PUBLIC LAW BOARD NO. 2206

AWARD NO. 41

CASE NO. 18

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when having Burro Crane B.N. 975060 repaired by other than Roadway Equipment Repair Shop Sub-Departments (Traveling Maintainers, Maintainer Mechanics, and Welders), without benefits of notice, consultation or mutual agreement with General Chairman Funk. (System File P-P-360C)

(2) That Claimants C.L. Lassiter and J.W. McCrary now be allowed equal proportionate shares at their straight time rates of pay for the total number of man hours expended by Shop Craft employes in performing the work of repairing the BN 975060 referred to in Part (1) of this claim.

OPINION OF BOARD:

Claimants were regularly assigned employes in Carrier's Roadway Equipment Repair Shop at Vancouver, Washington, a point on the former Spokane, Portland and Seattle Railway Company (SP&S) territory, represented by the Brotherhood of Maintenance of Way Employes (BMWE). Each of the Claimants held seniority in classifications of Mechanic (Traveling Maintainer), Welder and Helper. The referenced job titles are listed in Rule 55, Classification of Work, with particular emphasis in this case upon Rule 55-M, reading as follows:

M. Traveling Maintainer and Maintainer Mechanic

An employe skilled in and assigned to building (if not purchased) repairing, dismantling or adjusting roadway machine equipment and machinery, and on former SP&S certain repairs to automotive equipment. (Emphasis added.)

On or about September 19, 1977, one of Carrier's large work cranes, (Burro Crane No. 975060) was severely damaged when the boom struck some overhead wires and crashed onto the cab of the crane. The site of the damage was Mile Post 279.9, on former SP&S territory, between Kahlotus and Sperry, Washington, a point approximately 270 miles northeast of Vancouver and 117 miles south of Spokane. Carrier's local officers elected to have the damaged crane transported to Hillyard Work Equipment Shop, near Spokane, for repairs rather than to the Vancouver Repair Shop. At Hillyard, the damaged boom and cab were repaired by shopcraft employes using welding and metal cutting equipment. The employes who made these repairs are members of the Boilermakers craft represented by the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (IBB). Apparently it is not contested that the shopcraft employes at Hillyard, including the Boilermakers, worked on the crane from September 19, 1977 until October 14, 1977 when it was returned to service. Thereafter, the BMWE filed the present claim in a letter of October 26, 1977, reading in pertinent part as follows:

> Burlington Northern,Inc.,hereinafter referred to as Company, violated the Effective Agreement on or about September 19, 1977 when it failed to have Burro Crane B.N. 975060 repaired at equipment repair shop in Vancouver, Washington and instead proceeded to effect repairs at Hilliard, Washington using shop craft employes for this service.
>
> Rules including but not limited to 1A,1B,1C,2A,5H,55M, Note to Rule 55, and Rule 69C are by referral made part of this letter.

Prior to merger, work of repairing equipment which failed in service or needed repairs while working on S.P. & S. track was done by equipment maintainers at Vancouver equipment repair shop. This work is retained for these employes in accordance with Rules 1C and 69C and contracting of this work is prohibited except as provided under Note to Rule 55.

Burro Crane B.N. 975060 was damaged while working on former S.P. & S. territory between Pasco and Spokane on the B.N. Seventeenth Sub-Division and therefore should have been repaired by Maintenance of Way employes at Vancouver.

Due to this violation we request that Claimants C. L. Lassiter and J. W. McCrary be allowed in addition to any other compensation they may have received, the amount paid to shop craft employes while working on this piece of equipment from September 19th to October 14, 1977 or when work is completed.

The claim was denied at all levels of handling, up to and including Carrier's Chief Appeals Officer, who made final denial in a letter dated December 8, 1978, reading in pertinent part as follows:

Mr. F. H. Funk, Vice President
Brotherhood of Maintenance of
Way Employees
715 Northwestern Federal Bldg.
Minneapolis, Minnesota 55403

December 8, 1978

File MW-84(t12) 11/21/77

Dear Mr. Funk:

This refers to conference held October 12, 1978 and your letter dated May 16, 1978, file F-P-360C, regarding claim on behalf of C. L. Lassiter and J. W. McCrary.

You have furnished no proof or evidence to support your contention that Claimant Lassiter is a certified welder. Upon checking into your statement, Mr. Roger Creswell, former Shop Foreman at Vancouver, contacted Claimant Lassiter in this regard and was informed by him that he had taken a welding course in a vocational school, but had never taken a certification test or been certified as a welder.

Nor is Claimant McCrary a certified welder qualified to perform the work on which claim is based. Mr. McCrary has only been assigned a welder for a short time from January 31, 1977 until displaced on May 9, 1977. This short period of time hardly makes him a qualified welder on all types of welding.

In your letter dated May 16, 1978 you make reference to repairs made to a boom on Burro Crane X-37 in 1950. Welders working on boom of X-37 at that time are unknown and as to supervision at the shop at that time is also unknown.

In any event, the material used in the construction of booms is different now then in the past. As to struts and cross members on a boom, true struts are replaced with new ones made of a special steel and are not of common angle iron as used in the past, but have to be welded in this instance to boom base with proper welding rod so no improper stress or oxidation occurs in this section. Proper amount of welding application and length of bead is critical as to not causing future cracks or breaking of material.

This machine was damaged at MP 279.9 east of Pasco on the 17th Subdivision, which is 116.9 miles from Hillyard Shop whereas Vancouver Shop, even if it had been equipped and had the skills required to make the repairs, was 270.9 miles away. There was no necessity to ship this machine to Vancouver when it could be repaired at Hillyard where the equipment and the skills are.

As previously stated, claim you have appealed completely disregards the clear provisions of the time limit on claims rule as it lacks the essential specifics required to constitute a valid claim. Other then stating that an alleged violation occurred "on or about September 19, 1977," you have not identified who performed the work, on what dates and actual hours allegedly consumed in the performance of the work. The burden of proof rests on you as the petitioner to furnish the required supporting data for each and every date and any effort on your part to advance the claim on a continuing basis is categorically rejected. There is no obligation on the Carrier to develop unknown circumstances on or about September 19, 1977 or whether the circumstances on any subsequent unnamed dates were the same. Third Division Award No. 12848 is but one of many awards that have held such defects fatal:

> "Since this claim fails to set forth the nature and extent of the performance of the disputed work or when or by whom it was performed, the claim is lacking in the specificity required by Section 3, First (i) of the Railway Labor Act..."

In view of the foregoing, declination of your appeal is respectfully reaffirmed.

Sincerely,

L. K. Hall
Asst. to Vice President

EJK/dfd,6

Thereafter. the claim was appealed to this Board for final and binding disposition.

It should be noted that the Boilermakers organization has a demonstrated third-party interest in the present case. In handling on the property, the IBB responded on December 17, 1978 to notification from Carrier of the BMWE claim, as follows:

This refers to your letter of December 5, 1978 which serves to advise of a claim appealed to your office by the Maintenance of Way Organization i connection with certain repairs to Burro Crane B.N. 975060, performed by boilermakers at Hillyard Shop, Spokane, Washington.

First, we must point out that Hillyard Shop is formerly a G.N. facility (not SP & S) and that boilermakers therein have historically performed the work as described in your above referred to letter. We direct your attention to Rule 57 in the Great Northern Agreement Schedule which grants to the boilermakers this contractual right and reads as follows i pertinent part:

> Rule 57.
> Boilermakers' work shall consist of .....building, repairing, removing and applying steel cabs and running boards.....the laying out and fitting up any sheet-iron or sheet steel work made of 16 guage or heavier.... .....boilermakers' work in connection with building and repairing of steam shovels, derricks,booms, housings, circles and coal buggies, I-beams, channel iron, angle iron, and T-iron work.....
>
> (underscoring added)

The foregoing rule is identical in language to the present rule (Rule 57) of the controlling agreement. Since boilermakers are regularly assigned and do daily perform the work in question at Hillyard, and doing so in accordance with contract, custom and tradition of long standing, we consider the contentions and claim of the Maintenance of Way Organizatio as an attempt to capture work properly performed by the Boilermaker Craf

Without receding from our position in any way, we are unaware of any instance when Maintenance of Way employees have performed this work on former S.P. & S. property and we are advised that Blacksmiths are assigned to this work in Vancouver.

We trust that you will protect the interests of this Organization in this matter.

Yours truly,

Brian T. Johnson

Brian T. Johnson
General Chairman

Prior to hearing of this case by our Board, the Chairman provided the IBB with notice and opportunity to be heard. The IBB appeared at the Board hearing and presented a written submission which has been duly considered, together with the submissions, evidence and arguments advanced by the Carrier and BMWE.

In addition to Rule 55-M of the present BN/BMWE Agreement supra, other contract provisions cited and/or relied upon by the three parties herein include Article I and Rules 40 and 41 of the former SP&S/BMWE Agreement; Rules 1(c) and 69(c) and Note to Rule 55 in the present BN/BMWE Agreement; and Rule 57 from the former Great Northern (GN)/IBB Agreement, which is identical with the present Rule 57 of the BN/IBB Agreement. The referenced rules read as follows:

> "Article 1 - SCOPE
>
> These rules govern the hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, including derrick and steamshovel operators, pile driver operators, and water service foremen; not including supervisory forces above the rank of track inspector, and not including the signal, telegraph and telephone maintenance departments, and clerks."

"RULE 40.

All work on Operating property, as classified in this Agreement, shall be performed by employes covered by this Agreement, unless by mutual agreement between the General Chairman and designated Representative of Management, it is agreed that certain jobs may be contracted to outside parties account inability of the railroad due to lack of equipment, qualified forces or other reasons to perform such work with its own forces. It is recognized that where train service is made inoperative due to conditions such as, but not limited to, washouts or fires, individuals or contractors may be employed pending discussion with respect to such mutual agreement."

"RULE 41. (Revised 12-4-59)

Roadway Equipment Repair and Operation Department Forces will be composed of the following classes of employees as the nature of the work requires:

First--Mechanic. An employee skilled in and assigned to building, repairing, dismantling or adjusting roadway machine equipment and machinery, automotive equipment, and responsible for such work.

* * *

"RULE 1. SCOPE

* * *

C. This Agreement does not apply to employes in the Signal, Telegraph and Telephone Maintenance Department, nor to clerks. The sole purpose of including employes and sub-departments listed herein is to preserve pre-existing rights accruing to employes covered by agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S railway companies prior to date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging companies which were in effect prior to the date of merger."

"RULE 69. EFFECTIVE DATE AND CHANGES

* * *

C. It is the intent of this Agreement to preserve pre-existing rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Companies which were in effect prior to the date of merger."

* * *

"NOTE to Rule 55: The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department.

Employes included within the Scope of this Agreement - in the Maintenance of Way and Structures Department, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes - perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employes of named Repair Shops.

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days

prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith."

* * *

BOILERMAKERS' SPECIAL RULES

Rule 57. CLASSIFICATION OF WORK

Boilermakers' work shall consist of laying out, cutting apart, building or repairing boilers, car tanks and drums, inspecting, patching, riveting, chipping, caulking, flanging and all flue work; building, repairing, removing and applying steel cabs and running boards, metal headlight boards, wind sheets, engine tender tanks, steel tender frames (except such parts of steel tender frames as are necessary to be brought to car shops for repairs), pressed steel tender truck frames, building and repairing metal pilots, the removing and applying of metal pilots to metal pilot beams; the laying out and fitting up any sheet-iron or sheet-steel work made of 16 gauge or heavier, including fronts and doors, grates and grate rigging, ash pans, front end netting and diaphragm work, removing and applying all stay bolts, radials, flexible caps, sleeves, crown bolts, stay rods, and braces in boilers, tanks and drums; applying and removing arch tubes, operating punches and shears for shaping and forming, pneumatic stay-bolt breakers, air rams and hammers; bull, jam and yoke riveters; boilermakers' work in connection with the building and repairing of steam shovels, derricks, booms, housing, circles, and coal buggies, I-beam, channel iron, angle iron, and T-iron work, all drilling, cutting and tapping and operating rolls in connection with boilermakers' work; oxyacetylene, thermit and electric welding on work generally recognized as boilermakers' work, and all other work generally recognized as boilermakers' work.

* * *

The underlying basis for this claim is the BMWE contention that the repair work on the Burro Crane damaged on former SP&S territory would have gone to the BMWE employes at the Vancouver Repair Shop under the former SP&S/BMWE Agreement and, therefore, those employes were entitled to the work under Rules 1(c) and 69(c) of the present Agreement BN/BMWE Agreement. BMWE alleges additionally and alternatively that Carrier also failed to comply with the consultation requirements of Rule 40 of the former SP&S/BMWE Agreement and Note to Rule 55 of the BN/BMWE Agreement. Rule 55-M of the BN/BMWE Agreement also is relevant because it contains the following express reference: "...on former SP&S certain repairs to automotive equipment". Therefore, the bottom line allegation of the BMWE is that Carrier violated Rules 1(c), 55 and 69(c) of the present BN/BMWE Agreement, incorporating by reference Rules 1, 40 and 41 of the former SP&S/BMWE Agreement.

Carrier answers that the BMWE had no "exclusive" right under the former SP&S/BMWE Agreement to perform the work of repairing machinery like the Burro Crane and, therefore, cannot claim such work under the present "general" BN/BMWE Scope Rule. Arguendo, Carrier asserts that even if there was a violation in the facts of the present case damages should not be awarded since Claimants were "fully employed and under pay" during the time the shop-craft employes did the repair work on the train. The IBB avers that since the work was performed at Hillyard, a former GN point, it belongs "exclusively" to their craft pursuant to the express provisions of Rule 57 of both the former GN/Shopcraft and BN/Shopcraft Agreements.

We have decided claims somewhat similar to the instant dispute in our earlier Awards No. 8 and 20, construing and applying Rules 1(c) and 69(c), and Awards No. 34 and 35 interpreting Rule 55 and the Note to Rule 55.

The same general principles which required dismissal of the claims in Awards No. 8, 20, 34 and 35 mandate a sustaining Award in the factual context of the present case.

As we held in Awards No. 8 and 20, Rules 1(c) and 69(c) have the intent and effect of preserving pre-existing Scope Rule rights of Maintenance of Way Employes on the merged BN, as they existed on the respective pre-merged carriers. In other words, such rights are "frozen" in time as they existed on the effective date of May 1, 1971. We frequently have pointed out that the rights thus preserved by Rules 1(c) and 69(c) on the merged Carrier are coextensive with, and consequently neither lesser nor greater than, the work reservation rights enjoyed by the employes under their respective previous agreements between BMWE and the former CB&Q, NP, GN and SP&S railway companies. Thus, the proper focus of inquiry in the present case is to determine whether Claimants would have been entitled under the former SP&S/BMWE Agreement to perform the work in contention herein. If so, then that "pre-existing right" was carried forward and preserved by Rules 1(c) and 69(c) which would be violated by Carrier's unilateral assignment of the work to the Boilermakers at Hillyard. If the work would not have "belonged" to the Claimants under the former SP&S/BMWE Agreement then the claimed violation of Rules 1(c) and 69(c) of the present BN/BMWE Agreement would be without foundation.

Much of the controversy in the earlier scope rule cases we have decided has resolved around the "general" versus "specific" dichotomy. Thus, in Awards No. 8 and 20 we pointed out that where the "pre-existing right" arose under a general scope rule which was silent or ambiguous in its express language regarding work reservation, then the organization alleging a violation of present Rules 1(c) and 69(c) has to show reservation

of the work on the former property by custom, practice and tradition of performance to the practical exclusion of others. The corollary applies equally and consistently, however, i.e., if the Scope and/or Classification Rules on the former territory were "specific" in the express reservation of the disputed work for Maintenance of Way Employes, then the Organization does not have the evidentiary burden of proving "exclusivity" and does not have to prove reservation by custom, practice and tradition in order to make out a violation of present Rules 1(c) and 69(c).

Under the foregoing governing principles of interpretation, initially we must inquire whether Article I or Rules 40 and 41 on the former SP&S/BMWE Agreement expressly and specifically reserved to Maintenance of Way Employes the work of repairing machine equipment like the damaged crane. A long line of Third Division decisions has held that Rules 40 and 41 of the SP&S/BMWE Agreement reserved expressly for Maintenance of Way Mechanics the repair of damaged automotive equipment and roadway machine equipment on the former SP&S. Awards 3-19684; 3-19898; 3-19909; 3-19924; 3-20042; 3-20338; 3-20412 and 3-20633. Several of the cited cases are virtually on all fours with the central issue in this case and we find no basis to deviate from the line of unbroken precedent. We have no hesitancy in following those decisions and holding that had this claim arisen under the former SP&S/BMWE Agreement, the BMWE Mechanics would have been entitled to perform the repair work on the Burro Crane damaged on SP&S property. Since the Claimants would have been entitled to the disputed work "but for" the merger, this pre-existing right to the work is carried forward and preserved under Rules 1(c) and 69(c) of the BN/BMWE Agreement. Additional impetus to support the claim is provided by the express language of Rule 55-M, although we stop short of finding

that Rule 55-M standing alone constitutes a reservation of the disputed work to BMWE.

Based upon the foregoing analysis, we are compelled to conclude that Carrier did violate Rules 1(c) and 69(c) of the BN/BMWE Agreement (and implicitly Rules 40 and 41 of the SP&S/BMWE Agreement) by assigning the repair work on the Burro Crane No. 975060 to Boilermakers at Hillyard rather than to the BMWE employes at Vancouver Repair Shop. In so holding, we do not derogate the language of Rule 57 of the BN/Shopcraft Agreements. However, we deem it critical to the outcome of this case to note that Carrier transported the crane from the point of damage on the former SP&S territory to a repair facility on former GN territory to be repaired by Boilermakers, rather than taking it to the former SP&S repair facility at Vancouver where Claimants were employed. In the freeze-frame view and retrospective analysis mandated by the "pre-existing right" clauses in Rules 1(c) and 69(c), that action was the functional equivalent of taking the work off of the property (SP&S) and giving to foreign contract employes (GN) without prior discussion with the BMWE General Chairman. If, as Carrier alleges, skills and facilities at Vancouver were insufficient to handle the job then such were matters for discussion with the Organization under Rules 40 of the SP&S/BMWE Agreement and the Note to Rule 55 of the BN/BMWE Agreement, and not for unilateral transfer of the work by Carrier.

Based upon all of the foregoing, we shall sustain Part (1) of the claim. With respect to Part (2), Carrier's plea that no damages should lie for the proven violation is rejected for reasons developed in Awards 3-19898; 3-20042; 3-21412; 3-20633; 3-21340 and 3-21808. However, the Organization as moving party is under the obligation to provide for the

record sufficient evidence upon which this Board may calculate and award compensatory damages if violations are proven. The present record is devoid of any probative evidence concerning the number of man-hours spent during the period September 19 through October 14, 1977 by the Boilermakers performing the welding and other repair work to the boom and cab of the damaged crane. The lack of specific evidence on this critical point was raised by Carrier in handling on the property but never adequately responded to by the Organization. This evidentiary gap redounds to the detriment of the Organization which has the burden of proving every material aspect of its claim, including type and amount of damages. In the face of the proven violation of Rules 1(c) and 69(c) it would be a travesty to award no damages at all. But in the absence of specific proof regarding the amount of lost work opportunity, we shall award only nominal damages of one (1) hour of pay at the straight-time rate for each Claimant for each regular working day during the period September 19 through October 14, 1977.

AWARD

1. Part (1) of the claim is sustained.

2. Part (2) of the claim is sustained only to the extent indicated in the Opinion.

Walter Wodynsky
Carrier Member

J. H. Funk
Employe Member

Dana E. Eischen, Chairman

Date: 10/7/81