NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 130
and	)
	) Award No. 131
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: February 7, 2008

STATEMENT OF CLAIM:

(1) The Agreement was violated when the Carrier utilized outside forces to perform Maintenance of Way and Structures Department work (Grading, sub-ballast placement, fencing and incidental work) in connection with construction of a crossover at Mile Post 279.0 in the vicinity of Vail, Iowa on the Boone Subdivision beginning May 3 and continuing through June 25, 2004, instead of Seniority District T-4 employes T. Arter, J. Hood, M. Corbin, R. Harkrider, R. Bennett, L. Ray, R. Pohlner, G. Mathies, G. Koski, E. Ewoldt and V. Wheeler (System File 4RM-9566T/1401925 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(2) As a consequence of the violations referred to in Part (1) and/or Part (2) above, Claimants T. Arter, J. Hood, M. Corbin, R. Harkrider, R. Bennett, L. Ray, R. Pohlner, G. Mathies, G. Koski, E. Ewoldt and V. Wheeler shall now be compensated at their respective rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning May 3 and continuing through June 25, 2004.

FINDINGS:

Public Law Board No. 6302 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.

On February 24, 2004, Carrier gave the Organization notice of its intent to contract out the grading, sub-ballast placement, fencing and incidental work for construction of a No. 24 Universal Crossover at Milepost 279.0 on the Boone Subdivision near Vail, Iowa. Carrier subsequently determined that the work was consolidated system gang new construction work and subject to the UP Agreement rather than the C&NW Federation Agreement. It so informed the Organization, rescinding the February 24 notice. Carrier served notice on the UP General Chairman and conferenced the notice with him.

During handling on the property, the Organization conceded that the work could be performed under the UP Agreement by system gangs. However, it maintained that when Carrier chose not to assign the work to system gang employees but instead to contract the work out, the work became exclusive to employees under the C & NW Federation Agreement.

We do not find the Organization's position persuasive. Either the work was subject to the C & NW Federation Agreement or to the UP Agreement. If the work was subject to the UP Agreement, we fail to see how contracting out the work would somehow render it subject to the C & NW Agreement. Whether the contracting violated the UP Agreement is not before us as no claim filed under that Agreement is before us. However, the claim that is before us, which was filed under the C & NW Federation Agreement must be denied.

AWARD

Claim denied.

Martin H. Malin, Chairman

D. A. Ring
Carrier Member
6-18-08

T. W. Kreke, Employee Member
Employee Member

Dated at Chicago, Illinois, June 13, 2008

LABOR MEMBER'S DISSENT
TO
AWARD 131 OF PUBLIC LAW BOARD NO. 6302
Referee Malin

The Majority in this case has clearly overlooked the glaring contract violation in this case and a Dissent is required because the reasoning of the of the Majority in denying the claim is based on false premises. In this instance, the Majority found that:

> "During handling on the property, the Organization conceded that the work could be performed under the UP Agreement by system gangs. However, it maintained that when Carrier chose not to assign the work to system gang employees but instead to contract the work out, the work became exclusive to employees under the C & NW Federation Agreement.
>
> We do not find the Organization's position persuasive. Either the work was subject to the C & NW Federation Agreement or to the UP Agreement. If the work was subject to the UP Agreement, we fail to see how contracting out the work would somehow render it subject to the C & NW Agreement. Whether the contracting violated the UP Agreement is not before us as no claim filed under that Agreement is before us. However, the claim that is before us, which was filed under the C & NW Federation Agreement must be denied."

At no time did the Organization contend that the claimed work "*** became exclusive to employees under the C&NW Agreement." In our letter confirming the March 9, 2004 conference of UP Service Order No. 28341 it was noted:

> "The C&NW System Federation wants to make it abundantly clear that the Consolidated System Gang Agreement **is** an integral part of our CBA. **Employees assigned to such system gangs** are governed by the rules of the UP/BMWE CBA. The Consolidated System Gang Agreement does **not** contain any provisions that would permit the UPRR to apply the UP CBA to work on former C&NW property not performed by consolidated system gangs.

"As cited in conference, the C&NW CBA has a specific scope rule that clearly states: 'Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department ***shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property.'*** (Emphasis provided)

Based on the above, the C&NW System Federation expressed the position in conference that, while the work of construction of the No. 24 concrete crossover at MP 279.0 may be performed by consolidated system gang forces, it is done so under Appendix 13 of the C&NW CBA. SO#28431 is not a notice of intent to have system gangs perform the cited work; it is a notice to have outside contractor forces perform the work. Therefore, the Carrier contention that the UP CBA would apply is totally without support. The outside contractor forces would be performing work covered under the C&NW CBA on territory covered under the C&NW CBA.

If the work is system gang work, system gang forces must perform the work.. **Contractor forces are NOT included under the consolidated system gang agreement.** If contractor forces perform work on the territory subject to the C&NW CBA, the Carrier can not circumvent our CBA by alleging that the contractor was performing 'system gang work'. Clearly, it is not system gang work if it is not performed by system gang forces. **The C&NW CBA is the applicable and controlling agreement with regards to the work cited in SO#28431!**

In Mr. Hanquist's conference confirmation letter, he has used the term 'exclusive' in reference to the work under dispute. In conference with the C&NW System, the Brotherhood did not use the work 'exclusive' at any time to refer to the rights of the BMWE to perform this work. The Brotherhood did cite the Scope Rule of the current C&NW CBA to support our position, but the term 'exclusive' or 'exclusive right to perform this work' was not used by the organization." (Emphasis in original)

The seed of exclusivity was planted and nurtured by the Carrier in hopes of convincing the neutral of a jurisdictional dispute in regards to the applicable agreement (C&NW or UP). Unfortunately, that seed sprouted into a vine that was clung to by the Majority in this instance when it determined: "*** Either the work was subject to the C&NW Agreement ***or*** to the UP Agreement. ***", when in fact the work was subject to both the C&NW Agreement ***and*** to the UP Agreement

as well as the Consolidated System Gang Agreement. All employes covered under those agreements including the Claimants identified in this dispute have a right to the claimed work.

On the former C&NW territory, the Carrier has the option of constructing crossovers with employes holding seniority under the terms of the C&NW Agreement or it may assign such work to employes drawn from the former C&NW, UP, D&RGW, SPW and WP territories under the terms of the Implementing Agreement effective January 1, 1998. This Implementing Agreement referred to as the Consolidated System Gang Agreement is Appendix "13" of the C&NW Agreement ***and*** Appendix "T" of the UP Agreement. Employes holding seniority under the C&NW Agreement and Consolidated System Gang Agreement have overlapping contract rights to construct crossovers on the former C&NW territory. While the Carrier has the option of performing crossover construction on former C&NW territory under the terms of the C&NW Agreement ***or*** the UP Consolidated System Agreement, the work is not exclusive to either Agreement.

Similar sets of overlapping contract rights exist on the separate territories covered by the SPW Agreement and the UP Agreement. On territory covered by the SPW Agreement (primarily former SPW and WP territory), UP has the option of performing certain work under the terms of the SPW Agreement or the Consolidated System Gang Agreement. Likewise, on territory covered by the UP Agreement (primarily former UP and D&RGW territory), UP has the option of performing certain work under the terms of the UP Agreement or the Consolidated System Gang Agreement. In essence, on territories covered by each of the three Agreements (C&NW, UP and SPW

Agreements), BMWE-represented employes have a dual set of contract provisions to protect their rights to perform certain work such as crossover construction. In addition to the work reservations provided by the local C&NW, UP or SPW rules and practices, BMWE-represented employes covered by these agreements enjoy the protections provided by Consolidated System Gang Agreement and the provisions of the UP Agreement incorporated therein. Therefore, the majority erred when it denied the claim based on presumed inapplicability of the cited C&NW Agreement rather than the proven violation of that agreement.

While UP has the option of assigning crossover construction work to BMWE-represented employes under the terms of the applicable local C&NW, UP or SPW Agreement, or the Consolidated System Gang Agreement, it may not ignore both sets of contract rights and assign such work to outside contractors. On this point, the NRAB and Special Boards of Adjustment have consistently held for more than forty (40) years that the inability of a class or craft to prove exclusive jurisdiction as between itself and another class or craft of the carrier's own employes does not give the carrier the right to disregard its obligations to both crafts and assign the work to an outside contractor. In this connection, see NRAB Third Division Awards 11733, 16372, 27012, Awards 43 and 66 of Special Board of Adjustment No. 1016 and Award 1 of Public Law Board No. 6671. Typical of the early holdings on this issue is Third Division Award 11733 rendered in 1963, which held:

"* Assuming that, pursuant to the two applicable Agreements and past practice, the work had been given to Electricians, there might well be grounds for arguing that the Signalmen's Agreement had not been abridged. But that is not the situation now confronting us. Here, the work was not given to employes of either group who might have laid claim to it. While no complaint was filed by the Electricians, the Signalmen did protest. There is good reason, therefore, to uphold their claim.**

This is not a situation, moreover, as in some of the cited awards, where almost any employe might be required to perform a simple brief task such as changing a light bulb or replacing a fuse. It seems evident that the chore performed on July 1 was covered by the Signalmen's Agreement, if not by specific detailed listing in Rule 1, then by the broader reference to 'construction, installation, maintenance and repair . . . in the field . . . as well as all other work generally recognized as signal work.' (It may also be noted that 'excavating, digging holes and trenches . . .' are listed among Signal Helper duties in Classification--Rule 2(f).)

In short, assuming that Management negotiates certain work into two collective Agreements (thus depriving each Organization of complete exclusivity), that is no warrant, in our judgment, for contracting out that work to outsiders, when such action is specifically restricted, nor does it necessarily bar a sustaining Award." (Emphasis in bold added)

A more recent award holding to a similar effect is Award 1 of Public Law Board No. 6671 dated May 11, 2004 where Arbitrator Peter Meyers held:

"The Carrier's insistence that the exclusivity test applies here is unsupported by the parties' collective bargaining agreement, past Board decisions, and the evidentiary record. Neither the contractual Scope Rule nor any other evidence in the record establishes the existence of any provision indicating that work identified in the Scope Rule is protected only if a craft can prove exclusive rights to the work. In fact, the Scope Rule and Side Letter No. 2 refer to work 'being performed' by Amtrak forces, and neither provision ever indicates that covered work must be 'exclusively performed' by Amtrak forces. In addition, the overwhelming weight of the cited Board decisions indicates that the exclusivity test does not properly apply to disputes over the contracting out of work; instead, this standard has been applied to disputes

"between a single carrier's different craft employees. Accordingly, this Board finds that the exclusivity test does not apply to the instant dispute. We hold that the Organization need not show exclusive rights to the work at issue, but instead must demonstrate only that its forces historically have regularly performed carpet installation work of this scope and magnitude on or before January 1, 1987.

A related point is the Carrier's argument that other crafts have performed carpet installation work. As with the Carrier's assertion about the exclusivity rule, this contention would be directly relevant if this were a dispute between crafts over which had the right to perform carpet installation work. This matter, however, is not a dispute between crafts, but rather a dispute over whether the Carrier may contract out the work in question. The fact that more than one craft may have performed this work is not relevant to the resolution of this contracting out dispute. ***" (Emphasis in bold added) (Award 1 of PLB No. 6671 at PP.26-27)

I cannot agree with the Majority's reasons for denying the claim and must respectfully dissent.

Respectfully submitted,

Timothy W. Kreke
Labor Member

CARRIER MEMBER'S RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 131 OF PUBLIC LAW BOARD 6302
Referee Malin

Of utmost importance in the Organization's dissent is their concurrence that the Carrier can assign this work to either employees working on Consolidated System Gangs under the terms of the Union Pacific (UP) BMWE collective bargaining agreement or employees working under the terms of the former Chicago and North Western (CNW) BMWE collective bargaining agreement. However, by their dissent, it is apparent the Organization cannot decide which agreement rules should prevail or what position they should take in a dispute where these overlapping BMWE collective bargaining agreement contracts are in effect. Apparently, what the Organization was attempting to do was to place the Carrier in a Catch-22 situation.

By the language in their dissent, it is clear that while the work can be performed under the rules of either the UP or the CNW collective bargaining agreement forces they should be able to pick and choose which contract they want to file a claim under. In other words, if the Carrier has the work performed under the UP agreement then all the Organization would have to do is sit back and file a claim under the CNW agreement. Or, vice versa, if the Carrier had the work performed under the CNW agreement then all they would have to do is sit back and file a claim under the UP agreement. Fortunately, the Referee was able to see through this potential "game playing" and the award puts an end to that. The Referee correctly found that where the UP agreement was the agreement under which the work would be performed that Agreement would be applicable and the CNW Agreement would not be applicable. The Majority's decision was therefore not an erroneous one.

Respectfully submitted,

Dominic A. Ring
Carrier Member