PUBLIC LAW BOARD NO. 6056

AWARD NO. 1
CASE NO. 1

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Soo Line Railroad Company

QUESTIONS IN DISPUTE:

Organization's Questions at Issue

1. Did the Carrier violate existing agreements and practices when it issued System Bulletin Nos. 166 and 167 dated July 21, 1997 without including a crew number, sufficient work location information and the specific purpose for establishing the crew?

2. Did the Carrier violate existing agreements and practices when it failed to bulletin approximately twenty (20) positions on the extra tie gang established pursuant to System Bulletin Nos. 166 and 167 dated July 21, 1997?

3. If the answer to Question Nos 1 and/or 2 above is 'Yes', what shall the remedy be?

Carrier's Questions at Issue

1. Do Rules 2 and 10 of the October 1, 1987 Schedule Agreement and Article VII of the September 23, 1991 Agreement require the Company to specifically identify on the bulletin the type of production work to be performed by a Production Crew or gang, i.e. rail, tie, ballast, surfacing tasks?

2. Do Rules 2 and 10 of the October 1, 1987 Schedule Agreement or Article VII of the September 23, 1991 Agreement restrict the performance of work by a gang or Production Crew to a specific type of seasonal/production task such as rail, tie, ballast or surfacing work?

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The instant dispute arose out of the publication of Bulletin Nos. 166 and 167 by Carrier on July 21, 1997. Bulletin No. 166 advertised for one Extra Gang Foreman to work with "... the Production Crew installing ties and other work related to the MOW Craft." The position was to start "... on or about August 11, 1997 on the Paynesville Sub and working the Heartland Division." For LOCATION, the Bulletin listed "Heartland Division." The Bulletin went on to show hours of service, rest days, and an approximate duration of 4 months. It also described the position as a new "temporary" position. Instead of an information item designated as "HEADQUARTERS, IF ANY, OR CREW NO:," the bulletin contained the following entry: "DEPARTMENT AND RN NO.'S: 49670-019 30498." In addition, the bulletin made no mention of the application of Side Letter # 5 to the position.

Bulletin No. 167 followed a similar format in advertising for four machine operator positions. Except for the information unique to the machine operator classifications, the bulletin contained the same information as Bulletin No. 166. It went on, however, to note that "... Side Letter #10 applies to the Production Tamper."

The General Chairman challenged the propriety of the two bulletins in his August 1, 1997 letter, which noted the following deficiencies:

* * *

> Specifically, the bulletins do not list the crew number as required by Rule 10, nor do they contain expected work location information as required by Rule 10, and Side Letter(s) No. 5 and No. 10 of the September 23, 1991 agreement.
>
> Also, while Bulletins No. 166 & 167 advertise temporary positions for a crew installing ties, they each improperly continue with "and other work related to the MOW Craft." As you know, Rule No. 2 states "Extra gangs are those established for a specific purpose such as but not limited to tie renewal, rail relay, ballasting and surfacing." Accordingly, in this instance the reissued bulletins must state the purpose of the crew is to install ties, but the reference to "and other work ..." must

be deleted.

In our review of the improper Bulletins No. 166 & 167 we also find that a significant number of positions customarily associated with a tie gang were not advertised. We assume that this new tie gang will actually consist of more than the positions identified to date and that each of the additional positions will continue in excess of thirty (30) calendar days. If our assumption is correct we request that those additional positions be properly bulletined.

* * *

On August 7, 1997, Carrier issued award Bulletins 166A and 167A. In addition to naming the successful bidders, they directed readers to certain corrected information. Specifically, the bulletins made reference to "Production Crew #1" and contained the following Note:

PER SIDE LETTERS #5 AND #10, THE SCHEDULED WORK LOCATIONS INCLUDE THE PAYNESVILLE, ELBOW LAKE, CARRINGTON, PORTAL, VEBLEN, BEMIDJI, DETROIT LAKES, NOYES AND MERRIAM PARK SUBS.

This listing represents nine of the twenty-five subdivisions that comprise the Heartland Division.

Carrier also responded to the General Chairman's objections on August 7th. Its reply letter said, "The positions established by Bulletin Nos. 166 and 167 are those few jobs to be added to the Production Crew established by Bulletins 21 and 22 on February 26, 1997." The letter went on to explain the history of Bulletins 21 and 22.

Bulletins 21 and 22 are part of the on-property record. Together they advertised some 96 positions having a total duration of approximately 8 months. They describe "... laying rail starting on or about March 24, 1997 on the Elbow Lake Sub and working the Heartland Division. * * * The crew will reduce to two mini crews on or about July 17, 1997 doing work pertaining to the MOW Craft." It is undisputed that neither bulletin was challenged by the Organization via the claim process.

In its August 7, 1997 response, the Carrier also refuted the General Chairman's assertions that Rule 2 was violated. In its view, Rule 2 did not limit the use of an extra gang to a specific type of work. Rather, Rule 2(d) only served to distinguish the seasonal or temporary nature of

extra gangs from the year-round duration of section gangs. In addition, Carrier maintained that no Agreement rule required rebulletining positions whenever the specific type of work performed by an extra gang changed. Consequently, it was not necessary to rebulletin the positions that were properly awarded pursuant to Bulletins 21 and 22.

As the parties continued to develop their record on the property, they also explored expedited arbitration as a means of resolving the dispute. They reached agreement to establish this Board on September 19, 1997. When they were unable to agree upon the precise questions to be submitted to this Board, however, it was decided that each would separately propose questions. The separate questions have been listed at the outset of this Award.

In addition to the several pieces of correspondence exchanged on the property, the record includes the sworn statements of two Carrier representatives, the statement of one craft employee, and approximately 150 copies of actual bulletins issued between 1988 and 1996. Each party contended that its batch of past bulletins demonstrated a practice supporting its position. Carrier's Ex-Parte submission also contained several prior awards that, in its view, bolster various facets of its position. All of this material has been carefully reviewed by the Board.

Distilled to its essence, the Organization position is that critical and contractually mandated information pertaining to crew number, work location and the specific purpose for which the gang was established was missing from Bulletins 166 and 167. In addition, the Organization maintains that Carrier has improperly attempted to establish a tie-gang out the of mini-crews established via Bulletins 21 and 22 without bulletining the new positions.

Carrier, on the other hand, maintains that any deficiencies in Bulletins 166 and 167 were corrected by Bulletins 166A and 167A. It addition, it categorically denies that the Agreement requires extra gang bulletins to state a specific purpose for the gang which, thereby, restricts the use of the gang to that limited purpose.

Aside from the corrections noted in Bulletins 166A and 167A, the various other contentions of the parties are in sharp conflict. Examination of the on-property record reveals that the remaining contentions made by the parties have each been refuted, point-by-point, by opposing assertions. Given this status, since refuted assertions are not evidence, the claim must be established by the submission of probative evidence.

Well settled arbitral principles apply to contract interpretation disputes. If the Board finds the meaning of contested provisions to be clear and unambiguous, the provisions must be given effect as written. If the provisions are not clear and unambiguous, however, then the objective of the Board is to ascertain the mutual intent of the parties and apply the provisions as they intended. In ascertaining intent, the analysis must focus on discovering what the provisions meant to the negotiating parties when the language was adopted. It is this "meeting of the minds" that drives the interpretation and not other, unintended meanings, that may possibly be read into the provision. Finally, agreement provisions are not clear and unambiguous if the conflicting interpretations of the parties are both plausible.

In this dispute, the Organization's position is founded upon the pertinent provisions of Rules 2 and 10 with influence from Side Letters 5 and 10. In the Board's view, however, these provisions do not clearly and unambiguously guide all of the various aspects of this dispute. This is because the contentions of the parties are both found to be plausible in light of the actual contract provisions in question. For example, Rule 10(c) lists eleven specific items of information that must be included on bulletins. However, none of the eleven items contains an explicit requirement that the specific purpose of an extra gang be stated. Moreover, neither Side Letter 5 nor Side Letter 10 contains such a requirement. Indeed, those side letters require amplification of only two items of bulletin information: The approximate work schedule and the general geographic region where the work will be performed. Careful examination of both letters fails to reveal any explicit requirement pertaining to the specific purpose of the extra gang involved. Therefore, the specific purpose requirement, if it exists at all, must arise from the remaining available rule: Rule 2.

Rule 2 is the Classification of Work rule. The pertinent subdivision reads as follows:

> (d) An employe assigned to perform Track Sub-department labor on extra gangs is classified as an extra gang laborer. Extra gangs are those established for the performance of a specific project or purpose such as but not limited to tie renewal, rail relay, ballasting and surfacing.

Given the text of Rule 2(d), the Board finds the Organization's interpretation to be

plausible. Its precise terminology is susceptible to being read as the Organization does. On the other hand, however, the Carrier maintains that Rule 2(d) serves only to distinguish the temporary or seasonal nature of extra gang positions from the year-round nature of section gang positions. When viewed from that perspective, the Carrier's interpretation of Rule 2(d) is found to be equally plausible. Either interpretation can be read into the language.

In most disputes over contract interpretation, and this one is no exception, the burden of proof means that the party claiming a violation of the contract must prove that its position reflects the true intention of the parties. As noted previously, that burden is upon the Organization. In general, there are three means by which the Organization can satisfy this burden: By submission of evidence of bargaining history; by submission of prior arbitration awards that make an "on-point" interpretation of the disputed provisions; or, finally, by submission of past practice evidence to show how the parties, themselves, have interpreted the provisions in question.

On this record, there is no unrefuted evidence pertaining to the bargaining history. At best, there are unsupported assertions about the history. Such assertions are not probative evidence. As such, they are entitled to no determinative weight.

It further appears that the instant dispute is one of first impression. Neither party submitted any prior awards interpreting the provisions in question. Although the Carrier did submit prior awards with its submission, they are not "on-point" with the contentions in dispute.

Regarding past practice, however, both parties submitted an extensive number of past bulletins that purport to support their respective positions. After careful review, however, the Board finds that this evidence does not establish a consistent practice that provides the requisite support for the Organization's position. Instead, the past practice evidence is found to support the Carrier's position. The following examples illustrate:

Bulletin No. 42 dated 6/20/88 lists no specific purpose for Gang X88.
Bulletin No. 86 dated 8/1/89 lists no specific purpose for Gang X44.
Bulletin No. 97 dated 8/1/89 lists no specific purpose for Gang Z88.
Bulletin No. 127 dated 6/13/90 references a dual purpose "Tie/Ballast Gang."
Bulletin No. 138 dated 7/23/90 lists no specific purpose for Gang X02.
Bulletin No 39 dated 3/8/93 references the multi-purpose "Tie Spacing, Turnout, Crossing Gang."

Bulletin No. 12 dated 2/1/95 lists no specific purpose for "... a gang ..."
Bulletin No. 23 dated 2/28/95 lists crew "... will install ties, sidings, turnouts, crossings and rail relay."
Bulletin No. 37 dated 2/7/96 references crew will "... dump rock, renew crossings and other jobs pertaining to the MOW craft."

There is no evidence that any of the foregoing bulletins were objected to by the Organization on specific purpose grounds. As a result, they are persuasive evidence that Rule 2(d) does not create a specific purpose restriction as the Organization contends.

Regarding the Organization's work location objection, it appears that listing an entire Division has been the traditional means of specifying the general geographical region in which extra gang work will take place. Where the general location is narrowed in the bulletin, it is done so by listing one or more sub-divisions. Several of the bulletins list as many as four or five sub-divisions in addition to the Northern Division, which later was renamed to the Heartland Division. The following examples illustrate:

Bulletin No. 228 dated lists the entire "Northern Division." While this bulletin pre-dates Side Letter #5 (9/23/91), the practice did not appear to change thereafter.
Bulletin No. 26 dated 2/7/96 lists the entire "Heartland Division" in addition to naming four sub-divisions. The bulletin also notes the application of Side Letter #5 to the position.
Bulletin No. 222 dated 6/17/96 lists "... starting on the Detroit Lakes Sub and working the Heartland Division."

There is no evidence that any of the foregoing bulletins were objected to by the Organization on the grounds that the location information was overly broad. Accordingly, these example bulletins are persuasive evidence that location specifications in bulletins have been described relatively broadly.

In addition to the bulletin examples listed above, the Carrier's assertion that there is no past practice supporting the Organization's position is corroborated by the sworn statements of its two representatives. Both had many years of involvement in the bulletin process and refuted the Organization's past practice contentions.

While the Organization did submit a number of bulletins where an extra gang appeared to be dedicated to performing a single task, such as a tie renewal gang or a rail gang, they are not dispositive of the past practice issue. In this regard, it must be recalled that Carrier agreed there have been such dedicated gangs in the past when the workload was sufficient to keep a gang so occupied for an entire season. It is not surprising, therefore, that such gangs would have been bulletined from time to time. The Carrier's example bulletins show that it was equally likely to have an extra gang without a dedicated purpose. They show that there were many gangs that either did not have specific purposes or actually had multiple purposes. When all of the bulletins are read together, they do not establish the kind of consistent practice necessary to support the Organization's position.

Given the foregoing past practice discussion, certain findings are now in order. First, the Board finds that the parties did not intend to require a listing of a specific work purpose on bulletins for extra gang positions. We do not find anything in Rule 2(d) or Rule 10 to require such a listing. Second, we do not find that anything in the parties' Agreement restricts or limits the kind of work that an extra gang can perform. Stated differently, extra gangs can perform any kind of track work within the scope of the Agreement. Finally, the Board finds that the parties did not intend to require that extra gang positions be abolished and re-bulletined simply because the type of work performed may change from one type of work to another. Nothing in Rule 2 or Rule 10 is found to require such a process.

The foregoing discussion now brings the Board to the point where it is appropriate to address the parties' specific questions.

Organization Question No. 1

This question has three aspects. The first deals with the lack of a crew number in Bulletins 166 and 167. Although not all of the example bulletins contained a crew number and although Rule 10 (c) would suggest the crew number is optional, the fact that the Carrier included "Production Crew #1" as one of the corrections to Bulletins 166A and 167A is strong evidence that Carrier believed the original bulletins lacked required information. Thus, this aspect of Question No. 1 must be answered in the affirmative.

The second aspect of the question deals with the sufficiency of the work location information in light of Side Letters 5 and 10. The Board finds that these side letters were intended to provide eligible bidders a greater degree of information about the anticipated work location than might be applicable to extra gang positions not subject to the letters. In addition, the fact that the Carrier supplied more detailed location information on the corrected bulletins is strong evidence that it, too, felt the original information was deficient. Thus, this aspect of Question No. 1 must be answered in the affirmative.

The final aspect of the question deals with the lack of a specific purpose for the gang. For the reasons previously discussed, this aspect of Question No. 1 must be answered in the negative.

Organization Question No. 2

For the reasons previously discussed, we do not find that the Carrier violated the Agreement when it failed to re-bulletin the positions that were transferred over from the mini-crews established by Bulletin Nos. 21 and 22. This question, therefore, must be answered in the negative.

Organization Question No. 3.

The question deals with remedy. Despite the fact that Bulletins 166 and 167 were initially deficient, the Board finds they were expeditiously and appropriately corrected to conform with Agreement requirements. There is no evidence of harm or disadvantage to the successful bidder or to any other potential bidder. Consequently, the Board finds that no additional remedy is warranted by the circumstances.

Carrier Question No. 1

As previously noted, the Board finds that the specific type of production work to be performed by an extra gang does not need to be identified on position bulletins. Accordingly, this question must be answered in the negative.

Carrier Question No. 2

Pursuant to the Board's earlier findings, this question must be answered in the negative. The evidence does not establish that the Agreement restricts the performance of extra gang work to a specific type such as rail, tie, ballast or surfacing work.

AWARD:

The questions posed by the parties are answered as set forth in the Findings of the Board.

Gerald E. Wallin, Chairman
and Neutral Member

D. D. Bartholomay,
Organization Member

M. R. Kluska,
Carrier Member

Dated this 4th day of May, 1999 in St. Paul, Minnesota.