PUBLIC LAW BOARD NO. 4596

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

and

GRAND TRUNK WESTERN RAILROAD COMPANY

Case No. 3
Claim of Systems Committee
(Scope Clause Violation,
Battle Creek Shop)

OPINION AND AWARD

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

> "(1) Carrier violated the Working Agreement, specifically Rule 1, (Scope), when on or before October 15, 1984, it entered into an agreement with Bowman Products which allowed and/or permitted individuals not covered by said Agreement to perform work previously assigned to and performed by Storemen and Warehouser positions at the Battle Creek, Michigan Materials Department.
>
> (2) The work involved shall now be restored to the Scope of the Working Agreement.
>
> (3) The senior, qualified and available Warehouser at the Battle Creek Materials Department shall now be allowed eight (8) hours pay at the Warehouser I rate for October 15, 1984 and each subsequent date until the violation is corrected."

FINDINGS: The Board, based upon the record and evidence, finds that the Claimant, Organization, and Carrier involved in this dispute are Employee, Organization, and Carrier, respectively, within the meaning of the Railway Labor Act, as amended; that this Board is properly constituted and has jurisdiction over the dispute; that the parties were given due notice of the hearing, which was held in Detroit, Michigan on November 12, 1990, and that the parties made oral presentations to the Board at that hearing. The Board makes the following additional factual findings with respect to the claim:

At its Battle Creek Shops, the Carrier maintains a Materials Department Storeroom (the "Storeroom"), whose assigned employees, classified as Storemen and Warehousers, are covered by the Agreement. Those employees order, stock, dispense, account for, and inventory the parts, which have been used system-wide. Insofar as the record indicates, all the parts are and have been the property of the Carrier. Until 1976, items stocked in the storeroom included nuts and bolts, pipe, electrical fittings and other, similar material.

The Storeroom is located in the same building as the Heavy Repair Shop, at which repairs to diesel-electric locomotives are performed. The following procedures were used to access materials for use by shopcraft employees working in the Heavy Repair shop. Shopcraft employees went to the Storeroom counter and requested of the Storeman the part(s) needed; the Storeman would then go to the bin in the Storeroom where the part was kept, remove the part, mark on the shim (inventory) card the removal of the item, and issue the part to the shopcraft employee, charging the part to the using department at that time. Stores employees checked the shim cards and bins periodically and ordered parts from vendors, as necessary. When the parts were delivered, Stores employees restocked the bins.

The controlling Agreement provides, in part, that:

> "G. Positions within the scope of this agreement belong to the employees covered thereby, and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules."

Notwithstanding the Agreement, the Carrier, in 1976, contracted with Bowman Products ("Bowman"), an outside vendor, to provide nuts and bolts, pipe, electrical fittings and other, similar material - the same types of material which had been carried by the Storeroom - for use by shopcraft employees at the Heavy Repair Shop. Pursuant to the contract, Bowman set up parts bins at the Shop's Heavy Repair Track and stocked the bins with parts, which its employees periodically checked and reordered as necessary to keep an agreed-upon level. The orders would be physically delivered to the Shop, at which time Bowman employees would unpack the shipment and restock the bins. The Board notes that, at a time subsequent to the filing of the instant claim, Bowman was replaced with another Company, Blue Water Products; however, that arrangement is not before this Board.

It is undisputed that employees covered by the Agreement had never stocked bins located in the Battle Creek Heavy Repair Shop; indeed, insofar as the record indicates, there had been no parts bins or other regular storage facilities in the Shop prior to the arrangement with Bowman; shopcraft employees had received such parts directly from bins in the Storeroom, dispensed by covered employees, as the parts were needed.

It is also undisputed that the Organization was aware of the Carrier's use of Bowman to supply parts; however, the Organization asserts that it was told, and understood, that the arrangement with Bowman was for "direct purchase". The Organization denies having been informed or being aware of the arrangement in effect between the Carrier and Bowman until shortly before the filing of the claim on December 10, 1984. There is nothing in the record which establishes that the Organization was aware, or should have been aware, of the actual arrangement.

By a claim dated December 10, 1984, the Organization protested the Carrier's use of Bowman to perform the work of installing, inventorying, supplying, and issuing the parts. The claim was progressed on the property in the usual manner, without resolution, and was brought before this Board.

POSITIONS OF THE PARTIES: The positions of the parties were set forth in thorough written briefs. Those arguments made and responded to in the briefs and before the Board are summarized as follows.

The Organization argues that the work performed by Bowman was the work of inventorying and stocking of nuts and bolts, pipe and electrical fittings for the Shop. It asserts that Art. 1, Sec. (B) of the Agreement establishes that the Storeroom positions are covered by the Agreement; the record clearly establishes that the work in question had previously been assigned to and performed by covered employees and was, therefore, work covered by the Scope clause. The Organization argues that, under the Scope clause, the covered work could not be removed from the bargaining unit without the Organization's consent. It asserts that NRAB decisions support that proposition. The Organization also asserts that neither transfer of the work to another department or to another location changes its status or removes the work from the reach of the Agreement.

The Organization denies having given consent to the Carrier's removal of covered work. It asserts that it was unaware of the nature of the arrangement with Bowman, and contends that it was led to believe, and did believe, only that the Carrier was purchasing material direct from Bowman; it asserts that the Carrier had the burden to prove the Organization's knowledge of the arrangement had the burden to prove it, but points out that there is nothing in the record to support the Carrier's assertion. It argues that, in any event, a past practice in contravention of the Agreement cannot stand.

The Organization contends that the establishment and maintenance of stocks of stores, owned by the Carrier and maintained on its premises, goes far beyond a direct purchase arrangement which would be permissible under the Agreement. It asserts that the use of direct purchase would have resulted in the elimination of the covered work, which it asserts is the only way to escape the Agreement's jurisdiction; but it argues that, under the arrangement with Bowman, the work (other than actual issuance of the materials) continued to exist, since Bowman employees

checked and stocked bins with the same parts and on the Carrier's property. It asserts that the Carrier's own responses indicate that Bowman employees continue to perform the work at issue, making the arrangement with Bowman a contract for services, in which the services performed were within the coverage of the Agreement. It urges that the cost of the stocking and inventory work is necessarily included in the costs charged by Bowman, whether or not separately billed.

The Organization argues that Award No. 3 of PLB No. 3504 between the Carrier and the Organization is on point and requires a sustaining award.

The Organization asserts that the Carrier's arguments that Bowman continued to own the parts through and after the time they were used and that Rule 2's definition of clerks as employees working more than four hours per day in the craft negates the coverage of the Scope clause was not made on the property and cannot be raised for the first time before the Board.

The Carrier argues that the work in question is the stocking and inventorying of storage bins at the Battle Creek Shops, which it asserts had never been performed by employees covered by the Agreement. It points out that the Organization neither named the position which had performed the work nor the employee who had been deprived thereof. The Carrier points out that many employees perform some of the same functions as clerks; and that Rule 2 of the Agreement defines clerks as employees who devote not less than four hours each day to performing clerical functions; it urges that the time used to perform the work does not approach that level.

The Carrier asserts that the Warehousers stocked and handled materials purchased centrally by the Materials Department; when materials used to repair locomotives were ordered centrally, Warehousers performed that work and that shopcraft employees (not Clerks) then stocked their work sites.

The Carrier asserts that the arrangement with Bowman is, in fact, a direct order arrangement. In particular, it asserts that it is Bowman's bins which are placed adjacent to the Shop tracks and that the parts therein belong to Bowman. The Carrier urges that Bowman employees who conduct inventory work and ordering work do so on property belonging to Bowman; and it asserts that Bowman only bills the Carrier for parts after they have been used. Under this arrangement, asserts the Carrier, Bowman does not perform work previously performed by Clerks.

The Carrier asserts that Award No. 3 of PLB No. 3504 is inapplicable (as well as erroneous), in that the claim sustained therein involved an employee who had, in fact, worked in the Shop at Flat Rock, stocking bins there, and that the Board's ruling was premised on the existence of an employee who had previously performed the same work, in contrast to the present situation. The Carrier points out that the Board therein specifically upheld the Carrier's right to enter into direct purchase arrangements without violating the Agreement.

The Carrier also argues that the claim herein is excessive, since there is no proof that any employee suffered loss. It asserts that the Organization was required to demonstrate direct financial injury, which it failed to do. The Carrier also asserts that the record reveals no more than three hours per week of work performed by Bowman employees, therefore entitling employees to no more than the amount of pay which would reflect that work.

DISCUSSION AND ANALYSIS: The record indicates that the work at issue is the work of inventorying and stocking nuts and bolts, pipe and electrical fittings for the Shop. That work had previously been performed by Stores employees in the Materials Department in the clerical craft; and the parts had been kept in and distributed from bins in the Storeroom maintained by them. The Board is persuaded that, as a result of the "positions and work" Scope clause of the Agreement, the work in question belonged to covered employees and could not be removed without the Organization's consent. Mere change in the location of the work or assignment thereof to a different department thereafter is insufficient to remove the work from the coverage of the Agreement.

Of the Carrier's argument that clerical employees had never performed the work of stocking bins in the Shop, and that the work at issue had never been performed by covered employees, the Board is also unpersuaded. There is, in the first instance, no documentation in the record that shopcraft employees ever maintained parts bins or mini-storerooms in the Shop prior to the Carrier's arrangement with Bowman or that shopcraft employees performed stocking, inventorying, or ordering functions with respect to such parts; indeed, the communications appear to indicate that shopcraft employees drew such material from the Storeroom as needed.

Of the Carrier's assertion that the Organization was aware of the nature of the relationship between the Carrier and Bowman, and therefore consented to or acquiesed in the arrangement there is no factual support in the record. Indeed, the Organization's

statements in the record that it was advised and assumed the relationship between the Carrier and Bowman to constitute a direct purchase arrangement, and was never informed to the contrary, are unrebutted. Absent such a showing, the Organization cannot be held to have waived its right to object to the practice as violative of the Agreement.

In its Award No. 3, PLB No. 3504 addressed a claim that the Carrier improperly entered into a contract with an outside vendor to deliver stocks of nuts and bolts directly to the using departments at the Flat Rock Shops and to handle inventory and paperwork in connection with use of the parts, instead of having the using departments obtain the parts from a storeroom where that same work was performed by employees covered by the Agreement. The Board found the Carrier's arrangement to violate the Scope Rule. It concluded that

> "[w]hat has taken place [in the situation presented by Award No. 3 before that Board] is that the work of checking and stocking the departmental bins has been taken away from Stores employees and given to the vendor's employees. In that sense, Carrier has violated Rule 1 (G)."

Of the Carrier's argument that Award No. 3 is inapplicable to the instant situation, since, unlike this situation, the employee therein had previously performed the work at issue in the Shop, the Board is not persuaded. It was the nature of the work and the identity of the employees who performed it which brought the work within the reach of the Agreement, and not the physical location.

Neither did relocation of the work from the Storeroom to the Shop in the instant case, nor from one department to another, remove the work from the coverage of the Agreement. While location of work is a factor to be considered in determining whether work is within the scope of work belonging to covered employees, that factor is not determinative where the same work, involving the same types of parts, used by the same employees and for the same purposes, had previously been performed by them. Once covered by the Agreement, the only ways in which the work could be removed from its scope was by agreement or by elimination of the work itself.

In Award No. 3, PLB No. 3504 indicated "no quarrel with the Carrier regarding the concept that direct purchase is allowable"; and the Carrier asserts that it used such an arrangement in its relationship with Bowman in the instant case, thereby eliminating

its performance of the work in question and escaping the Scope clause. Without attempting to define the precise limits of when a direct purchase arrangement might be sufficient to escape the Scope clause, the Board is not persuaded that the record establishes the existence of such a clause so as to allow the Carrier to rely on it.

The Carrier asserts before the Board that its arrangement with Bowman constituted a direct purchase arrangement and that ownership of the material remains with the vendor until after its use, with the Carrier being billed after such use to replenish the supplies. The Board is, of course, limited to consideration of argument based on the factual record; and it has searched the record to ascertain whether the existence of a direct purchase arrangement, or the factual elements from which such an arrangement can be deduced, can be found therein.

Mr. Shier's letter of February 4, 1985 states "the Equipment Department at Battle Creek made a direct order arrangement with [Bowman] some nine (9) years ago.", but the communication does not describe the arrangement. In its response of March 21st, the Organization specifically disputed the Carrier's description of the arrangement as "direct order". It asserted that the material was

> "being stocked under a Storeroom concept and not ordered directly on an immediate need basis. In essence, the Carrier has allowed Bowman . . . to establish and operate a Mini-Storeroom on its property. . . . Carrier has not eliminated any work or the so-called 'middle man', but merely replaced him with Bowman . . . "

The Carrier's next communication, from Mr. Sherwood on May 15, 1985, denies generally any violation and asserts, again in conclusory terms, that the relationship with Bowman " . . . is basically a 'direct order' system."

The Organization's July 11th reply again denied the existence of a direct purchase arrangement and described its understanding of the situation as

> ". . . a situation where Bowman . . . was contracted to maintain a set-up Stores on the Carrier's property. In this regard, Bowman . . . installed storage bins at the . . . Shop and stocked such bins with the abovementioned items and continually inventoried and resupplied such bins on a regular basis."

The Carrier's next response, dated September 10, 1985, characterized the transaction as follows:

> ". . .the supplies that Bowman . . . is placing in bins at the . . . Shop is a direct charge to the Maintenance of Equipment accounts and does not go into a stock account. Therefore the Store Department has no jurisdiction or responsibility for these supplies. Thus, Storemen and Warehousers are not involved in this type of direct charge transaction."

In that same letter, the Carrier also asserted that "(t]he fact that this is a direct charge function by the using department, as it is in stationary stock throughout the property . . . " meant that the Organization had agreed with the Carrier that its practice did not violate the Agreement.

In its next, and apparently last communication prior to submission of the dispute to this Board, the Organization again asserted that the transaction was similar to that rejected by PLB No. 3504, Award No. 3 as not a direct purchase concept, with no middleman having been eliminated.

As the extended review of the record herein indicates, there was no assertion and no factual support, anywhere in the processing of the claim at issue herein, that the vendor continued to own the material until after it was used. While the Carrier's argument is well-constructed and effectively made, it lacks evidentiary support in the record. The Board notes, in addition, that it may not properly consider arguments made before the Board which were not made on the property. Accordingly, the Board declines consideration of the foregoing arguments; and it does not pass on whether the hybrid system described in the Carrier's submission before the Board would be sufficient to constitute a "direct purchase" arrangement so as to escape the Agreement.

The Board notes, in addition, that in the Flat Rock arrangement which was addressed in Award No. 3, the vendor installed storage bins in each department. Periodically, the salesman checked the stock in each bin in these departments and filled them if required. The Board in that case rejected the Carrier's contention that the arrangement constituted a direct purchase arrangement. It held that the work of checking and stocking the departmental nut and bolt bins had been taken away from stores employees and given to vendor employees. The Award did not state, nor indicate that it was relying on, the ownership of the supplies at the time they were inventoried and used.

For the foregoing reasons, the Board is persuaded that the Carrier's arrangement with Bowman impermissibly removed work within the coverage of the Agreement, thereby violating Article 1 of the Agreement.

There is no indication that any employee was laid off as a result of the Carrier's action; however, the factual record clearly establishes that work was performed by outside vendors which should properly have been performed by covered employees. The Board is persuaded that the amount of work which was improperly performed by employees of the vendor, which is also the basis of recovery recognized by PLB NO. 3504, is the appropriate measure of monetary relief for the Organization. While there is no showing that the amount of work in question was anything approaching a full-time position, the Carrier concedes that the vendor's employees performed inventorying and restocking work three hours per week. The remedy provided in the Award reflects that measure.

AWARD: The claim is sustained. The Carrier shall compensate the senior available and qualified Warehouser for three hours at his/her applicable rate for each week from October 15, 1984 until the end of the arrangement between the Carrier and Bowman which covered the inventorying and stocking of materials in the bins at the Carrier's Battle Creek Heavy Repair Shops.

M. David Vaughn, Neutral Chair

J.A. DeRoche, Carrier Member

J.C. Campbell, Organization Member

c:\wp51\NMBPLB\gttcscop.awd