PUBLIC LAW BOARD NO. 6636

In the Matter of Arbitration:
SPRINGFIELD TERMINAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case Nos. 3
Award No. 2

Public Law Board No. 6636:

S. A. Hurlburt, Jr., Member designated by BMWE

T. W. McNulty, Member designated by Springfield Terminal Railway Company

B. C. Deinhardt, Esq., Neutral Member and Chair appointed by National Mediation Board

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Mechanical Department employes (Carmen) to paint the Back Shop bathroom and the exterior of the Engine House in Waterville, Maine on July 7, 8, and 10, 1998 (System File MW-98-29).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Bucknam shall now be compensated for twenty-three (23) hours' pay at his straight time rate of pay for the work performed by the Carmen painters."

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BACKGROUND

The work involved in this claim was the painting of a Back Shop bathroom and the exterior of the Waterville Engine House. The Carrier determined that the work could be most expeditiously performed by shop craft employees at the Engine House and so on July 13, 16 and 17, 1998, assigned Carmen Painters to paint the walls, under the provision in the Carmen's contract that permitted them to perform "any and all other services associated with the duties outlined above [including 'Paint cars, locomotives, and components including stenciling'] and incidental to a clean, safe and operational facility," so long as the incidental work did not exceed four hours a day. The Claimant, R.A. Bucknam, a Building and Bridges Foreman in Waterville, Maine, filed a claim on August 12, 1998, which was timely and properly presented and handled at all stages of appeal on the property.

The parties not being able to resolve the issues, the case came before this Board. A hearing was held on September 24, 2003, in Springfield Terminal offices in Billerica, Massachusetts.

The Organization argues that Article 5 of the BMWE collective bargaining agreement gives Bridge and Building Department mechanics the work of constructing, repairing, dismantling, inspecting and maintaining bridges, buildings and other structures and that as this work falls under that definition, it is work properly assigned to B&B Mechanics. The Organization further argues that even assuming arguendo that another craft might properly claim the same work, the Carrier is still bound by the collective bargaining agreement with the BMWE. The Organization also claims that this work has "historically and customarily been done by the B&B Department."

The Organization relies heavily on Award 11 rendered by Public Law Board 5606, which held that the Carrier violated the contract in its assignment of work covered by the BMWE employees to pipefitters, arguably as permitted under the Pipefitters' contract. In that case, the Organization challenged the propriety of the assignment under

the other craft's contract and argued successfully that the work was not incidental to the work of the other craft or to a clean, safe, and operational facility.

The Board held in that case that the Machinists Incidental Work Rule [similar in language to that involved here] "may not be held to extend to the performance of work that has by rule or historical past practice been reserved to employees in which agreement language such as that contained in Rule 34 is not present." Further, the Board held that "it would have to be recognized, as the BMWE argues, that construction of an office in a building is not incidental work, or work that could be readily considered as incidental to 'a clean, safe and operational facility.'" Finally, the Board found that the BMWE had presented sufficient evidence to establish "that the work of remodeling and construction of offices on the property has traditionally and historically been work assigned to B&B Mechanics."

According to the Organization, that case is precedent on this property and is determinative of the issues before us.

The Carrier disputes the Organization's claim that the BMWE contract gives the Organization exclusive right to the work in question. The Carrier asserts, and the Organization concedes, that the work was performed in compliance with the Carmen's Incidental Work Rule. In addition, the Carrier states that "this type of work has been done by Mechanical Department employees for at least 15 years at this location." The Carrier provided statements from managers during the on-property handling of the case, attached to its letter to the Organization dated July 16, 2002, that indicate that historically the work has been shared by Carmen and B&B employees.

The Carrier presents a number of prior Awards to support its position. One case that involved this Carrier and the Brotherhood of Locomotive Engineers found that the Carrier could assign work to machinists pursuant to Rule 34 Incidental Work of their Agreement, language identical to the Carmen agreement language involved here, even when the Organization claimed the work under a clause that provided that "Hostlers will

perform any and all service associated with the movement of locomotives within engine territory." Public Law Board 6145, Award No. 35 (2000).

FINDINGS

We find that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and the parties were given due notice of the hearing. Since the Statement of Claim suggested that the Carmen might have third party interest in the claim, that organization was notified of the dispute and given an opportunity to file written submissions and to attend the Board hearing. No response was received and the organization did not appear at the hearing.

It is the Organization's burden to prove by substantial evidence that the Carrier has violated the Agreement. We do not believe that burden has been met.

We do not agree with the Organization's claim that its collective bargaining agreement gives it sole jurisdiction over the work described as the "primary duties" of the B&B Mechanics. That language is merely descriptive and creates certain seniority classes. The Organization relies on Third Division Awards 4800, 7052 and 17093 for the proposition that similarly descriptive language in seniority rules serves to reserve work to those for whom the Agreement is made. In those cases from 1950, 1955 and 1969, respectively, the Carrier assigned work to an intra-union classification (e.g. carpenter rather than steel worker, carpenter rather than mason, carpenter rather than painter) in circumstances where no contractual justification or guidance existed other than the description of the work in the one contract that covered both classifications.

Contrary to the Organization's interpretation, we find that these cases do not control where, as here, there is language in more than one craft's agreement that can be read to assign work to that craft. In Award 4800, the Board specifically observed that had there been an overlapping of duties, mere reference to the seniority provision would not

have sufficed. We also note that the Organization's interpretation would be contrary to that of the Neutral in PLB 6145, Award 35.

That said, neither do we find that the Carrier is free completely to disregard that language and assign work unfettered by any consideration of the agreement with the BMWE. Rather, we find that if the Carrier has a reasonable basis for assigning the work to employees other than those represented by the Organization, then there is no violation of the BMWE agreement. Such a reasonable basis might rest on past practice or on language in other contracts.

Applying these principles to the case before us, we find that the Organization did have some claim to the work of painting the bathroom or the exterior Engine House walls, as it constituted the maintenance of buildings or other structures. By the terms of the BMWE agreement, this claim was not exclusive, however. The Carrier presented evidence of some past practice of other crafts performing the work and of language in the Carmens' agreement that it claimed entitled Carrier to assign this work to the Carmen painters. Further, while we would not necessarily find that painting of a bathroom or exterior walls was a service associated with the painting of locomotives[1] and thus within the Carmen's Incidental Work Rule, the Organization conceded that the work was properly assigned under the Carmen's Incidental Work Rule and so that issue is not before us. Thus the Carrier had a reasonable basis for assigning the work to the Carmen.

The Organization claimed that the work had historically been performed by B&B Mechanics, and that evidence in support of this claim was presented in connection with PLB 5606 Award 11. No such evidence was presented to the Carrier or to the Board in this claim. (In fact, the Claim itself refers to this assignment as evidence on an "ongoing practice" of assigning the work to Carmen.) We do not agree with the Organization's assertion that it is incumbent on the Board to consider evidence that has been presented in other cases. Further, the evidence attached to the Employee's Submission in Award 11

was a compilation of statements from B&B employees that "building of these new offices ...is work that we have done numerous times..." This evidence does not establish that the mechanics' entitlement to the work is exclusive.

Contrary to the assertion of the Organization, we do not find PLB 5606, Award 11 to be controlling. First, in that case there was evidence of a past practice of B&B employees doing the work in question where here there is not. Further, in that case, the Organization disputed the Carrier's argument that the work was associated with Machinist work and incidental to a safe, clean and operational facility and thus properly assigned to Machinist under their Incidental Work Rule. Here that is not the case. Finally, we do not find support for that Board's argument that another craft's Incidental Work Rule must be totally disregarded if there is no corresponding rule in the BMWE contract.

Rather, we find that PLB 6145, Award 35, is more persuasive. In that case, work was claimed by the Brotherhood of Locomotive Engineers under the language of their Hostlers agreement that "Hostlers will perform any and all service associated with the movement of locomotives within engine house territory." Instead, the Carrier assigned the work to the Machinists under their Incidental Work Rule requiring machinists to "perform any and all other services associated with the repair and maintenance of machines and locomotives and incidental to a clean, safe, and operational facility." The Organization argued "that the Incidental Work Rule has no application to hostler services or work, and argues that it does not override its agreement rules with the Carrier." The Board concluded,

> In the opinion of the Board, to hold that the rules cited by the Organization give Hostlers an absolute right to perform all hostling work would require an unreasonable and harsh interpretation of the cited rules as well as a disregard of the rights of the shop craft mechanics and laborers to also perform hostling services or work. The rules cited must be read in concert

[1] We note that the Carrier is incorrect in its assertion that all that is required for work to fall within the Incidental Work Rule is that the work be "incidental to a clean, safe, and operational facility." Under the

> with one another, both as concerns the rights of other employees and as between the separate Hostler rules themselves. In doing so, it seem to the Board that the rules support a finding that it was not intended that a hostler would have a unilateral or unfettered right to all hostler work... Under the circumstances, the Board is not persuaded that employees holding seniority as hostlers have an exclusive right to perform all hostler work...

We concur with the reasoning in that case and find that the B&B mechanics here did not have an exclusive right to the work; that the record in this case does not contain evidence of past practice regarding B&B mechanics performing this work other than that produced by the Carrier showing that the work has historically been shared; that even if the Board were to consider evidence from another case that the mechanics have performed the disputed work in the past, there is no evidence that the claim to the work was exclusive; and that in this case, the Organization did not contest the assignment of the work to the Carmen under their incidental work rule. Under all these circumstances, we find that the Carrier did not violate the contract in assigning work to the Carmen.

CLAIM DENIED.

So ordered.

6/25/04

B. C. Deinhardt
Neutral Member and Chair

Stuart A. Hurlbert Jr 7/29/04
STUART Hurlbert JR
~~D. D. Bartholomay~~
Labor Member
A Dissent to Follow

T. W. McNulty
Carrier Member

contract, the work must also be associated with the painting of locomotives.