PUBLIC LAW BOARD NO. 2138

Award No. 4
Case No. 4
(Docket MW-21893)
(File 3541)

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NORFOLK & WESTERN RAILWAY COMPANY
(LAKE REGION)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it discontinued the use of drawbridge operators (drawbridge engineers) at Lorain, Ohio (Bridge 210-21) and assigned drawbridge operator's work at that point to clerk-telegraphers (System File MW-BVE-74-14).

2. Drawbridge operator's work at Lorain, Ohio be returned to drawbridge operators holding seniority as such within the Maintenance of Way Agreement.

3. Bridge Operators B. Naelitz, T. Pando, F.W. Coleman, Jr., J. Crum and J.R. Hammond each be allowed pay at the drawbridge operator's rate for an equal proportionate share of the total number of hours expended by clerk-telegraphers in performing the work described in Part (1) hereof beginning October 15, 1974 continuing until the aforesaid violation is discontinued.

STATEMENT OF FACTS:

The instant dispute involves interpretation and application of the working agreement effective February 1, 1951, made by and between New York, Chicago and St. Louis Railroad Company and the Vrotherhook of Maintenance of Way Employes

on what is now a part of this Carrier's Lake Region.

This dispute arose as the result of the abolishment of Claimants' positions as drawbridge operators at Lorain, Ohio, (Bridge 210-21) and the subsequent assignment of employes represented by the Clerk-Telegraphers organization to operate the newly constructed lift span bridge which replaced the old swing span bridge formerly operated by Claimants.

Carrier contends that after completion of the new lift span bridge, it became obvious that the work previously required of the Maintenance of Way employes on the old bridge had virtually disappeared because of the fact that the new bridge was entirely electronically operated and did not require the manual throwing of levers nor the inspection and maintenance of moving parts required on the old bridge. Moreover, because of the substantial modernization of the bridge operation, it became apparent that it would be much more efficient to move the existing Clerk-Telegraphers from nearby "Ru" (approximately 1000 feet west of the drawbridge) to the bridge control cabin and permitting them to operate the bridge in addition to their other duties, thus eliminating the necessity of having two sets of employes performing work requiring only one. Carrier asserts further that it is important to note that Claimants only operated the bridge; virtually all other duties in connection with the movement of trains and river traffic was performed by the Clerk-Telegraphers at "Ru".

In fact, the preponderance of the "Ru" Telegraphers' responsibilities were directly related to the control of traffic over the drawbridge. These duties included the control of the signal system for the bridge and the operation of power switches which merged the double track into a single track at either end of the bridge. In fact, the drawbridge was normally lined for rail traffic and was only opened for river traffic. The preponderance of traffic in a 24-hour period is in rail - there being approximately thirty trains per day compared to about 8 river boats per day.

It appears, therefore, that the greater proportion of work performed on the old bridge daily was done by Clerk-Telegraphers and that only a small percentage of bridge traffic required the operation of the drawbridge by Maintenance of Way employes.

Petitioner contends that beginning in September 1917 and until the close of work on October 21, 1974, the work of operating drawbridge 210-21 at Lorain, Ohio, had been assigned to and performed exclusively by Maintenance of Way Drawbridge Operators. During October 1974, when the newly constructed replacement bridge was placed into service, instead of assigning Claimants to operate this new bridge the Carrier abolished their position at the close of work on said date and assigned the work of operating said bridge to Clerk-Telegraphers who do not hold any seniority whatsoever under this agreement. As a result of said abolition, it is further contended by Petitioner, Claimants were "required" to fill carpenter positions at Lorain, Ohio.

Petitioner's basic contention in this dispute is that in view of the "past practice" that existed with respect to the old bridge from September 1917 to 1974, during which period agreements were collectively bargained and negotiated between the principals, and that since that past practice existed during the negotiation of these agreements and continued thereafter, that the disputed work was deemed covered by the current controlling collective bargaining agreement.

Petitioner contends further that work once coming within the coverage of an agreement cannot thereafter be removed therefrom unilaterally by Carrier. Petitioner also urges that in making these changes the conditions of the Claimants as to work being performed by them was "worsened" and that this violated the Merger Agreement of January 10, 1962. Furthermore that Carrier also violated the terms of the Railway Labor Act.

Carrier responds on its part that although the disputed work was performed at Lorain exclusively by Maintenance of Way employes during the period in question, that nevertheless throughout the property of Carrier other classifications (including Clerk-Telegraphers) performed similar work. That, accordingly, Claimants have not established that the disputed work was theirs exclusively to perform on a system-wide basis.

As indicated above, Carrier also takes the position that the nature of the work has changed and that there is no

need to use two sets of employes to perform one type of work.

OPINION:

We have carefully reviewed all of the contentions of both principals to this dispute, as well as the prior Awards cited by each party as binding precedent. Based on such review and on the entire record before us we reach the following findings and conclusions.

1. Upon the whole record and all the evidence, this Board finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of this dispute.

2. We do not quarrel with the established principle urged by Petitioner, and well supported by precedent, that Carrier may not asign to others the performance of work contained within the scope of its collective bargaining agreement with Petitioner. Similarly we concur that work once reserved to employes under the agreement cannot unilaterally be removed therefrom.

The gravamen of this position, however, is the fact, not merely conclusory allegations, that the disputed work is contained within the scope of the agreement or that it has been exclusively reserved to the Claimants' category.

To bolster its position as to its right to the disputed work, Petitioner refers us to the Scope Rule of the Agreement as well as to various of its other provisions.

Accordingly, we now address our attention to the agreement proper.

3. The Scope Rule provides that:

> "The rules contained in this agreement shall govern the hours of service, working conditions and rates of pay of all employes in the Maintenance of Way Department . . ." etc.

The Scope Rule does not contain any specific language governing specific job titles or specific duties of respective classifications. Additionally it does not mention the work of operating "drawbridges" or "drawbridge operator."

Petitioner then quotes from various seniority rules of the agreement, but here, too, no specific duties or functions are spelled out nor is there any mention of the classification "drawbridge operator". We are then referred by Petitioner to rules governing rates of pay, but this neither enlarges upon nor diminishes the general coverage of the Scope Rule.

We are compelled to the conclusion therefore that the Scope Rule here involved, as well as the other rules cited by Petitioner, insofar as specific categories of work are concerned, are all general in nature and do not cover the disputed work either generally or in any detail.

In these circumstances, the Board has held repeatedly that where the Scope Rule is general in nature, as is the case here, the burden of proof is on the Organization claiming the work to establish by substantial probative evidence that the employes it represents have performed such work historically, traditionally and exclusively and

system-wide. Petitioner has not sustained this burden of proof by any factual probative evidence in the record before us.

Additionally, we are referred to Rule 52 of the agreement which is entitled "Classification of Work" and which is more or less in the nature of a specific work reservation rule. It covers under sub-paragraph (b):

> "All work of contructing, maintaining, repairing and dismantling buildings, bridges ... and other similar structures ..."

It is obvious that this language does not mention the work of "operating bridges" nor does it include the classification of "drawbridge operator". In fact, it quite clearly omits both types of language. Thus, under this specific work reservation rule the disputed work is not covered by the agreement.

Accordingly, we repeat our conclusion that Petitioner has not sustained its burden of proof, in view of the generality of the Scope Rule as well as the other Rules cited by it, and particularly in view of the specific exclusory language of Rule 52.

In similar cases before this Board involving similar agreements and rules, the same conclusion as to non-exclusivity was reached; in view of such conclusion we cannot find that the disputed work was exclusively that of the Claimants to perform. Accordingly, Carrier had the right to reassign the disputed work to other classifications

covered by other agreements, particularly those within the property who have performed similar work at other locations.

See, for example Award 19516 (Blackwell-3rd Division) which held specifically:

> "A host of Board decisions hold that, where such a general Scope Rule controls, the Petitioner, in order to prevail, must prove that the work in issue has been traditionally and customarily performed by covered employes on a system-wide basis to the exclusion of all other employes. This so-called exclusivity rule is based on the rationale that the agreement covers an entire system in scope application."

See, also Third Division Awards 7387, 11128, 14227, 17051, 19514, 19576 and 19969, among a host of others.

We cite, further, Third Division Award 12284 (Kane) in which the facts were strikingly similar to those now before us. That case also involved the classification of Drawbridge Operator which was discontinued by Carrier; a somewhat similar "past practice" by Maintenance of Way employes at a particular location; and conflicting claims of two Organizations to the disputed work.

In that case the Board held that the Scope Rule being general in nature and Petitioner having failed to probatively satisfy the concept of "exclusivity" system-wide on the record, that, as a result, the disputed work was not Claimants' exclusively to perform. Nor, was proof of "past practice" of any avail in the absence of such proof of "exclusivity".

This decision was subsequently reaffirmed by the Board in Third Division Award 13709 (Mesigh).

With respect to Petitioner's contention that the "past practice", which has been detailed in the Statement of Facts above, is controlling here, we are of the opinion that such past practice in order to be controlling must show:

> "A controlling past practice, whereby said work has been reserved exclusively to them. Moreover that such controlling past practice must be of such nature as to reserve this work to these employes exclusively on a system-wide basis". See Third Division Award 12972 (Hamilton).

See also, on this issue, Third Division Awards 7031, 10636, 12009, as well as the various cases cited above.

We conclude and find therefore that although Claimants performed the disputed work at this location for a considerable time in the past, nevertheless they have failed to meet the rigorous test of "exclusivity" and have not established by probative evidence that the disputed work was exclusively theirs to perform.

4. We deal now with Petitioner's contention that Carrier violated the Merger Agreement of January 10, 1962. That agreement specifically provides, among other things:

> "In the event any dispute or controversy arises between Norfolk & Western and any labor organization signatory to this Agreement which cannot be settled by Norfolk & Western and the labor organization or organizations involved within 30 days after the dispute arises such dispute may be referred by either party to an Arbitration Committee for consideration and determination." (Emphasis supplied)

It is Petitioner's contention that the right to appeal such unsettled controversy is completely permissive in nature and that it has the option to appeal to the Arbitration Committee (proceedings for the establishment of which are spelled out in the Merger Agreement) or that it can appeal such unsettled controversy to another forum such as, for example, the National Railroad Adjustment Board. Carrier responds that the language of the Merger Agreement is "mandatory" in nature and that the only forum before which such appeals may be brought is the Arbitration Committee specifically designated in the Merger Agreement.

This Board is of the opinion, and we so hold and find, that in the absence of an alternative forum specifically provided for in the Merger Agreement, Petitioner is required to appeal any unsettled controversy to the Arbitration Committee specifically named in the Merger Agreement. Were we to reach any other conclusion, we would be modifying and amending the Merger Agreement contrary to the intent of the parties. Long established settled principles and precedents of this Board have held that we are not so authorized. We have no authority to revise, modify, delete, or add to the agreement that has been negotiated between the principals. Although the use of the word "may" is permissive as to the right of appeal, the entire content of the provision of the Merger Agreement last quoted is mandatory as to the forum

in which the appeals are to be heard. That forum and that forum alone - the Arbitration Committee - is the only one designated by the parties to the Merger Agreement.

In consequence we affirm the established principle and will not interject ourselves into that aspect of this dispute.

See Third Division Awards holding similarly: 17589, 17594, 19926, 19554, 19950, 19055, 20289 and 20764. For further reference, if this be needed, we quote from Third Division Award 20289 (Sickles) in which the Board held:

> "The Board has recently affirmed that when an agreement has made specific provision for resolution of disputes by an Arbitration Committee, this Board will not inject itself into the matter. See Awards 11926 and 19950. See also Awards 17639, 16869 and 14471."

5. Finally, Petitioner raises the contention that under Section 2, Seventh, of the Railway Labor Act, Carrier has violated the provisions of the act by assigning the disputed work to the Clerk-Telegraphers. In effect, what we are asked here to consider is the contention that a Federal Statute has been violated. We cannot agree that such matters come within the jurisdiction of this Board. This Board has no authority to consider Federal Statutes solely to determine whether they have been violated. These matters are for determination by other forums. The sole function of this Board is to interpret and apply the working agreements between the parties and specific claims which

arise under such agreements. In this manner we serve the function to which we have been assigned and which we are authorized to perform under the Railway Labor Act.

In support of the latter conclusion, we quote from First Division Award 5402 (Simons) in which the Board stated:

> "It is not within the jurisdiction of this Division to determine whether or not there has been a violation of Section 2-Seventh of the Railway Labor Act."

To the same effect see also First Division Award No. 6101; Second Division Awards 1783, 2465 and 2839; and Third Division Awards 2491, 4439, 5703, 5864, 6828, 19926 and 19950, among many others.

Accordingly, in view of the foregoing findings and conclusions, and based upon controlling precedent and the entire record before us, we are compelled to the conclusion that these claims must be denied in toto.

AWARD: CLAIMS DENIED.

Louis Norris
LOUIS NORRIS, Neutral and Chairman

H. G. Harper 10/24/78
H.G. HARPER, Organization Member

G. C. Edwards
G.C. EDWARDS, Carrier Member

DATED: Chicago, Illinois
October 12, 1978