PUBLIC LAW BOARD NO. 6553

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	AWARD NO. 1
And	)	CASE NO. 1
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	

STATEMENT OF CLAIM:

Claim on behalf of W. R. Postlewaite, B.L. Williamson and J. A. Shank requesting that they be paid at the B & B Plumber rate for three days at eight hours each beginning November 30, 2000, in that a contractor replaced a heating system boiler at Alliance, Ohio.

OPINION OF BOARD:

Public Law Board No. 6553, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute herein.

By way of background, this case arises under the July 1, 1986 NW-Wabash Agreement as amended by the May 6, 1999 Memorandum of Agreement. The July 1, 1986 NW-Wabash Agreement covered two properties: the Eastern Seniority Region, which was the territory of the former N & W Railroad, and the Western Seniority Region, the territory of the former Wabash Railroad.

Pursuant to the Surface Transportation Board's July 1998 approval of the acquisition and division of Conrail by CSX Transportation and the Carrier herein, an implementing agreement arbitration held under the New York Dock employe protective conditions placed the former Conrail employees and trackage acquired by Carrier under the July 1, 1986 NW-Wabash Agreement as the new Northern Seniority Region.

The parties subsequently negotiated the May 6, 1999 Memorandum of Agreement, adopting the NYD arbitration decision with certain adjustments. Among other things, some of the former Conrail job titles did not match up exactly with the existing classifications under the NW-Wabash Agreement. Particularly relevant to this case is the fact that Conrail had a number of plumbers in the Bridge and Building Department who performed work on Conrail territory pursuant to the Scope Rule of the Conrail Agreement. However, the NW-Wabash Agreement had no plumber classification. Accordingly, the parties agreed in the May 6, 1999

Memorandum of Agreement to include plumbers within the B & B Sub-department under the July 1, 1986 NW-Wabash Agreement. The provision states as follows:

SECTION 1 – SENIORITY GROUPS, CLASSES AND GRADES

Rule 2 of the 'NW-WAB Agreement' (which, as provided in Article II, Section 1 of Attachment No. 1 will apply to Conrail territories allocated to and operated by NSR) is revised by adding the following to be applicable to the Conrail territories allocated to and operated by NSR:

Rule 2 (h) This section 2(h) applies only to the portion of Conrail to be operated by NSR. The listing of the various classifications is not intended to require the establishment or to prevent the abolishment of positions in any classification. The listing of a given classification is not intended to assign work exclusively to that classification. It is understood that employees on one classification may perform work of another classification and that the indicated primary duties do not restrict the use of employees to perform other work as provided in the NW/WAB BMWE agreement.

The seniority classes and primary duties of each class are as follows:

Bridge and Building Sub-department

* * *

C. Plumber Roster:

1. **Plumber Foreman**
2. **Assistant Foreman**
3. **Plumber**
4. **Plumber Helper**

Assist Plumber

NOTE: Such former Conrail Plumber Roster positions occupied on the *effective date of this agreement will be attrited as the incumbents* leave service as a result of promotion to non-agreement positions, voluntary exercise of seniority to another position, retirement, resignation, dismissal or death. For each of these classifications, once all the positions have been

vacated the classification and roster will be eliminated. Thereafter, to the extent remaining plumbing duties are performed by BMWE represented employees under the NW/WAB agreement, such work will done (sic) by B & B Mechanics or other employees on the B & B rosters.

The May 6, 1999 Memorandum of Agreement did not specifically address the question of whether prior practices on Conrail territory would be carried over nor did it modify the existing NW/Wabash Scope Rule, which is set forth in the July 1, 1986 Agreement as follows:

RULE 1 – SCOPE

These rules govern the rates of pay, hours of service and working conditions of all employees in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employee performing similar work recognized as belonging to and coming under the jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, but do not apply to supervisory forces above the rank of foreman. . . .

Against that backdrop, the instant dispute arose when the Carrier, without prior notice to the Organization, contracted out for the installation of a heating system boiler in the Maintenance of Way building at Alliance, Ohio over a period of three days beginning November 30, 2000. During the installation of the boiler, the Claimants were regularly assigned as plumbers on the Northern Region, which is the former Conrail territory under the operation of this Carrier since June 1, 1999. Two were on vacation and the other was performing regularly assigned duties.

The Organization filed a claim on December 18, 2000, alleging, first, that the work performed by the contractor was Scope covered work accruing to plumbers not only by virtue of the listing of plumbers within the Bridge and Building Sub-Department, but also because they customarily and historically performed the work in question on former Conrail property prior to June 1, 1999. Second, the Organization claimed that Appendix F had been violated. Appendix F states:

APPENDIX "F"

ARTICLE IV – CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the

date of the contracting transaction as is practicable and in ay event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement.

There is no need to address the Organization's first argument because the second has merit. Carrier conceded that it failed to provide the required notice, but argued that the disputed work is not Scope covered. In order for the Board to accept that argument, however, we would have to find that the inclusion of the plumber classification in the May 6, 1999 Memorandum of Agreement was intended to be mere surplusage. Such an interpretation would be contrary to ordinary, well-established rules of contract interpretation. Generally speaking, all words used in an agreement should be given effect. The fact that the parties provided for a new plumber classification in their implementing agreement indicates that they intended plumbers to perform at least some work customarily associated with that job classification.

Our conclusion in that regard is supported by the Note to Rule 2 which provides for the former Conrail plumbers to be attrited as the incumbents leave service. The parties recognized that, once all positions have been vacated, the roster will be eliminated and "thereafter, to the extent remaining plumbing duties are performed by BMWE represented employees," the work will be done by B & B Mechanics. Such language confirms that the parties intended to apportion plumbing work to the new B & B Plumbers, at least until such time as the roster became depleted.

This is not to say that the adoption of a new plumber classification constitutes an exclusive reservation of specific tasks to these employees. Rule 2(h) expressly rejects the notion of such exclusivity. However, the controlling consideration here is that the disputed work is arguably Scope covered, thereby triggering the notice requirements set forth in Appendix F.

We therefore find that Carrier violated Appendix F when it failed to notify the Organization that it intended to contract out the work of installing a heating system boiler. Having reached this finding, we need not consider the Carrier's contention that it did not take control of the heating system boiler until after installation by the vendor nor need we address the argument that the scope of the practice with respect to the allocation of plumbing work on Carrier property is different from the prior practices on Conrail territory. These are exactly the kind of issues the notice requirement was intended to resolve, but they have no bearing on whether the Appendix F notice should have been given in the first instance.

The remaining question is one of remedy. The parties have advanced widely divergent views on the question of whether make whole relief should be awarded to the fully employed Claimants in this case. There are precedent awards in support of both positions, though no prevailing view has emerged on this property.

After careful consideration, the Board concludes that the unique circumstances of the instant matter dictate the exercise of restraint in imposing a monetary remedy. This is the first case under the parties' new implementing agreement and the contours of that agreement were sufficiently ambiguous so as to preclude a finding that the lack of notice was a calculated violation of the contract. The parties are now on notice, however, that the procedures agreed to in such matters must be followed henceforth. Future disregard of Carrier's responsibility to provide proper notification will surely generate decisions such as found in Third Division Awards 35702; 36092 and Special Board of Adjustment No. 1016, Award No. 146.

AWARD

Claim sustained in accordance with the opinion.

Ann S. Kenis

ANN S. KENIS, Neutral Member

Dennis L. Kerby - See Comments Below

Dennis L. Kerby
Carrier Member

Jed Dodd

Jed Dodd
Employe Member

Dated February 18, 2003.

In concurring with the findings as to assessment of the facts, agreement application, and basis of remedy, dissent to the determination that notice per Appendix F was required by the finding that the disputed work is "arguably" Scope covered. Appendix F is only applicable when the work is determined to be within the Scope, as demonstrated through evidence of past performance of same or similar task or by express agreement language. This Scope Rule is general and this record contained no evidence of any prior performance by BMWE. "Plumber," as a classification title, is ambiguous and in the normal course of usage would not have the same meaning in all cases. Clearly, although "Plumber" may have certain implications, use of that term does not evidence any specific tasks to be within the Scope for application of Appendix F.