PUBLIC LAW BOARD NO. 5606

PARTIES) BROTHERHOOOD OF MAINTENANCE OF WAY EMPLOYES
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned and allowed Supervisors Matt Rines and Chris Gessman to perform Maintenance of Way work, i.e., move furniture from the Engineering Office in Rigby, Maine to the Engineering Office in Waterville, Maine on Monday, April 29, 2002, instead of assigning furloughed Bridge & Building (B&B) Mechanic J. C. Hafford.

2. As a consequence of the violation referred to in Part (1) above, furloughed B&B Mechanic J. C. Hafford shall now be allowed six (6) hours' pay at the B&B Mechanic's straight time rate. (Carrier File MW-02-33)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The primary issue in this case is whether Article 1, Scope, and Article 5, Seniority Classes, of the current agreement were violated when the Carrier had two supervisors who are not represented by the Brotherhood of Maintenance of Way Employes (Organization) move and transport office furniture.

Then, should the Board find the above referenced rules of agreement were violated, the remaining question would be whether Claimant, a furloughed B&B Mechanic, is entitled to a penalty payment of six (6) hours at the straight time rate of pay.

Those portions of Article 1 and Article 5 cited by the Organization in support of the claim read as follows:

Article 1 - Scope

1.1 The rules contained herein shall govern the hours of service, working conditions, and rates of pay of Engineering and Mechanical Department employees represented by the Brotherhood of Maintenance of Way Employes (BMWE) who are working on Track, Bridges and Buildings, Work Equipment Maintenance, or Welding Plant.

1.2 These rules do not apply to supervisory forces above the rank of foreman nor do they apply to employees covered by other agreements.

Article 5 – Seniority Classes

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5.2 Bridge and Building Sub-Department

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3. Bridge and Building Mechanics:

Construct, repair, dismantle, inspect and maintain bridges, buildings and other structures.

The Organization asserts "the moving of furniture from one location to another has traditionally, customarily and historically always been done by the Bridge and Building Department employees, whether it be a short distance or that of many miles." It offers two personal statements bearing the signatures of B&B employees who say they have traditionally performed the work at issue in the past. One statement is from Claimant; the other from a B&B Carpenter wherein the latter merely states: "Moving furniture from offices, etc. has traditionally been performed by B&B personnel."

It is the position of the Carrier that although employees subject to its Agreement with the Organization have performed the work of moving furniture on occasion in the past, the practice of moving furniture has not been and is not exclusively handled by B&B workers. The Carrier says the moving of furniture is done by employees from many crafts and supervisory employees out of convenience, not due to any contractual obligation. The Carrier thus says that there is absolutely no agreement language or past precedent which would reserve the work at issue for B&B employees, as here claimed.

The Board finds it significant that the two brief statements furnished by the Organization in support of the claim only state that the work of moving or transporting furniture has "traditionally" been performed by B&B Mechanics. Certainly, these brief and unsubstantiated statements are not sufficient to support what is claimed to be a customary and historic practice. Some actual proof besides uncorroborated assertions of tradition, which have been denied by the Carrier, is necessary to prove the contention that the Organization has an historic right to perform a type of work before it can be said that other classes of employees are precluded from performing that work.

Moreover, the only contact language which the Organization has cited to carry the burden of proving that employees who it represents have been granted the right to the work at issue through past collective bargaining is limited to the excerpts of Articles 1 and 5 as shown above. Although the portions of the rules cited reference BMWE employees working on buildings as well as the construction, repair, dismantling, inspection and maintenance of buildings and other structures, both rules are silent with respect to the specific work at issue, the moving and transporting of furniture.

Boards such as this have many times held that mere assertions that a violation has occurred are not sufficient without positive evidence to substantiate the allegations made in a claim. Certainly, as also repeatedly stated in numerous awards over the years, the burden of proving a claim rests on the petitioner who is seeking a penalty.

As stated in Award No. 3630, Carmen v. T&NO, Referee James P. Carey, Jr.:

> It is the fundamental principle of the employer-employee relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law. Contractual surrender in whole or in part of such basic attributes of the managerial function should appear in clear and unmistakable language.

See also the following excerpts from past board awards:

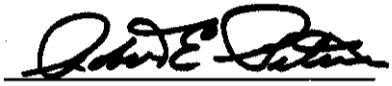
> Award No. 177, Machinists v MP, Referee Adolph E. Wenke:
>
> It is true that Carrier has the inherent right, except as it has limited or restricted itself by the terms of its agreements, to operate its business in a manner it thinks best and this would include the right to determine where it would have its repair work done.
>
> Award No. 2916, Machinists v CMStP&P, Referee James P. Kiernan:

The right of an employer, including the Carrier herein, to arrange and control its forces and manage its business has long been recognized, subject to its contractual obligations and as it may be limited by law.

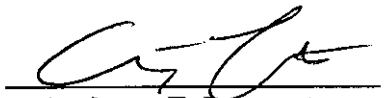
For the reasons given above, the Board finds that the Organization has not met a necessary burden of proof for it to be concluded from the record before us that there was, in fact, a violation of rules of the controlling agreement. The claim must, therefore, be denied for lack of agreement support of record.

AWARD:

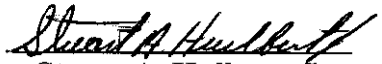
Claim denied.



Robert E. Peterson
Chair & Neutral Member



Anthony F. Lomanto
Carrier Member



Stuart A. Hulburt, Jr.
Organization Member

North Billerica, MA
Dated June 29, 2005