NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26314
Docket Number MW-26293

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to clear right-of-way on the Allegheny Division beginning October 10, 1983 (System Dockets CR-610 and CR-609).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Messrs. R. J. Beauseigneur and M. I. Saggese shall each be allowed pay at the Class 2 machine operator's rate for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: Between October 10, 1983 and November 30, 1983, Carrier contracted with an outside firm for the use of two TD8 Dozers and two Lowboys with operators to clear right-of-way on the Allegheny Division. As a result of this action, the Organization filed Claims in behalf of two furloughed Class 2 Machine Operators. The Organization contended that Carrier violated the Scope Rule of the Controlling Agreement by contracting out the work of Maintenance of Way Employes in the manner it did in this instance. It further contended that Carrier violated the notice requirement of the Scope Rule when it failed to give the General Chairman involved notice in writing of its intent to Subcontract at least 15 days prior to the transaction.

Carrier responded to the Claim by stating that it did give notice to the General Chairman on September 2, 1983, that it intended to subcontract the clearing of the right-of-way. It also took the position that the Scope Rule of the Agreement was not controlling in this instance. When it came to the renting of equipment of the type used in this case, the March 16, 1977, Agreement prevailed.

The Organization countered by arguing that even if the March 16, 1977, Agreement was controlling (and it was not), Carrier violated that Agreement as well. It did not make every effort to rent the equipment in question without operators and it did not give Notice to the General Chairman involved. Both actions are required by the March 16, 1977, Agreement in this instance.

The case before the Board raises a number of issues and each will be reviewed and decided separately. Before the Board considers its Findings, a chronology of what has taken place should be presented.

CHRONOLOGY OF EVENTS

On March 16, 1977, an Agreement was signed by the Maintenance of Way General Chairmen and the Senior Director-Labor Relations of Conrail. It essentially allowed Carrier to contract for certain equipment to be used on its property with outside operators of that equipment. The quid pro quo for that right was that Carrier would make a reasonable effort to obtain the equipment without an operator. If this was not possible, a Carrier employe would be upgraded to the equivalent Machine/Equipment Operator rate for the time that the unit was in service on Carrier property. The total text of the March 16, 1977, appears below:

> "AGREEMENT BETWEEN THE CONSOLIDATED RAIL CORPORATION AND ITS EMPLOYEES OF THE MAINTENANCE OF WAY DEPARTMENT REPRESENTED BY THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES AND LOCAL 8-182 OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION.
>
> IT IS AGREED:
>
> 1. It will be the express policy of the Carrier to make reasonable effort to rent construction equipment such as back hoes, truck cranes of 20 ton capacity or less, road graders, trucks of 5 tons or less capacity, bulldozers of class D-7 or smaller, and front end loaders of a capacity of 2 yards or less without operators supplied by the lessors.
>
> 2. (a) When the rental of a unit of the above-listed construction equipment is contingent upon the demand of the lessor that he supply the operator for the unit, the rate of an appropriate track department employee will be upgraded to the equivalent Machine/Equipment Operator rate for the time that the unit is in service on the property. However, such employee will continue in his normal occupation while the unit is on the property. When such unit operated is on a rest day or holiday, an employee on duty and working in the vicinity of the unit will be considered for the upgrading of the rate.
>
> (b) The provisions of paragraph (a) above will be applicable when the period of rental is 30 calendar days or less.

If the period of rental is to exceed 30 days, the appropriate Division Engineer will confer with the designated Representative of the appropriate General Chairman prior thereto.

3. The appropriate Division Engineer will give the designated Representative of the appropriate General Chairman as much advance Notice as possible when the above-listed lessor-operated equipment is to be brought on the property, including the name and address of the lessor, and they will jointly determine the appropriate employees whose rates are to be upgraded as a result thereof.

4. It is understood that where the Carrier has engaged an Outside Contractor to perform service on the property such as ballast cleaning, rail grinding, weed spraying, rehabiliation work, etc., and the services of the contractor include the use of his equipment, the matter will be handled in the usual manner and the utilization of such equipment will not be subject to the provisions of Sections 1, 2 and 3 hereof.

Signed at Philadelphia, Pa., March 16, 1977.

Five General Chairman, M&W
President, Local 8-182, OCAW

Senior Director
Labor Relations,
Conrail"

The parties apparently operated under the March 16, 1977, Agreement with little or no trouble. On February 1, 1982, the parties entered into an Agreement that governed the relationship between the Carrier and the Organization. A Memorandum of Understanding in connection with that Agreement was signed. That Memorandum reads as follows:

"APPENDIX 'B'

"MEMORANDUM OF UNDERSTANDING IN CONNECTION WITH THE AGREEMENT EFFECTIVE FEBRUARY 1, 1982 BETWEEN CONSOLIDATED RAIL CORPORATION AND THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES.

1. The Schedule Agreements of the former component railroads and all amendments, supplements and appendices to these agreements (with the exceptions of those listed below) and all other previous agreements which are in conflict with the Agreement effective February 1, 1982, are terminated:

A. Agreement of February 10, 1971 establishing so-called Off Track Vehicle Insurance effective May 1, 1971.

B. Agreement of May 15, 1973 establishing a Plan for Supplemental Sickness Benefits effective July 1, 1973.

C. Agreement of October 10, 1975, establishing a National Dental Plan effective March 1, 1976.

D. Article V of the Agreement of August 19, 1954, and memorandum of the same date providing for the establishment of a plan for group hospital, surgical and medical insurance and subsequent agreement provisions amending that plan.

E. Agreement of October 30, 1978 establishing a Plan for Early Retirement Major Medical effective November 1, 1978.

F. The Union Shop Agreement of August 29, 1952, adopted December 1, 1979. (Appendix G)

G. The Seniority Modification Agreement of July 28, 1976.

H. The dues checkoff Agreement effective December 1, 1979, as amended effective July 1, 1981. (Appendix F)

I. The March 4, 1976 Agreement for transferring protected employees. (Appendix E)

2. Pending resolution of the cross representation problem involving Plumbers or Water Service Employees, MW Repairmen, Bridge Inspectors and Scale Inspectors, the Agreement effective February 1, 1982 and the Appendices shall apply to such employees represented by the Brotherhood of Maintenance of Way Employes.

NOTE: Article X, Personal Leave of the National Agreement signed December 11, 1981 is attached as Appendix K."

The Organization bases its argument that the March 16, 1977, Agreement ceased to exist after February 1, 1982, on the fact that it was not listed in Appendix B. Consequently, it has not been carried forward by the parties.

Carrier takes the position, however, that on August 3, 1981, the parties agreed that one General Chairman and the Director of Labor Relations would determine what existing Agreements would remain in effect after January 31, 1982. The complete text of the letter containing that understanding is reproduced below:

"August 3, 1981

Messrs: S. Freccia
J. J. Lattanzio
F. J. Lecce
W. A. House

General Chairman
Brotherhood of Maintenance of Way Employes

Gentlemen:

In connection with the agreement reached August 3, 1981, the following understandings shall apply:

1. Any employee whose hourly rate or monthly rate divided by 176 significantly excedes the appropriate standard rate established by the agreement of August 3, 1981 shall continue to receive such higher rate on an incumbency basis. Future wage increases shall not apply to such incumbent rates and such positions contemplating hours in excess of 176 monthly shall continue to apply until the standard rate equals or exceeds the incumbent rate. The list of these positions shall be agreed upon by General Chairman S. R. Freccia and Director-Labor Relations G. F. Bent.

2. The hourly rate of the former Reading Inert Retarder Maintainer position at Rutherford shall continue to be $9.606.

3. General Chairman S. R. Freccia and Director-Labor Relations G. F. Bent shall determine those existing agreements that shall remain in effect after January 31, 1982.

4. In the application of Rule 37 - Tools, B&B Mechanics affected by the elimination of prior separate seniority classifications shall be furnished such additional tools as may be necessary.

5. The Company agrees to consider any change in the seniority classifications set forth in the agreement signed August 3, 1981 or in the procedures for determining seniority dates as contained in the agreements of January 26, 1979, March 5, 1979 and January 11, 1980, that is jointly requested by the General Chairman within the next thirty (30) days. Other changes so requested by the Brotherhood or the Company shall also be considered.

Very truly yours,

R. E. Swert
Senior Assistant Vice President
Labor Relations"

On July 14, 1983, Carrier's Senior Director Labor Relations G. F. Bent wrote to the General Chairman stating that the March 16, 1977 Agreement continued in effect and indicated that it has been so applied. Complete text of the Bent letter appears below:

"July 14, 1983

Mr. S. R. Freccia, General Chairman
Brotherhood of Maintenance of Way Employees
16 Court Street, Room 610
Brooklyn, NY 11241

Dear Sir:

Under Item 3 of Mr. Swert's letter of August 3, 1981, we were to have determined those existing Agreements that would remain in effect after January 31, 1982.

While we have not formally made this detemination, we have considered that the March 16, 1977 agreement (copy attached) with regard to the use of outside equipment and operators continued in effect and it has been so applied.

In addition to this agreement, are there others that you believe should be included in this category?

Very truly yours,

/s/G. F. Bent

G. F. Bent
Senior Director-
Labor Relations

Attachment

cc: J. J. Lattanzio
F. L. Lecce
W. A. House

Copy of the March 16, 1977 Agreement is attached.

G. F. Bent"

On the basis of the Bent letter of July 14, 1983, Carrier concluded that all the General Chairmen who received a copy of it agreed with Carrier that the March 16, 1977, Agreement was in force even though it was not listed in Appendix B of the February 1, 1982, Agreement.

Carrier concluded that this position was correct because all the General Chairmen involved accepted the position with no negative response to the Bent letter. No claim was pressed to the final step of the procedure until the instant one. This claim was filed on October 26, 1983.

ISSUES

In dispute in this case are a number of issues:

1. Is the March 16, 1977, Agreement in effect?

2. What constitutes written notice to the General Chairman of a subcontract and when must that notice be given?

3. What constitutes adequate effort on the part of Carrier to rent construction equipment?

DISCUSSION AND FINDINGS

The major issue in dispute is whether the March 16, 1977, Agreement survived after the February 1, 1982, Agreement was signed. After considerable analysis of the record, including the testimony of both parties at the Hearing, and a review of contract principles that apply in such instances, it is the conclusion of the Board that the March 16, 1977, Agreement did not legally survive the February 1, 1982, Agreement. It is difficult to conclude that the Bent letter should have a greater status than the words of an Agreement that were negotiated and agreed upon by both parties. The Bent letter is based on the fact that the parties behaved as if the March 16, 1977, Agreement was in effect after the February 1, 1982, Agreement was signed. While this fact can serve to mitigate against Carrier's liability, the Board does not think it should give life to the March 16, 1977, Agreement beyond the date of February 1, 1982.

Principles of contract interpretation compel this Board to disregard the practice of the parties and enforce the language of the written Agreement when the practice is contrary to that language, as it is in this instance.

Appendix 'B' of the February 1, 1982, Agreement clearly states that the Schedule Agreements of the former component railroads and all amendments, supplements, and appendices to these Agreement are terminated. Any exception to this statement was to be listed in the appendix. The parties listed eleven separate Agreements that were to be maintained in effect after February 1, 1982. March 16, 1977, Agreement was not one of those listed.

With the filing of the instant Claim, the Organization took the position that the March 16, 1977, Agreement did not survive after the February 1, 1982, Agreement was signed. This Board is in full concurrence with the Organization on this point.

The July 14, 1983, Bent letter stated that while we have not formally made this determination, we have considered the March 16, 1977, Agreement, to have continued in effect and it has been so applied. Carrier's argument that this letter was binding on all parties is not persuasive.

The Bent letter does not have the standing of a bilateral agreement. It is the unilateral statement and cannot be considered as binding on the Organization just because there is no objection to it in the record before this Board. The controlling document in this instance is the February 1, 1982, Agreement. It is signed by both parties and, for better or worse, it must be applied.

While the Board has concluded that the February 1, 1982, Agreement eliminated the March 16, 1977, Agreement, it also recognizes that some confusion on the issue has existed, even to the present time. Given this confusion, this Board is of the opinion that Carrier should not be held responsible for the total amount of the Claim. There is some fault on both sides in the administration and application of the Contract in this case. The Board will therefore only hold Carrier responsible for one-half of the liability in this instance for those Claimants who were furloughed.

From the order date of this Award forward, however, Carrier will be required to deal with the Organization based on the February 1, 1982, Agreement.

Also at issue in this Case is what constitutes written notice, as contemplated under Paragraph 2 of the Scope Rule. It is this Board's opinion that the 15-day notice must be served at least 15 days prior to the date Carrier legally commits itself to a subcontract. To rule otherwise would allow Carrier into a subcontract agreement that would be legally binding prior to the point at which it is required to discuss the subcontract with the Organization. This would clearly undermine the intent of Paragraph 3 of the Scope Rule.

A final issue is Carrier's obligation to assert a good faith effort to reduce the incident of subcontracting and to step up its efforts to procure rental equipment to be operated by Carrier employees. The Board thinks that the December 11, 1981, C. I. Hopkins letter set up the machinery to accomplish this end.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 13th day of May 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26314, DOCKET MW-26293
(Referee Rodney E. Dennis)

The Majority has held that the Scope Rule of the 1982 new collective bargaining Agreement was violated because the special Agreement of March 16, 1977, which recognized the Carrier's right to lease equipment with the lessor's operator, did not survive the 1982 Agreement. In effect, the Majority has negated the March 16, 1977 Agreement's continuing validity, an action achievable only by the parties mutual agreement or through the provisions of the Railway Labor Act.

Such a result clearly exceeds the Majority's authority. The 1977 special Agreement was negotiated in good faith and has been applied consistently both before and after the 1982 collective bargaining Agreement. Its continuance was recognized by a letter dated July 14, 1983, from the Senior Director-Labor Relations to the General Chairman, both of whom were specifically authorized by the negotiators of the 1982 Agreement to determine any surviving miscellaneous agreements. In fact, up to the date of the claims involved in this Award, the 1977 Agreement, by specific written notice to the General Chairmen signatory to the new 1982 Agreement, was applied at least 200 times after February 1, 1982, with only one protest, which was denied and never progressed off the property.

It was argued that because Appendix B to the Agreement effective February 1, 1982, which listed various national agreements that had continuing effect, did not also include the March 16, 1977 Agreement, the latter Agreement was no longer in effect, a position that the Majority has endorsed. The Majority failed to recognize the fact that both the new

Agreement, which became effective February 1, 1982, and its Appendix B were consummated on August 3, 1981. On this same date, the signatories to the new Agreement authorized the Senior Director Labor Relations and the Senior General Chairman to jointly determine those existing agreements that would remain in effect after January 31, 1982. The fact that these designees agreed to continue the March 16, 1977 Agreement after January 31, 1982, is solidly proven by the continuous application of this Agreement thereafter and the Organization's recognition thereof, particularly when not one General Chairman signatory to the Agreement signed in August, 1981, (that became effective February 1, 1982) took exception to the Senior Director's letter dated July 14, 1983 advising of Carrier's intent to retain and to continue abiding by the terms of the March 16, 1977 Agreement.

The Majority further compounds the issue by interpreting paragraph 2 of the Scope Rule when the parties agree that no notice was ever served thereunder. Consequently, how the timeliness of a notice served under an agreement other than the Scope Rule can be a proper matter for discussion is mystifying. Again, the Majority has entered an area beyond the realm of its assignment and, therefore; exceeded its jurisdiction and authority.

Thus, through Award 26314 the Majority would eliminate a completely valid agreement by failing to recognize or understand the timing and intent of the agreement negotiated and signed on August 3, 1981.

For these reasons, the Award is palpably wrong and we therefore dissent.

Robert L Hicks
R. L. Hicks

M W Fingerhut
M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P V Varga
P. V. Varga

James E. Yost
J. E. Yost

LABOR MEMBER'S RESPONSE TO
CARRIER MEMBERS' DISSENT TO
AWARD 26314, DOCKET MW-26293
(Referee Rodney E. Dennis)

The Carrier Members' Dissent is little more than a restatement of the position set forth by the Carrier in its written submission and oral arguments before the Board. The restatement of that position in the form of a dissent does not change the fact that the position was obviously wrong from its inception.

The Carrier Members' statement that the March 16, 1977 Agreement could be negated only through the "parties mutual agreement or through the provisions of the Railway Labor Act" is correct. However, the facts of record and language of the Agreement make it clearer than clear that the parties DID agree, within Appendix "B" of the February 1, 1982 Agreement, to negate the March 16, 1977 Agreement.

The Carrier Members' contention that the Senior Director Labor Relation's July 14, 1983 letter addressed to the "Senior General Chairman" somehow revived the March 16, 1977 Agreement is palpably wrong. The July 14, 1983 letter was simply a unilateral statement by the Carrier. No objective rational mind could possibly consider that letter as evidence of a bilateral agreement between the parties.

The Carrier Members make much of the fact that the Organization took no exception to the July 14, 1983 letter. What they conveniently fail to mention is that the addressee, the "Senior General Chairman" died on Monday, July 18, 1983. Hence, it is no wonder that the Senior General Chairman failed to take exception to the July 14 letter.

The Carrier Members' position in the penultimate paragraph is most confounding. Their suggestion that the Majority exceeded its jurisdiction by interpreting Paragraph 2 of the Scope Rule when no notice was ever served thereunder begs the central question. The Carrier plainly stated in its written submission that it served advance notice. Inasmuch as the March 16, 1977 Agreement had been abrogated at the time the notice was served, it is clear that the advance notice was not served pursuant to the March 16, 1977 Agreement. The only other rule which requires such advance notice is the Scope Rule. The Majority correctly ruled that the advance notice that the Carrier served was not timely under the Scope Rule.

The Majority has clearly not exceeded its jurisdiction or authority. To the contrary, the Majority has issued a well reasoned award that is based upon a logical interpretation of the rules of the collective bargaining agreement.

D. D. Bartholomay
Labor Member