SPECIAL BOARD OF ADJUSTMENT
BMWED-UP FLAGGING ARBITRATION BOARD

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT	)
	) Case No. 5
and	)
	) Award No. 5
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
Robert Shanahan Jr., Employee Member
Derek E. Hinds, Carrier Member

Hearing Date: July 28, 2020

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (RailPros) to perform Maintenance of Way Department flagman duties at various locations on the Van Buren and Waco Subdivisions on February 27, March 11, 20 and April 3, 2017 (System File UP659BT17/1684870 MPR).

2. The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with its plans to contract out the work described in Part (1) above and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces 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 B. Cole shall now be compensated for an equal and proportional share for all hours (straight and overtime, as well as credits and benefits flowing therefrom) expended by the contractor's employees.

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 April 10, 2017, the Organization submitted a claim alleging that on February 27, 2017, March 11, 2017, March 20, 2017 and April 3, 2017, Carrier assigned an outside contractor, Rail Pro Construction, who "performed the Maintenance of Way work of flagman on the Van Buren and Waco Subdivisions." Carrier responded by letter dated May 31, 2017, that "the Rail Pros employee in this case provided protection for independent projects adjacent to Carrier tracks. This project provided no cost or benefit incurred or gained by Union Pacific Railroad."

The instant case requires us to apply our decision in Case No. 2, Award No. 1. That case involved a similar claim of improper assignment of Maintenance of Way flagging work to non-Maintenance of Way forces and a similar denial by Carrier on the ground that the work at issue was part of a third party's project and that Carrier did not control who performed the work. The Organization requested documentation substantiating Carrier's position and Carrier failed to provide it. Consequently, we sustained the claim, reasoning (footnotes omitted):

> 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, 37047, 37677, 42996, and 42325. 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.
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> . . . . .

> 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 followed the same approach in Case No. 3, Award No. 2, and Case No. 4, Award No. 4.

The record in the instant case is substantially different from the record in the prior cases presented to this Board. In the instant case, Carrier submitted a statement from Manager Track Maintenance Michael Short that the work referenced on the Van Buren Subdivision was performed for the Diamond Pipeline Company and the work on the Waco Subdivision was performed with respect to a highway overpass. Carrier also submitted the documentation authorizing these third parties to access Carrier's property – the Right of Entry Agreement with James Construction Group for the work occurring on the Waco Subdivision, and the Supplemental License Agreement with Diamond Pipeline LLC for the work occurring on the Van Buren Subdivision. Finally, Carrier submitted a statement from Todd Wimmer, Senior Director of Workforce for the Engineering Department. Mr. Wimmer explained:

> A Right-of-Entry Agreement is arranged by our Real Estate Department before the third party can begin work. . . . Beings how this work is solely for the benefit of the third party and no cost or benefit to Union Pacific, the Right-of-Entry agreement instructs them to arrange for their own flagging protection. The third party is also instructed to contact the respective field management within 48 hours of starting work. It is because of these sporadic property access requests, and short lead time notifications that the third party is advised to provide their own vendor for flagging services.

The Organization observes that the Right-of-Entry agreement includes terms and conditions contained in Exhibits A, B and C and faults Carrier for not producing those exhibits during handling on the property. The Organization maintains that Carrier's failure to produce those exhibits, particularly Exhibits B and D, renders Carrier's showing insufficient. We do not agree. The evidence provided by Carrier documented and attested to the fact that the work in question was part of independent projects of Diamond Pipeline, LLC and James Construction Group. The Organization's claim alleged, as it had to, that Carrier assigned or caused to be assigned Rail Pro to perform the flagging work. The evidence presented by Carrier on the property rebutted those allegations. The onus then shifted to the Organization to rebut Carrier's evidence.

The Organization submitted a document headed, "EXHIBIT B TO CONTRACTOR'S RIGHT OF ENTRY AGREEMENT." The document requires that the contractor notify Carrier a minimum number of days in advance of commencing work so that Carrier can assign a flagman and provides for the cost of the flagman to be billed to the contractor or the state (presumably the State of Texas). The Organization also submitted a document headed "EXHIBIT D TO CONTRACTOR'S RIGHT OF ENTRY AGREEMENT" which states that if contractor is going to foul Carrier's track it must have a Carrier flagman present.

The only identification the Organization gave for these documents was that they came from an unrelated dispute. There is no indication of what that dispute was and no indication of the party to the right of entry agreement to which these documents were exhibits. There is no indication of the dates of these documents.[1] The foundation for these documents in the record is too weak to enable them to rebut Carrier's evidence with respect to events occurring in the first half of 2017. Accordingly we hold that the Organization failed to carry its burden of proof in this case.

AWARD

Claim denied.

Martin H. Malin, Chairman

Derek E. Hinds
Carrier Member

Robert Shanahan, Jr.
Employee Member

Dissent to follow

Dated at Chicago, Illinois, September 1, 2020

[1]The Exhibit B has a fax trailer of May 12, 2015, and Exhibit D has a fax trailer of May 11, 2015. Thus, the documents must predate these dates but there is no indication of their origination dates.

LABOR MEMBER'S DISSENT TO
CASE NO. 5 - AWARD NO. 5
AND
CASE NO. 6 - AWARD NO. 6
OF
SPECIAL BOARD OF ADJUSTMENT BMWED-UP
FLAGGING ARBITRATION BOARD

(Referee Martin Malin)

I dissent with the Majority's findings. In these cases, the Majority improperly held that a portion of a Right-of-Entry agreement coupled with statements from Carrier Managers was enough evidence for the Carrier to establish an affirmative defense and shift the burden to the Organization to demonstrate that the flagging work assigned to outside forces (RailPros) was in violation of the Agreement. This finding is in direct conflict with numerous arbitral findings that have held when the Organization requests documents related to a dominion and control defense, the Carrier is required to supply complete copies of those relevant documents. Importantly, this principle was upheld in Third Division Awards 42999, 43000, 43001, 43002, 43003, 43004, 43005 and 43006 wherein the Carrier's failure to produce all relevant evidence to support a dominion and control defense was fatal to the Carrier's position. Particularly, Third Division Award 42999 held:

> "According to the Carrier, under the terms of the original lease signed in 2010, the Carrier made improvements to tracks 1 & 2 in conjunction with Global, as benefit and funds were shared by the parties. It asserts that as of February 15, 2012 the parties signed and amended the lease agreement by way of an addendum which placed responsibility for track and land improvement on the lessee, Global. At the time, the Carrier explains, Global wanted four additional tracks to accommodate its increase in bulk liquid transload. The details of this amended agreement are defined, in part, by
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> Paragraph 5 a. Clause E:
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> 'E. The parties have agreed that Applicant may construct an expansion of the Private Siding to accommodate a Renewable Fuels and Petroleum Terminal on the Lease Property (as described in greater detail on Appendix D, the "Expanded Private Siding") The parties have agreed that the expense of constructing the Expanded Private Siding shall be the responsibility of Global'
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> In the Carrier's view, this provision establishes that the Carrier did not have dominion and control over the tracks at issue, and is adequate support for its defense.
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> The Organization maintains the work of concern was site cleanup and site preparation which fell cleanly within the mandates of scope covered work. It notes

"that the contracting out was done without notifying the General Chairman in advance of the intent to do so, or providing opportunity for conference. The Organization asserts that the Carrier must provide evidence regarding dominion and control in support of its defense, and rebukes the Carrier for failing to provide the Organization with the lease to Global. It concludes that the Carrier has failed to substantiate its dominion and control contentions. **Instead of providing all relevant lease documents, the Organization argues the Carrier provided only the addendum to the initial lease without also offering the initial lease. Because this document could contain important provisions regarding dominion and control, the Organization concludes the Carrier's defense must fail.**

The Board is persuaded that the nature of the work here concerned is historically and mutually recognized as scope covered. The Carrier deems lack of dominion and control to be adequate to exempt the matter from otherwise applicable notice and conference requirements. The Board is not so persuaded.

Under Rule 1.1 the work at issue is recognized as belonging to unit employees. The only exception to the notice and conference requirements is in Rule 1.3, in terms of emergencies. It follows that the work of concern in this case was scope covered and subject to the notice and conference requirements agreed to by the parties. Any alleged contention regarding transfer of dominion and control would therefore fall to the parties to explore together in conference.

At the crux of the parties' Agreement regarding subcontracting is good faith. This fundamental requisite translates into mandatory notice and an opportunity for conference. In this case, the Carrier unilaterally decided that the work was not covered when the issue of scope was not self-evident, but dependent upon documentation. **Not only did the Carrier deny the Organization notice of the subcontracting, but it refused to supply the Organization with the documentation a reasonable person would require when determining whether dominion and control had been transferred.**

The Board finds this withholding of notice and information to have been noncompliant with the requisites of the parties' Agreement. Carrier violated the Agreement by failing to provide mandatory notice and opportunity for conference. Accordingly, the claim is sustained in full.

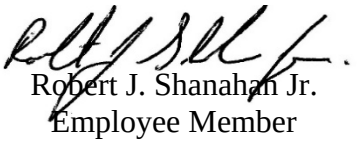
AWARD

Claim sustained."

In accordance with the above-identified awards, the Majority was in error when it held the Carrier was not required to provide complete copies of the documents that were in connection with an affirmative defense. Obviously, it is virtually impossible for the Organization to obtain Carrier controlled documents unless the Carrier is required to produce reasonable evidence to support an affirmative defense. Placing this burden upon the Organization gave the Carrier the unfettered ability to withhold documents and defeat the Organization when it raised the affirmative defense. In light of the Majority's finding in this regard, these awards should be given no precedential value.

Additionally, the Majority improperly allowed the Carrier's vague statements to establish the affirmative defense in substitution of complete copies of the actual agreements reached in relation to the claimed work. In these cases, the Organization produced documents titled Exhibit B to Contractor's Right of Entry and Exhibit D to Contractor's Right of Entry within the record, but the Majority improperly ruled the foundation was too weak to establish the documents within the record. It is apparent the Majority overlooked the purpose of these documents within the record. In short, these documents were included to demonstrate the importance of the Carrier providing a complete copy of the Right-of-Entry agreement in the instant case. The Carrier cannot be allowed to withhold critical documents when an affirmative defense has been raised. In conclusion, these Awards ignore the Organization's long standing right to perform flagging projects of this nature and have improperly authorized the Carrier to remove flagging work from the scope of the Agreement. In light of this flawed reasoning, there can be no question that these decisions have caused irreparable harm to Maintenance of Way employes who were not allowed to perform the same work that they have performed for decades. For all of the above-mentioned reasons, I must respectfully dissent.

Respectfully submitted,



Robert J. Shanahan Jr.
Employee Member