NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25996

THIRD DIVISION Docket Number CL-26016

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes (

(Chicago and Western Indiana Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9938) that:

(1) Carrier violated the effective Telegraphers' Agreement when, effective November 1, 1983, it abolished the position of Agent at 81st Street, Chicago, Illinois, and thereafter required and/or permitted employes of the Missouri Pacific Railroad Company to perform such agency functions;

(2) Carrier shall now compensate Mr. Leo Fister for the difference between the rate of pay of his assignment, Position 81-6, and that of abolished Position 81-4 for November 3, 1983, and for each and every Monday through Friday thereafter that a like violation exists. Carrier shall further compensate Mr. S. J. DeChristopher on the same basis as Mr. Fister, for November 5, 1983, and for each and every Saturday and Sunday thereafter that a like violation exists;

(3) Carrier shall further compensate Messrs. Fister or DeChristopher four (4) hours' pay at time and one-half rate of the former position of Agent-81st Street, which is in addition to their regular earnings for November 1, 1983, and for each and every day thereafter that a like violation exists."

OPINION OF BOARD: The record in this dispute indicates that the Chicago and Western Indiana Railroad Company (C&WI), from 1891 until November 1, 1983, maintained at the 81st Street Tower position of Agent and Relief. For more than a decade prior to November 1, 1983, these positions were responsible for handling demurrage accounts and performing various services for customers. At the time of this dispute they handled work with two C&WI customers: Action Wrecking Company and F. H. Leinweber Company. Effective November 1, 1983, the position and relief were abolished by Carrier and new positions, previously advertised, were established. Thereafter, the positions were discontinued and the work was performed by employees of the Missouri Pacific Railroad Company.

By letter of November 11, 1983, the Organization filed a Claim that the C&WI was in violation of the Scope Rule of the Agreement. The Organization maintained that a violation occurred when work under Agreement with the C&WI for Action Wrecking Company and F. H. Leinweber Company was abolished and when thereafter that same work was continued by employees of the Missouri Pacific Railroad. The Organization alleged that the C&WI "required and/or permitted employes of the Missouri Pacific Railroad to perform all agency work in connection with this station."

The Carrier on property does not deny that the work in question continues to be done, but argues that the work "does not belong exclusively to this Carrier." Carrier maintains, that because of business declines "the owners of the Chicago and Western Indiana Railroad elected to discontinue our services of handling their switching for them and hereafter handle the terminal work themselves." The C&WI maintains that, as it was provided no work by its owners, it therefore discontinued positions as it had no work to provide. It maintained that the disputed work in the instant case had "merely been taken back by the C&WI owner lines."

In advancing its Claim, the Organization maintains that there exists a coordinated effort between the Carriers in violation of the Scope of the Agreement. In its letter of November 23, 1983, the Organization states:

> "The fact that the work is now being performed by a Carrier which is also one of the owners of C&WI is not pertinent. Our Agreement is with the C&WI and if Carrier wishes to coordinate its operations with another Carrier, there are contractual obligations which must be complied with."

The Organization stands by its position that the work falls within the Scope of the Agreement and that the work is being performed by strangers to the Agreement.

As the moving party, the Petitioner must prove that by history, tradition and custom, the work complained of is work that falls within the Scope of the Agreement between the C&WI and the Organization. In the case at bar, the Organization offered proof to establish that the work was within the Scope of the Agreement, but the Carrier shifted to an affirmative defense. The central issue of the Carrier's defense was that it lacked control over the disputed work and since its services were no longer needed by an owner, it had no work to provide. As the work appears to be clearly within the Scope of the Agreement, the burden of persuasion shifts to the Carrier to provide evidence of probative value to substantiate its assertion.

This Board is keenly aware of and concurs with the principle of Third Division Award 13056 which stated:

> "The Scope Rule can not extend to work that does not belong to the Carrier; it applies only to work the Carrier has power to offer."

That Award and numerous others have held that when contested work is by contract, sale, or right, under the direction and control of strangers to the Agreement, then the Scope of the Agreement does not extend beyond the Carrier's control. (See as examples, Third Division Awards 20644, 20156, 20639, 19706, 19500, 19718; Fourth Division Award 4405.)

In its careful review of precedents, this Board finds that in past Awards material evidence of probative value was submitted by the Carrier to substantiate that by contract, agreement or circumstance it lacked control over the work. In the instant case, that is the central issue at bar: did the Carrier have control of the work in question, or did it not? We have searched the record as developed on property and find the Carrier proffers no evidence whatsoever to substantiate its arguments that the C&WI lacked control over the work performed under the Scope of the Agreement for Action Wrecking Company or F. H. Leinweber Company. The C&WI is a separate corporate entity and the work in dispute has been performed for decades on tracks that never belonged to the Missouri Pacific.

This Board is persuaded that the work was under the legitimate control of the C&WI. It therefore was not taken back by an owner line, since the Missouri Pacific never previously performed the work herein disputed for either Action Wrecking Company or F. H. Leinweber Company and as such, some Carrier precedent is not applicable as the work was neither retrieved nor returned to origin (Special Board of Adjustment No. 65, Award No. 414).

This Board does not deny the obvious, that the Missouri Pacific is one of a number of owners of the C&WI. Yet finding no evidence that the disputed work either belongs to the Missouri Pacific, is in contract for the joint performance of work with that rail carrier, or is beyond the control of the C&WI to offer, we cannot accept the presumption that the C&WI lacked control of the disputed work, simply because one of its owner lines presently has taken over the work.

This Board concludes that under the record as established on property, Organization's arguments prevail. We find no evidence whatsoever, that the work herein disputed, did not belong to the C&WI and therefore did not belong to the Organization holding the contract. In the facts of this case, we are convinced that the work under dispute was within the Scope of the Agreement; belonged historically to the C&WI; and was within their right to perform. As such, this Board finds that the Carrier violated the Agreement and sustains part (1) of the Claim.

In the instant case, this Board finds numerous issues raised ex parte that were not raised on property. As such, they are inappropriately before this Board and disregarded as per Circular 1. Reviewing compensation, there was no dispute on property with Claimant De Christopher, although Carrier did argue that Mr. Fister was not a proper Claimant and that part (3) of the Claim sought an inappropriate penalty payment.

This Board finds that Carrier must provide compensation for its violation of the Scope Rule of the Agreement. It finds no evidence that Mr. Fister is an improper and unqualified Claimant of the position herein affected and therefore sustains part (2) of the Claim. As per previous Awards, this Board sustains part (3) of the Claim as a continuing violation. The abolishment of Agent and Relief positions in the instant case necessitates remedial compensation to protect the integrity of the contract.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1986.