PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 3781

AWARD NO. 44

Case No. 44 (88)

Referee Fred Blackwell

Carrier Member: J. H. Burton Labor Member: W. E. LaRue

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the Brotherhood (CR-1760) that:

(a) The Carrier violated the Scheduled Agreement on January 15, 1985, when abolishing the position of Lubricator Maintainer at Lyons, New York, on the Buffalo Division and assigning the work to employees represented by the International Association of Machinist and Aerospace Workers (IAM) instead of to employees represented by the Brotherhood of Maintenance of Way Employees.

(b) Claimant G. L. Furman shall be compensated the rate of pay of the Lubricator Maintainer position for each day commencing January 15, 1985, including overtime until this issue is resolved.

FINDINGS:

Upon the whole record and all the evidence, after March 20, 1989 hearing in Washington, D. C., 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 by agreement and has jurisdiction of the parties and of the subject matter.

OPINION

THIRD PARTY DISPUTE

This is a Scope dispute under the Conrail-BMWE Agreement,

effective February 1, 1982, in which the International Association of Machinists and Aerospace Workers (Machinists) has a Third Party interest. The Machinists' Organization was given notice of such interest by this Board and has participated fully in the proceeding in accord with its interest as a party.

NATURE OF DISPUTE AND PERTINENT FACTS

Nature of Dispute

The essence of the allegations of the BMWE is that the Carrier violated the Scope and other rules of the BMWE Agreement with the Carrier by its action of abolishing the position of Lubricator Maintainer headquartered at Lyons, New York on the Buffalo Division, which had been advertised on December 15, 1981 under the BMWE Agreement, and readvertising such position on December 24, 1984 to the Machinist craft.

Pertinent Facts

The Claimant, Mr. G. L. Furman, entered the Carrier's service as a Painter on June 23, 1976. He obtained a Machinist's position on the Buffalo Division on April 25, 1977. On June 6, 1978, he was awarded a Machinist's position at Lyons, New York, and thereby established seniority on the Conrail/IAMAW Seniority District #IOC-MF/MW Department Machinist Roster. The duties of the position included the maintenance of Rail Lubricators.

On December 15, 1981, a new BMWE of Lubricator Maintainer was advertised under the Maintenance of Way Agreement with headquarters at Lyons, New York.

On December 22, 1981, Claimant Furman's Machinist position at Lyons, New York was abolished, and the Claimant was furloughed under the Machinists' Agreement.

Claimant Furman applied for and was awarded the new BMWE Lubricator position at Lyons, effective December 29, 1981. As a result of this award Claimant Furman established a seniority date on the Conrail/BMWE Lubricator Maintainer roster on the Buffalo Division (Carrier Exhibit 2).

On January 10, 1982, the Machinists' Local Chairman submitted a claim alleging that the Carrier's action of establishing the Maintenance of Way Lubricator position at Lyons, New York was violative of the Machinists' Scope Rule.

By letter dated October 30, 1984, the Carrier concurred with the Machinists' protest concerning the advertisement of the Lyons Lubricator position to the BMWE, and stated that the position would be readvertised to the Machinist craft. In accord with the foregoing statement the Carrier reestablished the Lubricator Maintainer position at Lyons under the Machinists' Agreement by Bulletin No. 85 dated December 24, 1984. The position of Lubricator Maintainer held by Claimant Furman under the BMWE Agreement, was abolished. As a furloughed Machinist, Claimant Furman was considered an automatic bidder for the readvertised position, but the position was awarded to a senior furloughed Machinist by Bulletin dated January 15, 1985 (Carrier Exhibit 5).

By letter dated March 8, 1985, the BMWE Assistant General

Chairman submitted a claim in behalf of Claimant Furman, alleging that the Carrier's readvertisement of the Lubricator Maintainer position to the Machinist's craft violated the Scope Rule and other rules of the BMWE Agreement with the Carrier.

The parties have discussed the claim but have not resolved same, and this case resulted.

POSITIONS OF THE PARTIES

BMWE

The position of the BMWE is that the confronting claim should be sustained on the grounds that historically the work of maintaining and installing lubricators at each location on the former NYC Buffalo Division had not been performed solely by Machinists, but had been performed by the BMWE, the Machinists, and even by the BRS at the hump in Buffalo; that prior to December 1981 the Lubricator Maintainer position on the Buffalo Division was not assigned to any craft exclusively; that paragraph 5 of the BMWE Scope Rule is not applicable to this dispute because this paragraph was not effective until February 1, 1982 at which time the disputed Lubricator Maintainer position at Lyons, New York was being performed under the BMWE Agreement; that instead, paragraph 4 of the BMWE Scope Rule is applicable; and that the Lubricator Maintainer position is a listed classification in the BMWE Agreement, whereas no such listing is found in the Machinist Agreement.

Conrail

The position of the Carrier is that the claim lacks merit

and should be denied in that the disputed work involving maintenance and installation of rail lubricator equipment does not accrue exclusively to BMWE Employees either by specific reference in the BMWE Scope or by system-wide practice; that the Grandfather clauses in both the BMWE Agreement, effective February 1, 1982 and the Machinist Agreement, effective May 1, 1979, evidence the right of the Machinists to perform the disputed work and negate the BMWE claim of right to the work; that the Carrier erroneously abolished the Machinist position which performed rail lubrication work from its establishment in June 1978 until its abolishment in December 1981; that such error was recognized in the consideration of the Machinists' challenge to the removal of the work from the Machinists' Agreement in December by the Carrier's December 1981 job abolishment, whereupon, the work was properly returned to the Machinists under the Grandfather clause of the Machinists' Agreement; and that even though the work of the rail lubricator position was being performed prior to and when the Conrail BMWE became effective on February 1, 1982, this consideration has no significance because the Machinists made timely challenge by letter dated January 10, 1982 to the advertisement of the Rail Lubricator position under the BMWE Agreement.

Machinists

The position of the Machinists is that the disputed rail lubricator work was performed under the Machinists' Agreement prior to and when the Conrail-Machinists Agreement became effec-

tive on May 1, 1979; and that, therefore, the Grandfather clause in the Machinists' Agreement preserves such work to the Machinists since they were performing it at that time, i.e., May 1, 1979.

FINDINGS AND DISCUSSION

After due study of the foregoing and of the whole record, inclusive of the submissions presented by the BMWE, the Carrier, and the Machinists, it is concluded that the record does not establish the merit of the claim and accordingly, the claim will be denied.

More specifically, the disputed work of maintaining and installing rail lubricator equipment was assigned to a Machinist position at Lyons, New York, before and when the Conrail-Machinists' Agreement became effective on May 1, 1979 and hence, the Grandfather clause in the Machinists' Agreement preserves such work to the Machinist craft on and after the effective date of that Agreement, i.e., May 1, 1979.

In reaching this conclusion and finding the Board has taken cognizance of the fact that the disputed work was being performed by a Maintenance of Way position before and when the Conrail-Maintenance of Way Agreement became effective on February 1, 1982; and that this fact, standing alone, would ordinarily suffice to bring the work under the Maintenance of Way Scope Rule by virtue of the therein statement that "[t]hese rules shall be the Agreement between..." Conrail and the Maintenance of Way Employees "engaged in...work which, as of the effective date of this Agree-

ment, was being performed by these employees."

However, when the fact of performance of the disputed work by a Maintenance of Way position on February 1, 1982 is considered along with other pertinent circumstances, such performance of the disputed work by a Maintenance of Way position is insufficient to establish the BMWE right to the work in dispute as opposed to the Machinists. First, such performance was under a cloud at its inception because the Machinists made a January 15, 1982 timely challenge to the Carrier's assignment of the work under the BMWE Agreement on December 29, 1981. In addition, without any protest or challenge of any kind from the BMWE, the disputed rail lubricator work was performed by a Machinist position at Lyons, New York from June 1978 to December 22, 1981. The performance of the disputed work by a Machinist during this period without challenge by other crafts, plus the fact that the disputed work was covered by the Grandfather clause in the May 1, 1979 Machinists' Agreement, is sufficient to establish, secure, and preserve the right of the Machinist craft to have the work remain under the Machinists' Agreement.

Self evidently, these circumstances forcibly support the Carrier's conclusion that it erred in advertising the Lubricator Maintainer position to the Maintenance of Way craft in December 1981. In any event, the facts of record in this case persuade that the disputed rail lubricator work is covered by the Grandfather clause of the May 1, 1979 Machinists' Agreement and that on

that basis, the Machinists' right to the continued performance of the work in dispute is superior to that of the Brotherhood of Maintenance of Way.

Accordingly, in view of the foregoing and based on the record as a whole, the claim will be denied.

AWARD:

Claim denied.

BY ORDER OF PUBLIC LAW BOARD NO. 3781.

Fred Blackwell

Fred Blackwell, Neutral Member

J. H. Burton, Carrier Member

W. E. LaRue, Labor Member
(dissent attached)

Executed on April 24, 1990

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Dissent of the Labor Member

to

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The decision of the Arbitrator was tainted by the use of multiple positions by the Carrier on similar cases when selecting a different form to present various positions depending upon the Carrier's liability and operating desires and not upon the clear intent of its executed agreement.

Similar to Third Division Award 28265, the Carrier's position before the Third Division in that case was just the opposite as was placed before this Board.

It is at once evident that both BRS and BMWE have colorable claims to Bridge Operation duties under their Agreements; the former based upon the specific language of its Scope Rule and the latter upon the general language of its Scope Rule as well as unvarying practice since 1975. At first glance, it appears that Carrier is in the anomalous position of having made a contractual commitment in 1981 to give BRS certain work which BMWE had been performing exclusively since 1975. Carrier pleads that this was a mistake by its negotiators which should warrant its release from the clear contractual obligation to BRS. This Board, however, is not persuaded to that view. Reformantion of a contract is a matter for the negotiating table not the arbitration forum.

Proper disposition of this Claim lies not in arbitral dispensation for Carrier but rather in the express language of the savings clause which appears in both the Conrail/BRS Agrement of 1981 and the Conrail/BMWE Agreement of 1982:

> "It is understood and agreed in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement; and it is also understood that work not covered by this Agreement which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement." (Emphasis added)

It is not disputed that as of the effective date of each of these Agreements, BMWE-represented employees not BRS-represented employees were performing all Bridge Operation duties on all three shifts at the Branch River Bridge. Even if, arguendo, the BRS Claim of March 1984, had been filed promptly and in a timely manner in 1981, the above-quoted "freeze-frame" clause preserved the status quo under which BMWE-represented employees were entitled to Bridge Operator duties at River Branch Bridge.

Third Division 28265 attached.

As was noted by this decision, at the time the 1982 Agreement became effective the work historically performed by BMWE, except for the period of 1978 through 1981 at Lynon's, New York, had been returned to those who had historically performed the work. For a period between 1978 and 1981, even though the Carrier had violated the agreement and assigned the incorrect craft and class, by the time the agreement became effective the work had been returned to the BMWE where it belonged.

Without departing from that position the Board in this case has allowed the Carrier to consolidate work, which by the clear intent of the 3R Act Section 503 and the scope of the Collective Bargaining Agreement, it was prevented heretofore. As setforth in the BMWE position, the work the BMWE was entitled was that work on the former New York Central, (Lyons, Rochester to CP3) Erie, Lackawanna, Lehigh Valley, and Niagra Junction Railroads that had been historically performed by BMWE, and did not request of the Board to consolidate the work which was historically performed by the Machinists at Buffalo, New York.

Therefore, this labor member must dissent.

W. E. LaRue
Labor Member