PUBLIC LAW BOARD NO. 3460

Award No. 63
Case No. 63

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railroad Company

STATEMENT OF CLAIM: "1. The Agreement was violated when the Carrier assigned outside forces to unload and distribute ties from gondola cars at locations between Stanley and Temple, North Dakota; Surrey and Karlsrude, North Dakota; Devils Lake and Leeds, North Dakota; and between Staples and New York Mills, Minnesota on various dates beginning December 11, 1981 through April 22, 1982 (System files T-D-192C, T-D-196C, T-D-205C and T-M-404C).

2. The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work as stipulated in the Note to Rule 55.

3. As a consequence of the aforesaid violations, Group 2 Machine Operator V. H. Selfors shall be allowed pay at the applicable rate for all straight time and overtime work performed by the contractor on December 11, 12, 14, 15, 16, 22, and 23, 1081; January 5, 6, 22, 25, 26, 27, 28, 29; February 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 16, 17, 18, 19, 22, 23, 24, 25 and 26, 1982. Group 2 Machine Operator R. J. Schneider shall be allowed eight (8) hours of pay at the Group 2 machine operator's straight time rate plus any applicable overtime pay for work performed by the contractor on March 29, 30, 31 and April 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, and 22, 1982."

FINDINGS

Upon the whole record, after hearing, the 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.

The Claimants herein, Group 2 Machine Operators, were regularly assigned in the Carrier's roadway equipment subdepartment working at Minot, North Dakota and Staples, Minnesota at the time of the incidents involved in this dispute. On the dates specified in the claim in December 1981 and January through April 1982, Carrier contracted out the work of unloading ties from gondola cars at various locations in North Dakota and Minnesota to the Herzog Manufacturing Company of St. Joseph, Missouri. All the points involved in Minnesota and North Dakota were in Carrier's Twin Cities region. The ties were removed from the gondola cars by a special machine known as a "cartopper." Carrier did not own such a machine and a machine was available from the contractor only with its own operator. At various points during the unloading of the the ties, Carrier's own maintenance of way forces were used to assist in the unloading process.

The record indicates that prior to the events herein, over a period of many decades, ties had been shipped and unloaded on the right of way after arriving in either cattle cars or flat cars. When they arrived at the work locations they were unloaded by

hand. This function was performed by track forces. In 1977, Carrier attempted to move ties and gondola cars and there were many problems with the track forces in attempting to unload them by hand. In fact, on February 25, 1977, the Vice General Chairman of the Organization requested that the maintenance of way employees would not be asked to unload ties under the conditions which prevailed when they were shipped in gondola cars. Carrier responded at that time in 1977 advising the Organization as follows:

> "Please be advised that it is not the policy of the Minnesota Division to unload ties from gondola cars. If we do receive any ties loaded in gondola cars, we will make arrangements to unload in some other manner."

The record indicates that the alternative methods Carrier employed were using its own forces with either locomotive cranes or other machines and also using contractors, such as Herzog, which was equipped for the particular task. Apparently, Carrier determined that it was much more efficient to unload ties from gondola cars by which much larger quantities could be shipped, than in any other manner.

Petitioner argues in essence that the Carrier violated the Scope Rule with Note to Rule 55 as well as Appendix F dealing with the

Mediation Agreement of October 7, 1959 in its actions in contracting out the work of removing ties to the Herzog Company. Petitioner maintains that the work of removing ties from various railroad cars has been historically and exclusively the work of its members and, further, that Carrier was obligated under Rule 55 and its Note, in particular, to notify the Organization of its intention to contract out such work. If the work, indeed, was a change in method under the Mediation Agreement, again Carrier was obligated, as the Organization views it, to notify the Petitioner of its intention to make a material change in its operations. In either event the Organization insists that Carrier violated the Agreement, in particular the entire Scope Rule, by contracting out work which was customarily performed by employees in the track department.

Carrier's argument may be summarized to indicate that the work of unloading ties from gondola cars has not been historically, and by systemwide past practice, the exclusive work of employees covered by the Maintenance of Way Agreement and, in particular, not by Machine Operators. The work in question is not specified in the Scope Rule of the Agreement and since exclusivity as well in terms of practice has not been established, the claim has no merit as Carrier views it. Carrier insists that there was no violation of the Note to Rule 55 in its actions. Carrier relies,

in part, on Award No. 8 of Public Law Board 2206 which specified in pertinent part:

> "The Scope Rule of the parties' Agreement, like that of the Capitol's MB, is a general scope rule. In such circumstances the Organizations prevail under the Note to Rule 55, must show reservation of the disputed work to Maintenance of Ways employees by exclusive systemwide."

A careful check of the record of the dispute does not support any proposition that the work of unloading ties from gondola cars has been performed exclusively by employees covered by the Agreement in question. In fact it is evident that for at least five years, since 1977, the removal of ties from gondola cars has had a mixed practice using both outside contractors as well as employer's own track forces. Thus Petitioner has not met its burden of showing either exclusivity or even customary performance of the disputed work by its own members. Further, it is evident that the particular tasks specified in the claims are not spelled out with particularity in the Scope Rule. Although it is true that track forces have customarily and historically unloaded ties by hand from various other types of Carrier's cars, that is not the issue before this Board. By its language, the Note to Rule 55 does not preclude the finding that work must be at least customarily, if not exclusively, performed by employees represented by the

Petitioner for the Petitioner to succeed. In this instance, the work was neither exclusively performed or customarily performed by track forces nor was the work specified in the language of the scope rule. The Board is constrained to conclude, in view of the fact that Petitioner has failed to demonstrate that the work in question was reserved to it by agreement, custom or practice, that the claims must be dismissed for lack of proof. (See Third Division Award 23276.)

AWARD

Claim dismissed for lack of proof.

I. M. Lieberman, Neutral-Chairman

W. Hodynsky,
Carrier Member

S. W. Waldeier
~~E. H. Funk~~,
Employee Member

St. Paul, Minnesota

May . 1983
September 28

DISSENT TO AWARD NO. 63 OF PUBLIC LAW BOARD NO. 3460

In reaching its decision in this case the Majority stated that:

> " A careful check of the record of the dispute does not support any proposition that the work of unloading ties from gondola cars has been performed exclusively by employees covered by the Agreement in question. In fact it is evident that for at least five years, since 1977, the removal of ties from gondola cars has had a mixed practice using both outside contractors as well as employer's own track forces. ***"

and that:

> " *** Although it is true that track forces have customarily and historically unloaded ties by hand from various other types of Carrier's cars, that is not the issue before this Board. ***"

The Board goes on to deny the Claim based upon the Organization's failure to establish that the tie unloading work involved here was exclusively performed by Maintenance of Way forces. The Board's determination is in error as follows:

First, this dispute involved the Carrier's uncontested failure to give the General Chairman advance written notice of its intention to contract out the tie unloading work in question. This Board, in considering the question of "exclusivity", departed from the well established body of awards espousing the principle that the question of exclusive reservation of work has no application in disputes involving the Carriers failure to provide the requisite advance notice in accordance with Article IV of the May 17, 1968 National Agreement and similar rules involving advance notice such as the Note to Rule 55. In this connection we invite attention to Third Division Awards 18305, 18687, 18792, 18999, 19578, 19631, 19899, 23203, 23354, 23578, 24137, 24173, 24236, 24280, 26016, 26174, 26212, 27012, 27185 and Award No. 5 of Public Law Board No. 4306. Typical thereof is Third Division Award 19578, wherein the same neutral member involved here, held:

> " We have rejected the exclusivity argument in a long line of cases, starting with Award No. 18305, and see no reason to depart from this reasoning. It is apparent that Carrier has ignored the provisions of Article IV and hence we shall sustain Part 1 (a and b) of the Claim."

Third Division Award 23203 held:

> "Carrier argues that the organization did not have exclusive rights to the work in question and therefore it need not confer with the general chairman. This Board has addressed the exclusivity issue in previous awards and has rejected the argument that the organization must prove exclusivity prior to carrier being required to give notice under Article IV (Third Division Award N. 19574, Lieberman)."

By making a determination relative to the question of "exclusivity" the Board has departed from the well established and well reasoned body of awards holding to the effect that the question of exclusivity is not applicable in circumstances involving the Carriers failure to provide advance notice of its intent to contract out work.

Second, we submit that this Award is in error because of the Board's determination that while track forces have customarily and historically unloaded ties "that is not the issue before this Board." The Board is in error because this dispute very plainly concerns the Carrier's assignment of outside forces to perform work unloading crossties along the right-of-way. Whether such work was accomplished by hand or with the aid of mechanized equipment is immaterial. The character of the work involved is the central concern. In this instance the Organization established the fact that the work of unloading crossties was work customarily and historically performed by Maintenance of Way forces. It is a well established principle that the Agreement applies to the character of the work and not merely to the method of performing it. Apropos here is Third Division Award 13189 which held:

> "Once it is ascertained that a certain kind of work belongs to a class or craft of employes under the provisions of an Agreement, either specifically or impliedly, that work belongs to such class or craft, regardless of the method or equipment used to perform the work. The Agreement applies to the character of the work and not merely to the method of performing it."

In the final analysis, it is clear that the reasoning applied in Award No. 63 of Public Law Board No. 3460 is faulty, therefore, I dissent.

S. W. Waldeier

S. W. Waldeier, Vice President