Case No. 414
Award No. 185

PUBLIC LAW BOARD NO. 2960

PARTIES Brotherhood of Maintenance of Way Employees

TO and

DISPUTE Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim filed in behalf of Messrs. P. T. Fabela, G. S. Frye, J. A. Pekelsma, R. R. Robinson, and M. G. Soto for an equal and proportionate share of 224 man hours rendered by contractor forces due to the carrier assigning the demolition of the Noble Street Control Tower to the U.S. Dismantlement Corporation on the dates of March 4, 5, 6, and 7, 1991.

FINDINGS: This Board, upon the whole record and all of the evidence, finds that the Employees and Carrier involved in this dispute are respectively Employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

OPINION OF THE BOARD: On April 24, 1991, the Vice Chairman filed a claim protesting the lack of advance notice of the use of an outside contractor to demolish a building known as the "Noble Street Tower." The claim was denied on the basis (1) that the building was not in use and not involved in the railroad operation and thereby being outside the scope of the agreement, (2) that dismantling was beyond the legal and safety ability of the Carrier, (3) that the contractor was responsible for the disposal of the material, (4) that a permit was required that could only be obtained by the contractor, (5) that asbestos was present, and (6) that the Claimants were employed at the site. In its rejection of the denial, the Organization noted that the Carrier had presented no documentation for its assertions concerning safety, permits, etc. In its final declination (after the claims conference) the only reason cited in denying the claim was that the building was not used in the Carrier's operation and that the Scope Rule only applied to structures involved in the Carrier's operation. Similarly, the Carrier's defense in its submission and before the Board was that the building was not used in the operation of the Carrier's service and therefore exempt form Rule 1(b).

In view of the limited scope of the Carrier's submission, all other defenses raised in its initial declination are deemed waived. Moreover, we note no documentation of its various assertions was provided.

Accordingly, the dispute before the Board is very narrow and is whether the Scope Rule applies to these particular circumstances, namely a building that has fallen into disuse. If the Scope Rule doesn't cover this building, no notice was necessary. If it does, notice was necessary and the agreement was violated. The critical portions of Rule 1 read as follows:

> "(b) Employees included within the scope of this agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures, and other facilities used in the operation of the company in the performance of common carrier service on the operating property."

It is noted that, based on the record, the Board is left to conclude that the Carrier still owned the building. There is no ownership question as in cases where the Carrier sells unused or abandoned property on a "where is, as is" basis. The Carrier's principal point is that the building wasn't in active use in the operation of common service. The Board believes that the Carrier's interpretation is unduly technical and robs Rule 1(b) of its essential meaning. If the Carrier was right, then very little if any "dismantling" work would be covered by the Scope Rule. The Board observes that most dismantling work probably is as a result of the Carrier not using certain tracks or structures. If the Carrier's slight of hand were allowed to prevail, the Scope Rule as it relates to dismantling would be nullified. This is not an unreasonable interpretation of the rule. The reference to the tracks and structures being used in "the performance of common service on the operating property" is more reasonably interpreted to provide an exception to remote Carrier facilities (offices, etc.) that aren't directly on the property or used in the operation of trains. In this case there is no doubt that the building was on the operating property and at one time was "used" in the operation of common carrier service.

It is noted that the Carrier relied heavily on Third Division Award 28007 and, to a lesser extent, Awards 19253 and 19640. However, these awards are distinguished. First of all, notice was served in Award 28007. Second, the precise language of the Scope Rule in that case is not apparent. Here the Scope Rule is specific as to dismantling. It may not have been specific in Award No. 28007. Award 19253 is distinguished because the facility was leased. Award 19640 involved the construction of a pedestrian overpass which is clearly not part of the operation.

In view of the foregoing, the claim is sustained.

AWARD

The claim is sustained.

Gil Vernon, Chairman and
Neutral Member

D. D. Bartholomay
Union Member

J. M. Harvieux
Carrier Member

Dated: October 31 1994.