference). The parties granted the Board specific jurisdiction to issue decisions on "lead cases" that would be used to analyze and *resolve* various similar disputes. The purpose, meaning and intent of the parties in creating the Board and empowering it to decide lead cases cannot be overstated.

Lastly, when the parties established the Board they agreed to specific "lead cases". These lead cases contained all applicable arguments that the parties believed would allow the decisions to *resolve* the pending disputes. The parties forcefully advocated their respective positions through their submissions and oral presentations to the Board (BMWED's submissions in Awards 1, 2 and 4 are attached hereto by reference). Awards 1, 2 and 4 fully apply to the numerous pending flagging cases and serve to resolve them without further argument as there is no valid distinguishing difference between the on-property handling of the pending disputes and the on-

[1] While the railroad in this instance is the Union Pacific Railroad, the territory at issue was formerly the Missouri Pacific Railroad (MPR). The maintenance of way workers on the Union Pacific's former MPR territory remain governed by the MPR collective bargaining agreement - herein the Agreement.

property handling of Awards 1, 2 and 4. The Carrier, as well as future arbitrators, must accept these lead case decisions and use them to resolve the outstanding flagging claims. The failure to do so would go against the spirit, intent and purpose of the parties' BMWED-UP Flagging Arbitration Board and the lead case decisions it issued.

Respectfully submitted,

Andrew M. Mulford
Labor Member
November 1, 2018