PUBLIC LAW BOARD NO. 3348

Parties to Dispute

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Award No. 1

Case No. 1

STATEMENT OF CLAIM

1. That the Carrier violated the Agreement between the Parties when, effective at the close of the shifts July 15, 1982, they abolished the position of all Fuel Laborers at Winslow, Arizona and concurrently therewith assigned the work formerly performed by them to employees holding no seniority under the Maintenance of Way Agreement.

2. That the work of fueling and sanding of engines shall be restored to the Fuel Laborers holding seniority as such under the Agreement between the Carrier and the Brotherhood of Maintenance of Way Employees.

3. That Carrier shall compensate the incumbents of these positions, namely:D. A. Ayers, seniority date 6-18-72; P. M. Chavey, seniority date 11-17-73; D. Sanchez, seniority date 10-20-76; and L.W. Doucette, seniority date 4-11-77, and any other employees who may be subsequently affected for loss of earnings and/or difference in earnings suffered account the Carrier's improper action.

BACKGROUND

By letter dated August 11, 1982 the Organization notified the Carrier of the claim stated in the foregoing. This claim was declined by the Carrier response dated September 15, 1982; in this same declination Carrier invoked the third or multi-party issue. After additional exchange of correspondence on property on November 3, 1982, January 14, 1983, February 8, 1983 and February 14, 1983 whereby the instant dispute was not resolved, an Agreement was signed by the parties on

February 17, 1983 which established the instant Public Law Board under provisions of the Railway Labor Act as amended. After a first hearing was held by this Board on April 28, 1983 it was the determination of the majority that a third-party interest existed and a second hearing was scheduled for November 2, 1983. During the interim a letter soliciting third-party interest was sent to five (5) other Organizations on May 2, 1983 by the Chairman and Neutral Member of the Board in accordance with Section 7 of the Agreement of February 17, 1983 and in accordance with the Railway Labor Act at 3 First (j). The Organizations to which third-party notices were sent, which were those with members performing the same type of work at dispute at other points in the system, included the following: the International Brotherhood of Firemen and Oilers; the Brotherhood of Railway Carmen of the United States and Canada; the International Brotherhood of Electrical Workers; the International Association of Machinists and Aerospace Workers, and the United Transportation Union. By letter dated May 4, 1983 the Claimant Organization objected to the inclusion of the Carrier's original declination of the claim with the third-party notice. This objection was answered by the Chairman and Neutral Member of the Board by additional correspondence dated May 6, 1983. After the third-party notices were sent, prior to the second hearing, the Board received correspondence from the International Brotherhood of Electrical Workers (IBEW), System Council No. 20, Albuquerque, New Mexico. This correspondence, dated June 27, 1983 stated that Organization's interest in and position on the second point of the claim at bar. The IBEW, which

was the only Organization to respond to the third-party notice, also declined attendance at the November 2, 1983 hearing but requested copy of the final Award resulting from this Public Law Board's resolution of the instant dispute.

DISCUSSION AND FINDINGS

Prior to discussing the central issues of the dispute itself the Board underlines that it is well established that neither the National Railroad Adjustment Board not Special Boards of Adjustment will consider materials which were not submitted during the handling of the claim on property. This firmly established tradition, codified by Circular No.1, has been articulated in many Awards (Third Division Awards 20178; 20841; 21463; 22054). This Board will, therefore, disregard materials in the record before it which represent any addition to those introduced on property.

There are a number of related issues in the instant dispute which must be resolved. One addresses the question of the meaning of the Organization's claim itself: does the claim address only an issue related to work at the point in question, or does it address also an issue which has system-wide significance? Another but related issue centers on the de facto resolution of the question of work assignment at Winslow, Arizona itself.

With respect to the first issue which centers on the meaning of the claim, this Board notes that the wording of the claim points only to the need to resolve an issue at a particular point in the Carrier's

total system. Therefore, according to the wording of the original claim on property and according to the argument put forth by the Organization both in the record and in hearing, the discussion and resolution of the dispute should not go beyond such narrow limits. Although such may be the case with certain types of claims brought before a Board such as this, such as discipline claims, this is not necessarily the case for others, such as the instant one, which deals with a jurisdictional issue, and with a Scope Clause,(*) and the Board rejects the line of reasoning of the Organization. While reserving the specific discussion of the interpretation of the Scope Clause at bar until later, the Board herein invokes Court precedent for interpreting the instant dispute as a system-wide one because of the dispute's jurisdictional ramifications. When a collective bargaining agreement is resorted to in order to settle a jurisdictional dispute over work assignments the Court has held that such an agreement "...is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control...private contracts..." (John Wiley & Sons vs. Livingston, 376 U.S. 543, 550 of Steele vs. Louisville & N.R. Co., 323 U.S. 192). The agreement is, rather..."a generalized code to govern a myriad of

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(*) The original claim filed on August 11, 1982 was amended by further correspondence on property by the Organization, dated November 3, 1982, where specific reference is made to the Scope Rule in the collective bargaining agreement between the parties.

cases which the craftsmen cannot wholly anticipate...(which)... calls into being a new common law --- the common law of a particular industry..." (United Steelworkers of America vs. Warrior and Gulf Nev. Co., 363 U.S. 574, 578-79). Thus, implied in the instant claim of the Organization are dimensions of the employee-employer relationship which go beyond the specificity of the system point itself and which requires an analysis of system-wide issues since a "...collective (bargaining) agreement covers the whole relationship..." (Ibid. Emphasis added).

Further, the same line of reasoning used by the Organization as basis for the narrow interpretation of its claim was also used as objection to sending third-party notices. This too was and is rejected by the Board since third-party notices represent a practical necessity if all parties to the "...whole (employment) relationship..." are to be treated fairly. The Supreme Court has upheld this position by pointing out that..."(I)n order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining arguments, as well as the practice, usage and custom pertaining to all such agreements" (TCE Union vs. U.P.R.R., Supreme Court, No. 28, December 5, 1966). The Court here adds that this is particularly the case when it is a question of resorting to collective bargaining agreements in order to resolve jurisdictional disputes over work assignments. That this is so has been, in fact, also recognized by the parties themselves to this dispute by their Agreement of February

17, 1983 at 7.(*)

With respect to the factual situation at Winslow, Arizona it is the position of the Claimant Organization that the Carrier had no contractual right to assign the work of fueling and sanding engines, effective July 16, 1982 to others than those covered by the Organization agreement since past practice, going back some thirty-eight (38) years or more, indicated that such work had been exclusively performed by Organization members. Further, the Organization presents as evidence a letter from the General Chairman of the Organization to whose members the work had been transferred. This General Chairman states that ..."as far back as I can remember the Maintenance of Way employees have fueled the engines at Winslow". It is the further contention of the Claimant Organization that its contractual rights with respect to the work at Winslow, Arizona are safeguarded by Rule 1 and 2 of the agreement, and by implication, by Appendix No. 25 of the same agreement. These Rules and this Appendix read, in pertinent part, as follows.

Rule 1 - Scope.

> This Agreement governs the hours of service, wages and working conditions of employees of the following classes in the Maintenance of Way and Structures Department: Bridge and Building Foremen;

(*) A wholly different issue was the Organization's objection to the sending, with the third-party notices, a copy of the Carrier's declination issued on property. While the Chairman and Neutral Member of this Board respectfully disagreed with the Organization on this matter, he did notify the other Organizations potentially involved in this dispute of this objection.

Paint Foremen; Assistant Bridge and Building Foremen; Steel Bridgemen (not including Steel Bridge or Assistant Steel Bridge Foremen); Bridge Inspectors; Bridge and Building Mechanics; Bridge and Building Painters; Bridge and Building Helpers; Welder Gang Foremen; Welders; Heat Treaters; Welder Helpers; Extra Gang Foremen and Assistant Section Foremen; Trackmen; System Rail and Plow Gang Employees; Fuel Foremen; Pumpers and Water Treaters; Roadway Machine Operators; Bridge and Building and Water Service Laborers; Track, Bridge, Tunnel and Crossing Watchmen and Flagmen and such other classifications as may be shown in the appended wage scale or which may hereafter be added thereto.

Rule 2 - Seniority

Section (a) - Establishment of Seniority. Except for track, bridge, tunnel and crossing watchmen/flagmen and operators of miscellaneous roadway machines (other than those listed in Groups 5 and 7), none of whom establish seniority as such, seniority shall be established in one of the following groups:

Group 4. -
Class 1: Fuel Foremen
Class 2: Pumpers and Water Treaters.
Class 3: Fuel Station and Sandhouse Helpers and Laborers.

Appendix No. 25

Wage Appendix: Rates Effective January 1, 1983. (Rates effective January 1, 1983 include COLA increase of 34¢ per hour effective January 1, 1983).

Bridge and Building and Building and Water Service Laborers; Fuel Station Helpers and Fuel Station and Sandhouse Laborers; Lamptenders; Track, Bridge, Tunnel and Crossing Watchmen and Flagmen...$10.8270 per hour.

An analysis of the Scope Rule above, from which follows Rule 2 and Appendix 25 only by reference, shows that this Rule shares all of the merits and/or deficiencies of what numerous Awards of the National Railroad Adjustment Board and Awards emanating from Special Boards of Adjustment refer to as a general Scope Rule i.e. a Rule which "merely lists different classes of employees for whom hours of service and working conditions are covered by the Agreement" (Second Division Award

5525; See also Third Division Awards 18465; 19969; 21022 inter alia). Since the Scope Rule at bar, therefore, is a general Rule the burden of proof rests with the Organization, as petitioner, to furnish substantial evidence of system-wide exclusivity since the Scope Rule in dispute has system-wide application with respect to the "...whole (collective bargaining) relationship..." to cite United Steelworkers of America vs. Warrior and Gulf once again. A review of the record shows that petitioner has indeed provided evidence of its Organization members filling, by tradition and practice, the position of fuel laborer at the point in the Carrier system where this dispute arose without, however, providing additional evidence of system-wide exclusivity. That evidence of system-wide exclusivity is required in such circumstances when a general Scope Rule is at stake has abundant precedent in prior Awards of the National Railroad Adjustment Board (Third Division Awards 12972; 13161; 19761). In a contrary sense, reasonableness for such conclusion, following precedent of the above noted Awards, would be even more credible if Carrier, in terms of "affirmative defense" would provide for consideration of this Board information to the effect that work provided at a specific location to a specific Organization is not, in fact, system-wide since the Carrier is in a better position to have this information than the Claimant Organization. This is the sense of Third Division Award 13334, quoted by the Organization in its letter on property of November 3, 1982. This Award states:

> The employees at a specific location of an extensive system cannot be held chargeable with knowledge of practice throughout the system. This is knowledge pecularily within the ken of Carrier. When the Carrier avers that the local practice (as has been the case in the instant dispute) of which the employees have knowledge, is not system-wide, it is an affirmative defense and the burden of proof is Carrier's.

A review of the record shows that this burden of proof has been met by the Carrier in its first response to the claim on property (Letter of September 15, 1983: Exhibit "A").

While the record shows that a recent dispute on this property between the Carrier and another Organization does not deal with a Scope Rule which has the exact language as the one herein at bar, the resolution of that jurisdictional dispute, adjudicated to the U.S. District Court for the District of Kansas, is consistent with the conclusion arrived at by this Board in the instant case. There the Court stated, in pertinent part, which is applicable to the present case, that:

> While the evidence of the (Organization) did demonstrate exclusivity at the location(s) in this lawsuit, we do not find that to be determinative. Under the circumstances of this case, we believe that it is necessary to consider the past practices of the parties herein on a system-wide rather than a point-by-point basis. (Inter. Bro. of Firemen and Oilers vs. Santa Fe Railway Company, Case No. 82-4183, U.S. Dist. Ct., Kansas, October 6, 1982).

Further, three (3) prior cases handled on this property between the same petitioning Organization herein involved and the Carrier have led to Awards with respect to the same Scope Rule which are consistent with the conclusions herein enumerated by this Board (Third Division Awards 11758; 19373; 20018).

This Board so rules, therefore, that no contractual violation occured when the Carrier assigned work at Winslow, Arizona which had formerly been performed by members of the Claimant Organization to those covered by a different collective bargaining agreement.

AWARD

Claim denied.

Edward L. Suntrup, Neutral Member

G. M. Garmon, Carrier Member

C. F. Foose, Employee Member

December 22, 1983