PUBLIC LAW BOARD NO. 6867
AWARD NO. 2
CASE NO. 2

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY
(former Chicago & Northwestern Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (AWS Remediation and STS Consultants) to perform Maintenance of Way and Structures Department work (remove battery tub and box structures from the right of way) between Boone and Clinton, Iowa on the Boone Subdivision beginning October 26, 1998 and continuing, instead of assigning the senior furloughed foreman, assistant foreman/truck driver, trackman and two (2) common machine operators from C&NW Seniority District 4, Zones 'A' and 'B' (System File 4WJ-7251T/1179862 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the senior furloughed Seniority District 4, Zone 'A' and 'B' Foreman,

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Assistant Foreman/Truck Driver, Trackman and two (2) Common Machine Operators shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning October 26, 1998 and continuing."

FINDINGS:

Upon the whole record, after hearing, this 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 under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

As Third Party in Interest, the Brotherhood of Railroad Signalmen (BRS) was advised of the pendency of this dispute and chose to file a Submission with the Board.

This case is similar in many respects to that considered by the Board in Case No. 1, with certain exceptions. First, this continuing claim involves the work of removing battery tubs and box structures which commenced at a different location at the end of October, 1998, some two and one-half months after that protested in the prior case. Herein the Organization's claim notes recent drastic reductions in forces, and this claim is filed on behalf of furloughed employees.

Second, additional witness statements were exchanged between the parties on the property. The statement included in the Organization's Response to the BRS Submission in Case No. 1 was part of the underlying

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record in this case and was included with pictures of the equipment used in performing the disputed work at the time the claim was filed. Carrier pointed out what it believed to be the self-serving nature of this as well as the other written statement furnished by the Organization in support of Case No. 1.

Additionally, Carrier enclosed a statement from its Manager of Environment describing what its Signal Tub retirement program consisted of, including the process used for removing and sorting the batteries, removing the shelving and water and having it tested for the presence of lead, disposal of the water (most of which tested non hazardous), as well as the vault puncture to allow for drainage and the dismantling of the vault and backfill of the area. This statement was submitted in support of Carrier's position that the work involved constituted much more than that covered within the Scope of the BMWE Agreement, and was not simple removal of a concrete vault, as alleged.

Third, in its final denial, Carrier asserted that the Signal Department had removed their own foundations in the past, which was similar to the work performed by the contractor, with the exception of its hazardous material component. This statement was made to rebut the two employee statements submitted detailing the fact that they had performed this type of work in the past, and to support Carrier's argument that there was no system-wide practice or exclusivity of performance by the BMWE and that the case was really a jurisdictional dispute between two crafts.

However, these cases are similar in one crucial respect. Carrier initially contended that notice was given under Service Order #6018 for the system-wide contract for the removal and disposal of batteries. The

Organization repeated throughout that it received no notice concerning that service order, nor was one provided on the property. It did infer that if such notice had been given it would have been general in nature and would not meet the Rule 1(b) notice requirement. Again, Carrier failed to furnish any such notice or Service Order in support of its position that the contract was of such a magnitude and nature that it should not be required to piecemeal it or that the disputed work was an integral, inseparable part of the signal battery renewal project.

At the time Carrier commenced the contracting on the Boone Subdivision disputed by this claim, the Organization had filed the claims consolidated in Case No. 1 and had made clear that it had received no contracting notice for Service Order No. 6108. Carrier made no additional attempt to serve notice of the upcoming anticipated contracting or permit the General Chairman the opportunity to discuss whether the battery tub removal work disputed herein could have been performed safely by BMWE employees. This fact is consistent with Carrier's position that no notice was required since the work did not fall within the scope of the Agreement, an argument that the Board rejected in Award No. 1.

While this record may contain some evidence that the scope of the work performed by the contractor exceeded what could arguably be considered covered by the Agreement, evidence missing from Case No. 1, Carrier appears to acknowledge that at least part of the work performed by the contractor had been performed by both the BRS and BMWE employees in the past, and was arguably encompassed within Rule 1(b). Without reference to Service Order #6108, the Board is unable to accept Carrier's contention that such part was inseparable from the rest. That being the case, the Board concludes that the notice provision of Rule 1(b)

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is applicable to the disputed work of battery tub and box structure removal from the right of way. We adopt the rationale set forth in Award No. 1 finding a Scope Rule violation based upon the absence of required notice, as well as our comments concerning the appropriateness of a monetary remedy to make employees whole for this missed work opportunity. Since Claimants are all furloughed employees, Carrier did not pursue a "full employment" defense as it had in Case No. 1.

This claim was filed as a continuing violation under Rule 21. The case is remanded to the parties to confirm both the identity of the proper Claimants and the amount of hours worked by the contractor's employees in the performance of the removal of battery tub and box structures from the right of way and restoring the roadbed between Boone and Clinton, Iowa.

AWARD:

The claim is sustained in accordance with the Findings.

Margo R Newman
Margo R. Newman
Neutral Chairperson

Brant W. Hanquist
Brandt W. Hanquist
Carrier Member

Don D Bartholomay
Don D. Bartholomay
Employee Member

Dated: 3/24/06

Dated: 5-24-06

CARRIER DISSENT TO
PUBLIC LAW BOARD 6867 AWARDS 1 & 2
(Referee Newman)

This case involved the removal of old signal battery tubs along the right of way that had been installed by the Signal Department. The Brotherhood of Maintenance of Way Employes (BMWE) submitted a claim alleging the work of removal and disposal of the battery tubs was their work and therefore the agreement was violated.

In reaching a decision, the Referee described the work in the dispute as "*...the removal, loading and hauling of signal battery tubs and boxes which were part of the old signal system ...*". With this depiction of the work involved there should have been no question that the BMWE claim to the signal battery tub removal work was misplaced. However, in the award, the Referee erroneously found that those "battery tubs" which had housed the batteries for the signal system became a part of the "track structure" once the batteries had been removed. This was apparently premised on one statement from one BMWE individual who said he had been involved in removal of those tubs in the past.

Carrier cannot agree with the Referee's finding that because a BMWE employee may have removed some battery tubs in the past, the work could be considered to be transferred to the BMWE agreement. To apply the Referee's rationale once any part of the signal system becomes inoperable or not functional it becomes "a track structure". For example, switch heaters that the Signal Department installs in the track and maintains would become a track structure if they are removed or retired. Retarders which are also installed in the track by Signal employees would become a track structure at the time of being retired and removed. Similar to the battery tubs along the right of way, crossing gates at a closed crossing or the pole lines replaced with microwave which were along the right of way would become track structures. Or, a signal house would become a track structure, and so on. Obviously, the Referee's rationale that if ever a Maintenance of Way employee assisted a Signal employee the work could be considered to be covered under the BMWE Scope Rule because of it being along the right of way is not a correct interpretation.

The issue was clearly a jurisdictional dispute. The Brotherhood of Railway Signalmen (BRS) weighed in on the case with a submission and reinforced the work was under the Scope of their collective bargaining agreement. Since the tubs were signal appurtenances there was no Notice of Subcontracting required to be served to the BMWE General Chairman. The fact that the battery tubs were no longer a working part of the signal system or because they were on the right of way did not convey the work to the BMWE employees. As pointed out above there are numerous signal appliances (crossing gates, retarders, signal houses, signal masts, etc.) along the right of way and in the track. At no point are they ever conveyed to the Track Subdepartment or become a "track structure" as the Referee found the "battery tubs" to be on page 10 of the Award.

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One thing the Carrier does agree with the Referee is that the Carrier could have done a better job in responding to the claim. However, the claim of the BMWE was still a raid by the BMWE on arguably BRS work. This Award is akin to creating an Intercraft work jurisdiction rule, which the BMWE has consistently fought. As stated, the Board is not empowered to transfer work from one craft to another. It would take the three principal parties to transfer the work (the Carrier, the BMWE and the BRS). For these reasons the decision in the award is flawed. While the Carrier will pay the Claimants the requested remedy the award to dispose of the claim, we do not consider them to establish precedent nor to be an accurate interpretation of the agreement. We therefore dissent.

For the Carrier,

B. W. Hanquist

B. W. Hanquist
Asst. Director Labor Relations

ORGANIZATION MEMBER'S RESPONSE TO

CARRIER MEMBER'S DISSENT TO

AWARDS 1 AND 2 OF PUBLIC LAW BOARD NO. 6867
(Referee M. Newman)

This dissent in nothing more than a regurgitation of its position presented during oral arguments. Those same arguments were rejected in the awards and the dissent does not distract therefrom. Therefore, the awards are precedent on this issue and will be used as same by the Organization.

Respectfully submitted,

D. D. Bartholomay
Employe Member
PLB No. 6867