

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781

AWARD NO. 46

Case No. 46 (105)

Referee Fred Blackwell

Carrier Member: J. H. Burton

Labor Member: W. E. LaRue

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the Brotherhood (CR-2975) that:

- (a) The Carrier has violated the current Schedule Agreement, as amended, particularly the Scope Rule and Rule 1, when on December 22, 1986, the Carrier transferred and consolidated the work in the Grandview MW Material Yard, Columbus, Ohio, which was being performed by Maintenance of Way employees, to a new material yard facility at Fisher Road, and placed all such work under the scope of the BRAC-Conrail Agreement.
- (b) The Carrier shall now properly compensate two furloughed senior trackmen, one furloughed senior Class 1 machine operator, and one furloughed senior Class 2 machine operator, commencing December 22, 1986, eight hours each day, including overtime, and continuing until this dispute is resolved as provided by Rule 26(f) of the current collective bargaining agreement.

FINDINGS:

Upon the whole record and all the evidence, after December 15, 1989 hearing in Washington, D. C., the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

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OPINION

THIRD PARTY DISPUTE

This is a Third Party Dispute wherein after due notice of its Third Party interest in the dispute, the Transportation Communications International Union (TCU), fully participated in the proceeding by filing a submission on its position with the Board and participating in the December 15, 1989 oral argument on the case. By letter dated August 21, 1989 the BMW submitted a rebuttal brief to the position stated in the TCU submission.

In addition the Carrier submitted to the Board a December 21, 1989 letter and attachment, and a March 19, 1990 letter and attachment. By letter dated January 11, 1990 the BMW objected to the position paper transmitted with the Carrier's December 21, 1989 letter and requested that same not be considered by the Board or that, alternatively, the Board consider the post-hearing representations made in the BMW January 11, 1990 letter.

NATURE OF DISPUTE AND PERTINENT FACTS

Nature of Dispute

This case arises from three (3) claims filed under date of February 13, 1987 on the basis of allegations that the Carrier violated the Scope Rule and Rule 1 of the parties' Schedule Agreement and Title VII, Section 706, of the 3R Act¹ as amended in 1981 and 1986, by its action of December 22, 1986, whereby the Carrier closed down the Grandview Material Yard at Columbus, Ohio, and

¹ The Regional Railroad Reorganization Act of 1973.

transferred and consolidated the work of handling MW material and supplies which was being performed at Grandview by Maintenance of Way Employees, to the newly established Material Distribution Center at Fisher Road, Columbus, Ohio, and placed such work under the Scope of the TCU-Conrail Agreement. The remedy requested is that the Carrier be required to restore four (4) Maintenance of Way positions at the Grandview Yard that were abolished when that Yard was closed, two (2) trackmen and two machine operator positions, and to pay compensation for wage loss due to such violation to the four senior furloughed MW Employees in the classifications of the abolished positions.

The Carrier and the TCU submit that the Maintenance of Way claims are not supported by the cited rules and statute, and should be denied on this basis.

Pertinent Facts

Prior to December 1986, the Carrier maintained two Material Yards at which procurement and distribution of materials and supplies for the Columbus Division was conducted. One was the Grandview Yard, Columbus, Ohio, which was a Maintenance of Way Material Yard under the control of the Maintenance of Way Department. Maintenance of Way Employees exclusively performed the work relating to material and supplies handled into, stored at, and distributed from the Grandview Yard.

The other Material Yard was the 20th Street Material Yard, Columbus, Ohio, which handled material for departments other

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than the MW Department, e. g., the Signal Department, and at which all work of handling material was performed exclusively by members of the Clerical Craft.

The positions at the two (2) facilities, as of July 30, 1986, were as follows (Carrier 3-19-90 letter):

20th Street

1 Foreman (TCIU)
1 Lead Clerk (TCIU)
5 Clerks (TCIU)
13 Shipper Receivers (4 vacant) (TCIU)
3 Crane Operators (TCIU)

23 Total

Grandview

1 Clerk (TCIU)
1 Foreman (BMWE)
3 Truck Drivers (BMWE)
2 Machine Operators (BMWE)
1 Trackman (BMWE)

8 Total

Both the Grandview Yard and the 20th Street Material Yard were closed in 1986, and neither yard is now being used.

On August 19, 1986 the Carrier opened a New Material Distribution Center at Fisher Road with the same clerical staffing as previously shown for the 20th Street Yard and with vacancies being filled on August 26.

In December 1986, the Grandview Material Yard was closed. One Clerical position, and one (or two) MW trackman and two MW Machine Operator positions were abolished at Grandview. One MW Truck Driver remained headquartered at Grandview. One MW Foreman and two MW Truck Driver positions were advertised and headquartered at the Fisher Road Facility to handle delivery of MW materials. This brought the total position count at Fisher Road to twenty-six (26) positions.

Also in December 1986, the new Material Distribution Center became fully operational under the direction and management of

the Material and Purchasing Department. The Distribution Center serves as a central procurement and distribution facility for receiving, storing, and distributing all material and supplies for all departments. The work of delivering MW material after its assignment to the account of the MW Department, is performed by MW Employees assigned to three (3) MW positions established at the new Distribution Center, one Foreman and two (2) truck driver positions. All other work relating to handling material at the Distribution Center at Fisher Road has been assigned exclusively to TCU Employees.

It is the Carrier's assignment of all work, excepting work of delivering MW material, at the new Fisher Road Distribution Center to TCU Employees which is challenged by the Maintenance of Way Employees in this case, and the BMW says that work previously performed at Grandview Yard by MW Trackmen and Machine Operators is being improperly performed at the Fisher Road Center by TCU Employees.

The parties have discussed the claims but have not resolved same, and this case resulted.

POSITION OF THE PARTIES

The BMW asserts that the claims should be sustained in that work covered by the Maintenance of Way Scope Rule, which was previously performed exclusively by two MW Trackmen and two MW Machine Operators at the Grandview Yard, is now being improperly performed at the Fisher Road Warehouse by TCU Employees in viola-

tion of the Scope Rule of the Maintenance of Way-Conrail Schedule Agreement, particularly the Scope's grandfather clause, and Title VII, Section 706, of the 3R Act as amended in 1981 and 1986; and that the administrative change from assigning all incoming material at Grandview to the MW Department, to a mode of not assigning any incoming material at the newly established Material and Distribution Center on Fisher Road to the MW Department, is insufficient to support the Carrier's assignment of such work to the TCU Employees at Fisher Road, because the handling of Maintenance of Way materials had been historically performed by past practice by Maintenance of Way Employees at the Grandview Yard.

The Carrier submits that the claims should be denied in that the complained of work at the new Material Distribution Center at Fisher Road is not secured to the Maintenance of Way Employees by the cited rules and statute; that the MW Employees have no demand right to perform work of handling material at the Distribution Center until such time as the involved material is assigned to the account of and becomes the property of the MW Department; and that all work at the Material Distribution Center accruing to MW Employees by virtue of material having been assigned to the account of the MW Department, has been assigned to three (3) newly established MW positions at the Center, one foreman and two (2) truck driver positions, and is being performed by MW Employees assigned to these positions.

The Carrier asserts further that the grandfather clause

in the Scope Rule of the Maintenance of Way Agreement does not secure the disputed work to the Maintenance of Way Employees, because the protective text of the clause prohibits removal of work from Maintenance of Way Employees "...at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement."; and that the phrase "at the locations" in this text refers to the material facility at Grandview Yard which no longer exists.

The Carrier also submits that the work of handling material in other Distribution Centers on the system has historically accrued solely to the Clerical Craft; and that the material handling work being performed by the TCU Employees at the New Distribution Center on Fisher Road is covered by the Scope of the Conrail-TCU Agreement and hence such work belongs to and is being properly performed by Employees represented by the TCU.

The TCU submits that the claims should be denied in that the material handling work of the kind performed by the TCU Employees at the 20th Street Material Yard, Columbus, Ohio, has been historically performed by TCU Employees throughout the Carrier's system; that the same work is now being performed by TCU Employees at the New Material Distribution Center at Fisher Road; and that such work is secured to TCU Employees by virtue of a 'specific "work and positions" Scope Rule in the TCU Schedule Agreement.

QUESTION AT ISSUE

The question in the case is whether the Carrier's actions

in respect to the disputed work being performed at the Material Distribution Center at Fisher Road is violative of the Scope Rule of the Maintenance of Way Agreement, particularly the grandfather clause in the last paragraph of the Rule, and Title VII, Section 706, of the 3R act, as amended in 1981 and 1986?

FINDINGS AND DISCUSSION

After due study of the record as a whole, including the submissions presented by the three (3) parties to the dispute in support of their positions in the case, the Board concludes that the herein claims are not supported by the cited rules and statute and that in consequence, the claims must be denied.

The provision in Title VII, Section 706, of the 3R Act as amended in 1981 and 1986, which the BMWWE contends is applicable to the Carrier actions complained of in this case, reads in pertinent part as follows:

"With respect to any craft or class of employees not covered by a collective bargaining agreement that provides for a process substantially equivalent to that provided for in this section, the Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system if it does not remove such work from coverage of a collective bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which such work is assigned, allocated, reassigned, reallocated, or consolidated. Prior

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to the exercise of authority under this subsection, the Corporation shall negotiate an agreement with the representatives of the employees involved permitting such employees the right to follow their work."

While it is doubtful that this Board has jurisdiction to determine whether the cited statute has been violated by the Carrier's actions, assuming jurisdiction arguendo, the Board's assessment of this part of the record is that the record fails to show that the Carrier's action of closing the Grandview Yard and the 20th Street Yard, and establishing a new Material Distribution Center at Fisher Road, was initiated and carried out by virtue of the authority conferred upon the Carrier by the quoted statute; consequently, the provisions of the statute do not apply to the work being performed at the Fisher Road Material Distribution Center.

Also, the Carrier action of closing two (2) facilities at two different locations, and combining the activity and work formerly conducted thereat to a single new Material and Distribution Center at a new and different location, does not appear to be a consolidation within the meaning of that term in the statute. The positions at Grandview Yard and 20th Street Yard were not consolidated at the Fisher Road Center; the positions needed to operate Fisher Road were advertised for that location under and in accord with the provisions of the TCU and BMW Agreements.

In view of this assessment the Board further finds that the Carrier was not bound by the statute's requirement to negoti-

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ate an agreement with the Representatives of Employees involved in a transfer covered by the statute. Accordingly, the complained of action by the Carrier is not shown by the record to have violated the cited statute, and the challenge to the Carrier action on this ground is therefore rejected.

The Board further concludes that the record does not establish a violation by the Carrier of the BMWWE Scope Rule, which, in pertinent part, provides the following:

"These rules shall be the agreement between Consolidated Rail Corporation (excluding Altoona Shops) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employees, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and road-bed, and work which, as of the effective date of this Agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees.

* * *

It is understood and agreed in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement; and it is also understood that work not covered by this Agreement which is being performed on the property of any former component railroad by employees covered by this

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Agreement will not be removed from such employees at the locations at which such work was performed by past practice of agreement on the effective date of this Agreement."

In deciding that the herein claims are not supported by the confronting record, the Board recognized that from the perception of the Maintenance of Way Employees who handled Maintenance of Way material at the Grandview Yard, there is little or no difference in the physical characteristics of the work performed at Grandview and the disputed work of handling material at the Fisher Road Distribution Center performed by the TCU Employees. Heavy material such as rails, crossties, and frogs, for example, when handled into and around the Distribution Center at Fisher Road, presumably entail the same kind of physical activity that occurred when such material was handled at the Grandview Yard.

However, the physical characteristics of the disputed work, while a factor in Scope Rule problems, is not the controlling consideration in resolving disputes about whether work belongs under a particular craft's Scope Rule. Indeed, because the involved Scope Rules allow it, it is not unusual in the Railroad Industry for different crafts to perform identical work.

The controlling consideration in scope disputes is the language of the rules itself as construed and applied by Board authorities. In this dispute examination and analysis of the Scope Rule, combined with analysis of the facts, persuades the Board that the BMWWE Scope claims must be denied because they are

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invalid on at least two (2) grounds:

(1) The grandfather clause in the fifth paragraph of the Scope Rule does not apply to the work in dispute so as to secure such work exclusively to the Employees covered by the Maintenance of Way Agreement and Scope Rule.

(2) The Carrier's decision to treat Maintenance of Way material coming into the Fisher Road Distribution Center the same as material for other departments, was a valid administrative action which the Carrier was empowered to take; and hence the Maintenance of Way Employees have no demand right to handle material coming into the Distribution Center until it is assigned to the account of the Maintenance of Way Department.

In regard to this first ground, there is no doubt that the work performed by the Maintenance of Way Employees of handling Maintenance of Way material at the Grandview Yard, was covered by the grandfather clause in the Maintenance of Way Scope Rule to an extent which precluded the removal of such work from Maintenance of Way Employees and unilaterally assigning it to another craft at Grandview. This is because the operative language in the grandfather clause that provides that if "work not covered by this Agreement, was performed by Maintenance of Way Employees on the effective date of this Agreement", such work "will not be removed from such employees at the locations at which such work was performed..."

The grandfather clause, if Grandview had remained open,

would have interdicted the removal of material handling work at Grandview and assigning it to Employees at Grandview not covered by the BMW Agreement. The phrase in the clause of "at the locations at which such work was performed" means Grandview Yard. The protection of the grandfather clause does not apply to work at locations other than the rule's specified location, and hence the clause does not apply to the work being performed at the Fisher Road Material Distribution Center, because this is a different location than the location referred to in the rule. In sum, the grandfather clause in the fifth paragraph of BMW Scope Rule applied to work performed at Grandview Material Yard, and since Grandview no longer exists, the grandfather clause has no application in this dispute.

As regards ground (2) of the Board decision to deny the confronting claims, the Board notes that the text of the first paragraph of the Scope Rule contains verbiage which would cover material handling work that is in fact assigned to and performed by MW Employees at the Distribution Center at Fisher Road. But there is nothing in that verbiage that brings such work under the first paragraph of the Scope Rule, until its actual performance by Maintenance of Way Employees at the Fisher Road Distribution Center; and since material handling work at Fisher Road has not been performed by Maintenance of Way Employees at the Fisher Road Facility, there is no basis for finding the work to be covered by the BMW Scope. In this regard the Board concurs with the Carrier

contention that the Employees of an entity have no claim to perform work for such entity until the subject matter which creates and gives rise to the work, has been assigned to the account of and is in the possession of the entity. Award No. 12, Public Law Board No. 2945 (10-11-82) and Award No. 28, Public Law Board No. 2409 (03-30-81). Heavy material such as crossties, rails, and frogs are readily identifiable as material which is not likely to be used by any department other than the Maintenance of Way Department; however, this consideration does not eliminate the Carrier's right to establish for efficiency reasons a procurement and distribution system which confers work rights to Maintenance of Way Employees to handle this material only after it has been assigned on the books of the Material and Purchasing Department to the account of the Maintenance of Way Department. In other words, until the heavy material is assigned, administratively, to the account of the Maintenance of Way Department, the work of handling the material does not accrue to the Maintenance of Way Employees.

Furthermore, even though the administrative record keeping concerning the material is a paperwork transaction which is not visible to an individual observing the physical movement of the heavy material in and around the Fisher Road Distribution Center, this consideration has no impact on the Carrier's authority to modify and change its material handling system, and record keeping relative thereto, in order to improve efficiency where such can be done within the permissible bounds of the applicable

contract.

It therefore follows that an administrative change of this kind in the procurement and distribution of materials and supplies is not per se an improper action by the Carrier, and unless it is shown to be improper, it is an action which the Carrier may take in the exercise of its Management rights prerogatives. The facts here indicate that the new Material Distribution Center was opened to improve the efficiency of Carrier operations, and there is no record evidence which indicates a basis for finding that the Carrier made the administrative change for any improper reason in regard to which craft performs the material handling work.

The Board notes in conclusion that the TCU Employees performed essentially the same duties in respect to material handling at the 20th Street Yard, that they performed in and after August 1986 at the Material and Distribution Center at Fisher Road. The work of handling material at a central storehouse such as the Fisher Road facility, the record indicates, has always accrued to TCU Employees throughout the Carrier's system. It further appears that the work is covered by a specific "work and positions" clause in the Scope Rule in the TCU Schedule Agreement, which is absent from the BMW Scope Rule. In addition the TCU Scope Rule makes express reference to job titles containing the phrase "Material Management" on a system wide basis, viz.:

"RULE 1- SCOPE

(b)

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Chauffeurs (Material Management...

Industrial Truck Drivers (Material Management...

Motor Truck Drivers (Material Management...

Tractor Operators and Tractor Operator Helpers
(Material Management..."

Language regarding job titles that expressly refer to "material management" is not contained the BMW Scope Rule.

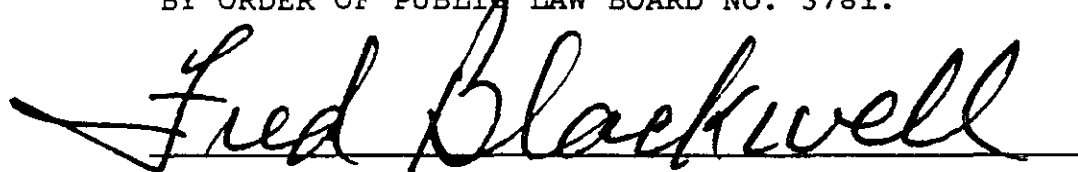
In view of these and other considerations shown of record respecting the TCU position in this dispute, the Board concludes that there is no basis for concluding that the Carrier has improperly assigned the herein disputed work to TCU Employees.

In view of the foregoing, and for the reasons indicated, the claim will be denied.²

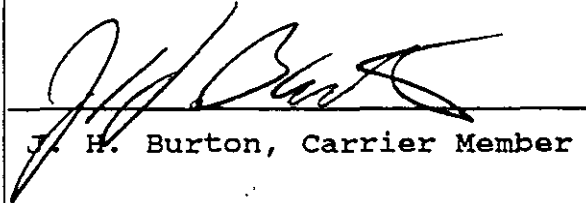
AWARD:

Claim denied.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.



Fred Blackwell, Neutral Member



J. H. Burton, Carrier Member



W. E. LaRue, Labor Member

Executed on 2-13-91

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² This ruling shall not be a precedent in any other dispute except where the circumstances are the same as the particular circumstances of this case.

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