Award No. 3994
Docket No. 3816
2-CRI&P-EW-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Electrical Workers)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement the Carrier improperly contracted out the rewinding, repairing and rebuilding of 29 complete traction motors, including armatures, and the rewinding, repairing and rebuilding of 2 armatures, during the period July 1 to 30, 1959.

2. That, accordingly, the Carrier be ordered to compensate the following named Claimants, at penalty rate, for the number of hours required to perform the above-mentioned work according to electric shop records:

Dunahugh. Vern
Smith, Melville C. Sr.
Barnhart, Claude M.
Rusland, Claude A.
Poehls, Edward E.
Castor, Harry
Valentine, Ervin R.
Shaw, Thomas L.
Smith, Melville C. Jr.
Lear, Lowell G.
Papish, Martin J.
Frary, Robert O.
Spurr, Edwin E.
Koehler, Paul W.
Ickes, Howard A.
Coram, Edward A.
Virnig, Louis J.
Ayers, Vernon L.
Hardi, John
Alexander, William P.
Sherwood, Ishmael S.
Roemer, James A.
Vollert, Harry
Borden, Roy A.
Loding, William J.
Cord, LaRue K.
Randall, Harry L.
Naab, Joseph P.
Addison, Pete
Carson, Donald F.
Poehls, Earl G.
Corder, Carl
Brokaw, Harvey L.
Brock, Ralph K.
Carruthers, Paul P.
Smith, Wallace L.
Holloway, Averill H.
Thompson, George R.
Anderson, Robert E.
Hobbs, Jack N.
Bowden, Orren B.
LePera, Dominick
Lewis, Herbert C.
Martin, Alvin W. Jr.
Herlehy, John L.
Bennett, Joel H.
Kulhavy, Gerald W.
Akins, Johnie R.
Ziegler, Harold A.
Graham, Jess D.
Hanneman, Glenn R.
Meyers, Byron
Merreighn, Francis E.
Birlew, Charles G. Jr.
Bell, Robert L.
Keopple, Donald B.
Orr, Everett L.
Larson, John
Buck, Merlyn V.
Boney, James R.
Marner, Arthur W.
Brown, David C.
Claeys, Herbert
Leedham, Howard
Barns, Dale H.
Miller, Fred R.
Hall, Emmett M.
Krantz, Raymond F.

modernized, improved, upgraded and warranted motors and armatures, and a type of motor and armature that only the manufacturer can produce and which the manufacturer is constantly striving to improve and modernize.

The inherent right of management to manage must permit managing officers to choose between available methods of furthering the purpose of the carrier. If such method chosen is one ordinarily pursued by management in the industry, it should be considered as a proper exercise of managerial judgment. In the instant case, it was the carrier's judgment that the proper and sensible thing to do was to take advantage of the unit exchange service offered by the manufacturer and secure from them complete, modernized, upgraded and warranted traction motors and armatures rather than attempt to repair or rebuild worn and antiquated ones in kind which would not give us the advantage of remanufactured, modernized, converted and warranted equipment.

As previously stated, the receipt of the remanufactured, modernized, improved, upgraded and warranted motors and armatures received on unit exchange purchase orders for older motors and armatures bears more resemblance to the purchase of new ones than to the maintenance and rebuilding of old traction motors.

We submit without relinquishing our position as above, that, even if claim had merit, which we deny, there is no showing of loss or damage to any individual. It is also our position, as upheld by this and other Divisions of the Adjustment Board, that there can be no penalty, much less at time and one-half rates, for work not performed.

This same question and same type of case from this property has been before your Board on previous occasions for hearing in Awards 3228, 3229, 3230, 3231, 3232 and 3233 (Referee Ferguson) and 3269 (Referee Hornbeck), all of which were rendered in favor of this carrier. Further, Awards 2377, 2922, 3158, 3184 and 3185 have also upheld carriers in similar cases.

On basis of the facts and circumstances recited in the foregoing, we contend there was no violation of the employes' agreement.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

In this case we are called upon again to decide whether the use of the "Unit Exchange Service" (UES) by the Carrier is violative of the applicable labor agreement. We have repeatedly held that such use does not violate that agreement or substantially similar agreements. See: Awards 2377, 2922, 3158, 3184, 3228, 3269, 3731, 3739, and 3816 of the Second Division. The Organization so strenuously contends that these Awards do not offer a sound basis for an equitable solution to the controversy between the parties that we have carefully re-examined our prior Awards. For the reasons hereinafter stated, we adhere to our previous rulings.

1. UES involves an arrangement which a carrier acquires from a manufacturer a fully remanufactured and upgraded piece of equipment carrying a new warranty in exchange for a worn-out or antiquated piece of the same or similar type. Upon being exchanged, the latter becomes the property of the manufacturer who rebuilds it with his own employes and keeps it in a pool for future sale to its customers. There is no demonstrable correlation between the origin of the worn-out equipment and the ultimate purchaser upon resale after renovation. After the exchanged piece has been rebuilt, the carrier which traded it in is billed by the manufacturer for the labor and material required to perform the rebuilding. As far as we can determine from the record before us, no further charge is made by the manufacturer for UES.

2. In July, 1959, the Carrier retired from its service 29 worn-out traction motors and 2 worn-out armatures and shipped them to the Electro-Motive Division of General Motors Corporation an a UES basis. The Carrier received in exchange from General Motors 29 traction motors and 2 armatures which had been remanufactured and upgraded and which carried a new warranty. This equipment was never before the property of the Carrier. At the same time, the Carrier exchanged 2 additional worn-out armatures with General Electric Company on a UES basis under the same conditions.

The Claimants who are employed by the Carrier at its Silvis (Illinois) Shop and who belong to the Electrical Workers' craft request compensation at penalty rate for the number of hours spent by the employes of General Motors and General Electric, respectively, in rebuilding the worn-out equipment which was transferred by the Carrier to said companies.

3. The rule is well established that work coming within the scope of the applicable labor agreement cannot, as a matter of principle, be contracted out by a carrier, unless such work is specifically excepted in the agreement or unless all the circumstances surrounding the case at hand clearly demonstrate that it obviously would be unreasonable or inequitable to have the work performed by employes included in the bargaining unit. See: Award 3868 of the Second Division and other Awards cited therein.

Relying on the above rule, the Claimants contend that the Carrier improperly contracted out the rebuilding, repairing, and rewinding of the worn-out traction motors and armatures which it turned over to the two manufacturers. The flaw in that contention is that the Carrier did not contract out the rebuilding of the equipment in question to the manufacturers for subsequent use at the Carrier's property but disposed of the equipment. It is undisputed that title to the equipment passed to the manufacturers and that no resale was made to the Carrier of the same equipment. The rule against contracting out of work coming under the scope of the labor agreement does not prohibit a legitimate transfer of the Carrier's property rights to the manufacturers. The fact that the employes of the new owners rebuilt the traded-in equipment is immaterial because any electrical work performed thereon was not covered by the labor agreement between the Carrier and the Organization.

In summary, we hold that no contracting out was involved in the Carrier's action here complained of.

4. In further support of their claim, the Claimants submit that the title page of the applicable labor agreement was changed by a Memorandum of Understanding in 1948, to prevent the Carrier from contracting out work specified in the labor agreement to employes other than those covered thereby. Said Memorandum states, as far as pertinent, that "the purpose in changing the title page . . . is to prohibit the Carrier from hereafter unilaterally assign-

ing the work specified in the agreement to other than employes covered by this agreement" and that the change in the title page does not "change present practices as to handling of Maintenance of Equipment work which may be necessary to send to the factory for repairs, rebuilding, replacement or exchange." A critical examination of the Memorandum has convinced us that it does not sustain the Claimants' position.

First, the Carrier did not assign the work of rebuilding the worn-out equipment to employes not in the bargaining unit as contemplated in the Memorandum. This work was assigned by the manufacturers to their employes after they had become the owners of the equipment. The Carrier had no voice in or control over such assignment.

Second, the Claimants admit that the purpose of the Memorandum was to prevent the Carrier from contracting out work in violation of the labor agreement. As pointed out hereinbefore, no contracting out was involved in the Carrier's transaction here in dispute. Nor can it be said that it involved a "replacement" or an "exchange" within the purview of the Memorandum. The arrangement between the Carrier and the two manufacturers constituted, in fact and in law, a purchase of certain newly rebuilt and upgraded pieces of equipment by the Carrier for which it partly paid in kind by trading in an equal number of worn-out or antiquated pieces. We find nothing in the Memorandum which would prohibit such a normal sales transaction.

Third, the Claimants' assertion that the exchange of the worn-out equipment on a UES basis was nothing more than a "cooperative contracting out" of electricians' work designed to evade the Carrier's contractual obligations under the Memorandum or the labor agreement is without merit. The evidence on the record considered as a whole has satisfied us that the Carrier does not possess the equipment necessary to rebuild and upgrade traction motors and armatures. Hence, we can detect no evasion of the Carrier's contractual obligations in the instant case.

In brief, we hold that the Memorandum of Understanding is not applicable to the facts underlying this case. Consequently, the Carrier did not violate it.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May, 1962.

DISSENT OF LABOR MEMBERS TO AWARD NUMBERS 3994, 3995, 3996, 3997, 3998

This Division in its Awards 1943, 3457 and 3720 found that the Carrier violated the Agreement when it contracted the rewinding, repairing and rebuilding of five traction motors and fifty-seven armatures to the Electro-Motive Company and National Electric Coil Division of McGraw-Edison Company.

In these disputes without any change in the Agreement this same Carrier contracted the rewinding, repairing and rebuilding of one-hundred-and-four

traction motors, two generators and two armatures to the Electro-Motive Company and National Electric Coil Division of McGraw-Edison Company. Therefore, the Carrier violated the Agreement.

The majority in Awards 3994, 3995, 3996, 3997 and 3998 failed to comply with the provisions of the current Agreement that has been interpreted by this Board in Awards 1865, 1866, 1943, 1952, 2841, 3235, 3456, 3457, 3556, 3633 and 3720, resulting in the Employes doing the same work and covered by the same Agreement, not being given equal treatment or equal protection under the law. Therefore, the majority's awards in these claims are in error and we are constrained to dissent.

E. J. McDermott

C. E. Bagwell

T. E. Losey

R. E. Stenzinger

James B. Zink