SPECIAL BOARD OF ADJUSTMENT
BMWED-UP FLAGGING ARBITRATION BOARD

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT)
) Case No. 6
and)
) Award No. 6
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 between Mile Posts D211.20 and D211.40 on the Dallas Subdivision on May 17, 18, 19, 23, 24, 25, 26, 30 and June 2, 6, 7, 12, 13, 14, 15, 16, 21, 22, 23 and 27, 2017 (System File UP687BT17/1689958 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 C. Galvan 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 July 7, 2017, the Organization submitted a claim alleging that on numerous dates in May and June 2017, Carrier assigned an outside contractor, Rail Pro Construction (Rail Pro), who "performed the Maintenance of Way work of flagman on the Dallas Subdivision." Carrier responded by letter dated August 15, 2017, that "the Rail Pros employee in this case provided protection for an independent City bridge project adjacent to Carrier tracks. This project provided no cost or benefit incurred or gained by Union Pacific Railroad."

The claim, evidence and arguments in the instant case are comparable in all material respects to the claim, arguments and evidence presented in Case No. 5, Award No. 5. During handling on the property, Carrier submitted a statement from Manager Track Maintenance Ron Jaure attesting that the Rail Pro flagman was flagging for a city bridge project, the same statement from Mr. Wimmer that was submitted in Case No. 5, and a copy of the Right of Entry Agreement with Webber, LLC, the party performing the project in question. We reiterate our analysis and holding from that case and incorporate it into this Award.

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

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
>
> Paragraph 5 a. Clause E:
>
> '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'
>
> 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.
>
> 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.

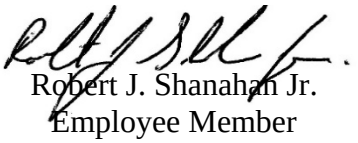
AWARD

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