SPECIAL BOARD OF ADJUSTMENT

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT)
) Case No. 4
and)
) Award No. 4
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 Palestine Subdivision on February 9-11, 17-18, 23-24 and 26-28, 2016 (System File UP635BT16/1654158 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 J. Fillyaw shall now be compensated for eighty (80) hours of straight time and forty (40) hours of overtime at rate of one and one half times per hour.

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 9-11, 17-18, 23-24 and 26-28, 2016, Carrier assigned an outside contractor, Rail Pro Construction (Rail Pro), who "performed the Maintenance of Way work of flagman between MP 213.25-213.50 on the Palastine Subdivision." Carrier responded by letter dated April 21, 2016,

that "the work at this location is not related to Carrier's operations. This work was done in preparation for the expansion of the Harris County Toll Road. It was not railroad related." 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.

The instant case is governed by our disposition in Case No. 2, Award No. 1. The only difference in the record of the instant case is that it included an email from Carrier's Manager of Track Projects stating, "The work was done in preparation for the expansion of the Harris County Toll Road. It was not railroad related." Thus, arguably Carrier identified the third party that it claimed controlled the work in question, although we note that Carrier did not expressly state that Harris County controlled the work in question. But, as in Case No. 2, Award No. 1, and Case No. 3, Award No. 2, the Organization in its post-conference letter 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 and Carrier failed to provide any documentation.

We do not find that Carrier's arguably identifying the third party provides a basis for distinguishing Case No. 2, Award No. 1. In all of the awards we cited in Case No. 2, Award No. 1, involving leases, sales and trackage agreements, the carrier identified the party to the lease, sale or trackage usage agreements. It was the carrier's failure to provide copies of the underlying documentation when requested by the organization that required the sustaining awards. Accordingly, as in Case No. 2, Award No. 1, and for the reasons stated therein, the instant claim must be sustained.

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