NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29685
Docket No. MW-29684
93-3-91-3-30

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way
(Employes
(
(Grand Trunk Western Railroad Company
(formerly The Detroit and Toledo Shore
(Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned employes covered by the Grand Trunk Western Agreement and the Detroit, Toledo and Ironton Railroad Agreement instead of employes covered by the Detroit, Toledo and Shore Line Agreement to perform bridge work on the Detroit, Toledo and Shore Line territory on the Ottawa River Bridge at Lang Yard in Toledo, Ohio on July 24, 25, 26 and 27, 1989 (Carrier's File 8365-1-282 DTS).

(2) As a consequence of the aforesaid violation, Detroit, Toledo and Shore Line B&B employes C. E. Billmaier and J. M. Eichenberg shall each be allowed ninety-six (96) hours of pay at their respective straight time rate and six (6) hours of pay at their respective and one-half rate."

FINDINGS:

The Third 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.

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

At issue in this dispute is the propriety of Carrier's actions in using employees from another bargaining unit to supplement the DTSL bridge gang in the performance of certain bridge maintenance work.

Carrier is the Grand Trunk Western (GTW) Railroad. It is made up of the former GTW, the former Detroit, Toledo and Ironton (DTI) and the former Detroit and Toledo Shore Line (DTSL) Railroads. The operation of the three former railroads has been consolidated under the single GTW corporate identity since 1982. However, employees represented by the Organization continue to work under the three separate agreements of their former railroads.

At the time of the disputed work, Carrier's B&B force on the former DTSL consisted of two active employees. A third employee on the seniority roster, the only other employee holding seniority, was offered recall from furlough for the project, but he declined the recall.

There is no dispute that the bridge maintenance work involved was within the scope of the DTSL Agreement.

Carrier provided the Organization advance notice of its intent to use a GTW B&B to supplement the two DTSL employees in performing the work of installing prepaneled bridge ties and walkway on a bridge located on the former DTSL territory. It asserted that supplementing the two-man DTSL gang was in compliance with Rule 52(m) of the effective Agreement. It said such action was necessary to accomplish the work safely and to minimize the time of the track outage. Discussions between the parties ensued, but no accord was reached.

During the progress of the work, it was noted that several walkway timbers needed replacing. Carrier had appropriate timbers in stock in the former DTI territory. Accordingly, it used former DTI employees to deliver and precut the timbers. The DTI employees did not otherwise participate in the installation of the timbers.

The two-man DTSL gang worked on the project throughout. They were augmented on three of the four workdays in dispute by three GTW employees. On the second of the four days, they were augmented by five GTW and three DTI employees. When the major portion of the task was completed, the GTW employees were pulled off and the two DTSL employees finished up the job.

Rule 52(m) of the parties' Agreement is a two-paragraph provision dealing with contracting of work. It does not provide an express definition of the meaning of the term "contract." The first paragraph deals with situations where the Carrier does have adequate and available forces and equipment. It requires notice, conference, and the reaching of an understanding about carrying out the work. The second paragraph states as follows:

> "The Company will contract for construction and maintenance work for which company forces and equipment are neither adequate nor available, but shall in each instance give the General Chairman advance notice of the specific work to be thus performed, and on request will confer with the General Chairman in respect thereto."

In analyzing this dispute, we have confined our consideration, as we must, to the information and contentions exchanged and argued by the parties on the property.

On the merits of the dispute, the Organization contends the Carrier's actions were an impermissible removal of work from seniority district boundaries. In addition, it says Carrier may not cast its actions as a contracting matter under Rule 52(m). It says prior decisions, specifically Awards 59-63 of Public Law Board No. 1837, involving other parties, found the same facts to be seniority district violations. The Organization also argues that the Carrier has an affirmative obligation to maintain a sufficient workforce. In this regard, it notes that Carrier did no B&B hiring in the twenty years prior to this dispute.

Carrier contends, in essence, that Rule 52(m) permitted its actions. Moreover, it notes that the Rule imposes no requirement that it cannot use other qualified employees outside of the bargaining unit.

The record here consists almost exclusively of assertion and counter assertion. It is undisputed, however, that Carrier used 100% of its available DTSL B&B force to work on the project. They were not assigned to work elsewhere.

We have reviewed the parties' competing contentions about the adequacy of the two-man DTSL gang to perform the entire project by itself. Based on the limited record available on this point, we find nothing unreasonable about Carrier's conclusion that the two-man force was inadequate for the task given the prevailing considerations of safety and efficiency.

One of the Organization's contentions, however, is that Carrier has deliberately allowed the DTSL B&B force to wither through attrition. It says, in effect, that Carrier's inactions made the force inadequate. We regard this assertion as a very serious contention which, if proven, could be pivotal in the outcome of this dispute. The record, however, contains no such proof. Carrier asserted the two-man B&B gang was sufficient for its day-to-day needs. The Organization made no effective response. On the limited record before us, we have no factual basis for concluding that the Carrier intentionally produced a situation of inadequate manpower.

In view of the foregoing analysis, it follows that Carrier was entitled to avail itself of the contracting rights provided by Rule 52(m). It remains for determination whether the use of in-house employees from another bargaining unit violated the provision.

As noted earlier, the Organization cites Public Law Board No. 1837 Awards 59-63 in support of the proposition that use of employees working under a separate agreement of a different component railroad do not constitute "contracting out." We have carefully reviewed the cited cases and find we cannot accept the Organization's interpretation of those decisions. Our examination reveals that all five cases were decided on the issue of unavailability. The Board there rejected the Carrier's contention that its forces were unavailable because it had assigned them to work elsewhere. The first three decisions did not deal, even tangentially, with an issue of contracting. The latter two make clear that no contention of contracting had been made by the Carrier. Any discussion of contracting appears to be dicta at most. Finally, the text of the decision does not allow us to conclude that the disputes there involved a provision identical to Rule 52(m) as we here.

Based solely on the limited record before us, and confined strictly to this claim, we find the posture of the "contracting" portion of the dispute to be one of first impression. We do not have available to us any prior interpretations of Rule 52(m).

Throughout the handling of the dispute on the property, the Carrier repeatedly asserted that its intended and actual supplemental use of qualified railroad employees outside of the bargaining unit was a proper application of Rule 52(m). Aside from a comment that Carrier's interpretation of the Rule was "ridiculous," a response made during the notice and meeting phase of the discussions on the property, the Organization made no other effective rebuttal of Carrier's assertion.

In Claims of this nature, the Organization has the burden of proof to establish the validity of its Claim. On this limited record, we find that the Organization has not satisfied this burden.

A W A R D

Claim denied.

NATIONAL RAILROAD OF ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever, Secretary to the Board

Dated at Chicago, Illinois, this 29th day of June 1993.

LABOR MEMBER'S DISSENT
TO
AWARD 29685, DOCKET MW-29684
(Referee Wallin)

The decision reached by the Majority in this docket is at best specious and certainly palpably erroneous. The only redeeming factor was that the Referee limited the application of the award, i.e., "Based solely on the limited record before us, and confined strictly to this claim ***"

The Carrier's Ex Parte Submission clarifies how the corporate structure came into being:

> "The Grand Trunk Western Railroad (Carrier) is made up of the Grand Trunk (GTW), the former Detroit, Toledo and Ironton (DTI) and the former Detroit and Toledo Shore Line (DTSL). The operation of the three former roads has been consolidated into a single corporate entity since 1982, but many of the crafts continue to work under the collective bargaining agreements of the former roads. Employees represented by the Brotherhood of Maintenance of Way Employees work under the three agreements on their former roads."

The author of this award, in essence, scribed that same language on Page 2 of the award (third paragraph).

The operative phrase is "*** consolidated into a single corporate entity since 1982 ***" If the Carrier is a single corporate entity, then how can it contract out work with itself? Black's Law Dictionary defines contract thusly:

> "**CONTRACT**. A promissory agreement between two or more persons that creates, modifies, or destroys a legal relation. Buffalo Pressed Steel Co. v. Kirwan, 138 Md. 60, 113 A. 628, 630; Mexican Petroleum Corporation of Louisiana v. North German Lloyd, D.C.La., 17 F.2d 113, 114."
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> "An agreement between two or more parties, preliminary step in making of which is offer by one and acceptance by other, in which minds of parties meet and concur in understanding of terms. Lee v. Travelers' Ins. Co. of Hartford, Conn., 173 S.C. 185, 175 S.E. 429."
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> "It is agreement creating obligation, in which there must be competent parties, subject-matter, legal consideration, mutuality of agreement, and mutuality of obligation, and agreement must not be so vague or uncertain that terms are not ascertainable. H. Liebes & Co. v. Klengenberg, C. C.A.Cal., 23 F.2d 611, 612."

It is apparent that at least <u>two</u> (2) parties are needed to consummate a contract. If the Carrier exists as a single corporate entity, then with whom or what did it consummate a contract? There was no evidence presented in this docket that the Carrier contracted with anyone to have this work performed. What the Carrier did was to have employes covered under one Agreement, which reserves work within seniority districts to employes with seniority confined thereto, to perform work on a seniority district covered by another Agreement which also confines seniority by district. This was simply a claim where employes covered by one Agreement were used on a seniority district where they had no seniority and no contractua

right to perform the work. Third Division Award 19543 stated it thusly:

> "The dispute herein involves facts, rules and contentions similar to those in Award No. 19542. Here Carrier assigned a maintenance of way Crane Operator who has seniority on the Wheeling and Lake Erie District, to perform hoisting engineer's work at the Ford Plant, Lorain, Ohio which is located within the Nickel Plate District. It is undisputed that employes with seniority on the Wheeling and Lake Erie District are covered by a different agreement than the one covering employes of the Nickel Plate, Lake Erie and Western and Clover Leaf District. Seniority is restricted to each District respectively.
>
> For the reasons stated in Award No. 19542, we will sustain the claim. It makes no difference that the work here was performed by a MW employe. The employe assigned does not hold seniority on the district on which the work was performed and he was thus not entitled to it. Claimant who holds seniority on the Nickel Plate District should have been assigned the hoisting engineer's work in question."

Third Division Awards 12671, 25964, 28524 and 28676 held to a like effect.

Obviously, this award is palpably erroneous and of no precedential value. Therefore, I dissent.

Respectfully submitted,

D. E. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 29685, DOCKET MW-29684
(Referee Wallin)

On the property, before the Board, and in its dissent to the award, the Organization has taken the incongruous position, not that the Carrier could not contract out the work under the terms of the DTSL collective bargaining agreement, but that the terms of the agreement required the carrier to go outside of its consolidated corporate workforce. The Board found that the Organization had failed in its burden of proving that assertion. The relevant portion of the applicable rule reads:

> "The company will contract for construction and maintenance work for which company forces and equipment are neither adequate nor available, but shall in each instance give the General Chairman advance notice of the specific work to be thus performed, and on request will confer with the General Chairman in respect thereto.

At the time the rule was negotiated, "company" was the DTSL, which is now the Shore Line Subdivision of the consolidated Grand Trunk. In spite of the fact that the GTW, DTSL and DTI have been merged since 1983, and in spite of the fact that effective June 18, 1990, the National Mediation Board held that the Grand Trunk is a single transportation system and that the Brotherhood Maintenance of Way Employes represents the employees of the craft on a system-wide basis, the employees of the former carriers continue to work under the collective bargaining agreements negotiated with the former carriers.

The former DTSL agreement has no application beyond Shore Line Subdivision, and though the Grand Trunk is now the company obligated to comply with the agreement, that does not expand the scope of the agreement's coverage beyond the "forces" of the DTSL. The rule, therefore, must be read "the company will contract for work for which Shore Line Subdivision forces are

neither adequate nor available." In this case, the Shore Line Subdivision B&B gang was inadequate; the company supplemented the gang with available men and equipment from the Grand Trunk.

The Organization's attempt to rely on Black's Law Dictionary definition of "contract" demonstrates the weakness of its position, and, in fact, the quote is not accurate. There is no language in the collective bargaining agreement on which the Organization could rely and no logic to an argument that, if it prevailed, would have the Carrier furloughing members of the Organization on one portion of the railroad while exercising its right to contract work outside the scope of the collective bargaining agreement and its corporate workforce to some private company. The Carrier went outside the scope of the collective bargaining agreement with the employees of the former DTSL in accordance with the rule permitting it to do so under these circumstances.

The Organization did not and could not prove the claim it made before the Board and the Board properly denied the claim on that basis.

Robert L Hicks
R. L. Hicks

M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P. V. Varga

James E. Yost
J. E. Yost