AWARD NO. 5
Case No. 5

Organization File No. BG A090610
Carrier File No.

PUBLIC LAW BOARD NO. 7460

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
)
TO)
)
DISPUTE) PADUCAH & LOUISVILLE RAILWAY

STATEMENT OF CLAIM:

1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (operate a chase tamper behind a production tamper) between Mile Posts 72 and 84 on April 30, May 1, 2 and 3, 2009.

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 said work or enter good-faith discussions on this matter as required by Appendix 8.

3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant B. Geer shall now "... be compensated sixteen (16) hours at his respective straight time of $21.39 and twenty four (24) hours overtime at his respective overtime rate of $32.09 for machine operator for all hours worked by the outside contractor for a total of $1112.40."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated December 16, 2010, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

It is undisputed that between Thursday, April 30 and Saturday, May 2, 2009 the Carrier utilized a contractor to operate a chase tamper to perform track tamping work between Mile Posts 72 and 84. It is also undisputed that the work performed is within the scope of duties belonging to the Maintenance of Way craft, and that the Carrier owns the equipment to perform this work. Claimant holds seniority in the Track Subdepartment and was regularly assigned as a machine operator on the Carrier's North end at the time of this claim. His assigned work days were Monday through Friday. According to the Organization, the contractor performed this work for ten hours on each of the three dates of claim.

The Organization argues that the work performed by the contractor is reserved to members of the craft and may be contracted out only under specific circumstances set forth in Appendix 8 of the Agreement. It submits that the criteria for contracting out the work were not satisfied in this instance. Further, the Organization avers that the Carrier did not serve notice of its intent to contract out this work or meet with the General Chairman or his representative to discuss the transaction as required by Appendix 8.

The three conditions that must exist to permit contracting out covered work under Appendix 8 are (1) special skills necessary to perform the work are not possessed by the employees, (2) special equipment necessary to perform the work is not owned by or available to the Carrier, or (3) time requirements exist which present undertakings not contemplated by the Agreement that are beyond the capacity of the Maintenance of Way employees.

The Carrier argues that Appendix 10 of the Agreement renders Appendix 8 inapplicable as long as the Carrier has active employees assigned to at least thirty-six regular full time positions

covered by the Agreement. It is undisputed that the Carrier had at least thirty-six active full time Maintenance of Way employees at the time of the events giving rise to the claim.

The real dispute between the parties in this case is whether Appendix 10 was in effect at the time the work was performed by the contractor. Resolution of that dispute depends upon the interpretation of the effective dates of the relevant Agreements.

In the parties' August 22, 2005 Agreement, Appendix 10 concluded with the following provision:

> (i) This rule shall be applicable between the effective date of this agreement and December 31, 2008. As of January 1, 2009, it will no longer be in effect and the provisions of Appendix 8 and Appendix 9 shall apply.

The General Chairman served a Section 6 Notice upon the Carrier on November 14, 2008 to amend the existing collective bargaining agreement. Bargaining began thereafter and the parties reached a tentative agreement on January 21, 2009. When the tentative agreement was put to the membership for ratification, however, it failed. The parties then resumed bargaining and the same tentative agreement was submitted to the membership for ratification a second time, but not until almost a year later. On December 22, 2009 the General Chairman advised the Carrier that the Agreement had been ratified. It was then executed by the appropriate Carrier and Organization representatives. The signature page of that Agreement contains the following provision:

EFFECT OF AGREEMENT

> (a) This agreement shall become effective on January 1, 2009 and shall remain in effect until and unless changed under the provisions of the Railway Labor Act, as amended, or by mutual consent of parties signatory hereto.

Appendix 8 of the Agreement was unchanged. Appendix 10 was also unchanged, except for the final paragraph, which now reads:

(i) This rule shall be applicable between the effective date of this agreement and December 31, 2013. As of January 1, 2014, it will no longer be in effect and the provisions of Appendix 8 and Appendix 9 shall apply.

The Organization argues that, at the time of the contracting out, Appendix 10 had expired and Appendix 8 was applicable regardless of the number of employees working in the craft. The Carrier responds that paragraph (i) of Appendix 10 gave it retroactive applicability because it tied the effectiveness of the rule to the effective date of the Agreement, which was January 1, 2009.

While it is true that Appendix 10 had expired at the time the work in question was performed, the parties agreed, when they wrote the new language in paragraph (i) that the application of the rule would be retroactive to the date the new Agreement became effective. When the tentative agreement was first put out for ratification, December 31, 2008 had already passed, but the parties obviously agreed that the interim period would be covered by the new Appendix 10. What they did not anticipate, though, was that it would take nearly a year for the Agreement to be finalized. They did not, however, change the applicability of Appendix 10, which they certainly could have done if that was their intent.

The Carrier notes that the retroactivity of the Agreement to January 1, 2009 made a number of provisions retroactive, notably the wage package. It points out, though, that the parties agreed that the increase in health care premiums would not be retroactive and covered that intent in a memorandum, which it says could have also been done had the parties intended that Appendix 10 also not have retroactive effect.

The Organization effectively is asking this Board to change the language of paragraph (i) in such a way that Appendix 10 would not become applicable until the ratification of the Agreement.

The Agreement establishing this Board specifically states, "The Board shall not have the authority to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions." Thus, what would be needed to have us sustain the claim is beyond our authority.

We conclude, therefore, that the restrictions upon contracting out bargaining unit work under Appendix 8 were not applicable in this case. As that was the only basis for the Organization's claim, we must find that the Agreement was not violated.

AWARD: Claim denied.

Barry E. Simon
Chairman and Neutral Member

Timothy W. Kreke
Employee Member

Gaylon I. James
Carrier Member

Dated: July 24, 2011
Arlington Heights, Illinois