PUBLIC LAW BOARD NO. 6867
AWARD NO. 1
CASE NO. 1

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY
(former Chicago & Northwestern Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (remove battery tub structures from the right of way) between Mile Posts 0.6 and 36.8 on the Peoria Subdivision on August 5, 6 and 7, 1998 (System File 3KB-6481T/1164581 CNW).

(2) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (remove battery tub structures from the right of way) between Mile Posts 94.7 and 107.9 on the Geneva Subdivision on August 8, 12 and 15, 1998 (System File 3KB-6482T/1164582).

(3) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (remove battery tub structures from the right of way) between Mile Posts 112.9 and 4.4 on the Geneva Subdivision on August 10, 11, 13 and 14, 1998 (System File 3KB-

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6483T/1164580).

(4) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the above-referenced work as required by Rule 1(b).

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Messrs. T.L. Glenn, W.D. Cornwell, L. A. Wiseman, R. D. Boncouri, W. D. Hodgkins, J. M. Campbell and R. E. Reagan shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the two hundred forty (240) man-hours expended by the outside forces in the performance of the work in question.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Messrs. T. L. Glenn, R. J. Timmons, R. L. Pillars and S. J. Osborn shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the one hundred ninety-two (192) man-hours expended by the outside forces in the performance of the work in question.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Messrs. T. L. Glenn, M. S. Armour, F. F. Norway and L. J. Estrada shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the three hundred eighteen (318) man-hours expended by the outside forces in the performance of the work in question."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the

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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.

As Third Party in Interest, the Brotherhood of Railroad Signalmen (BRS) was advised of the pendency of this dispute and chose to file a Submission with the Board.

This case is a consolidation of three claims involving Carrier's decision to contract out, without prior notice, the removal, loading and hauling of signal battery tubs and boxes which were part of the old signal system which had become obsolete with the institution of a new radio-controlled signal system. The Organization makes clear that it does not seek any work associated with the removal of the batteries themselves, which it acknowledges belongs to the Signal Department under the scope of the BRS Agreement.

According to the description by the General Chairman in his appeal of the claims, the work performed by the contractor included locating the battery tubs and wells and determining the presence of water. If water was present, a sample was collected and sent to a water plant to have its PH determined. If no acid was present, a hole was punched through the bottom of the tub allowing the water to drain. If acid was present, the water was pumped out and delivered to a Carrier treatment plant for processing. Once emptied, the tubs or wells were either filled with crushed limestone or removed, broken up and hauled to the nearest landfill. The equipment used to perform this work included a tractor backhoe, crewcab pickup truck, an open boxed dump truck and a leased

cube van. The Organization asserted that this work was maintenance of the right of way and dismantling of track structures which is specifically reserved to its Track Subdepartment under its Scope Rule. Public Law Board No. 1844, Awards 16 & 17.

During the processing of these claims on the property, Carrier explained that the work involved a system-wide contract for the removal and disposal of signal batteries including battery tub containers and potential waste fluid in them. It initially contended that notice was distributed under Service Order #6108, but when the Organization persisted that it never received any such notice, Carrier's position was clarified to be that no notice was required since the work in issue did not fall under the scope of its Agreement.

Carrier asserted that the work was specialized in nature and potentially environmentally hazardous, that its Environmental Policy for Disposing Batteries applied, and that the handling of signal batteries are part of the Signal Department and falls under the scope of the BRS Agreement, which is specific rather than general in nature. In its Third Party Response, the BRS agrees, relying on Third Division Awards 5200, 11674, 30108. Carrier argued on the property that this is really a jurisdictional dispute requiring a higher burden of proof, that its hazardous materials rules applied, and that BMWE employees were not trained in the required techniques. Carrier further contended that there are a number of parts to the removal process which Claimants are not qualified to perform, and that it is not required to piecemeal the work and is permitted to contract the entire process, as it did in this case.

The Organization took issue with Carrier's characterization of the

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work as hazardous in nature, noting that there was no showing that contractor employees were certified workers or wore any protective gear when performing the disputed work. Even if the work could be classified as involving hazardous material, the Organization posits that under Rule 1, Carrier is still required to give it advance notice of its intent to contract and an opportunity to discuss the reasons for such decision, since it is the type of work which is specifically covered under its Scope Rule and is customarily and ordinarily performed by BMWE employees, citing Third Division Awards 2701, 29121. The Organization included a written statement from an employee who noted that he had previous experience removing all types of battery wells and signal foundations on the property while operating a locomotive crane, there were many BMWE employees with sufficient training to work with hazardous materials and the necessary credentials to operate the trucks involved.

The Organization argues that Carrier is precluded from arguing that special skills and equipment were necessary to support its contracting decision, or that it was not required to piecemeal the project, when it failed to give the Organization an opportunity to conference the issue, which is the appropriate place for such discussions to take place. Third Division Awards 37314, 25967, 30970, 32862. The Organization asserts that the battery tub and box structures removal work was of such a nature that it stood alone and was performed as a separate project, citing Third Division Award 16440. It notes that it is the nature of the work performed that determines who is to perform it, citing Third Division Awards 37610 and 37611.

In its Response to the BRS Submission, the Organization attached a copy of a letter from a Crane Operator which was apparently submitted

on the property in a companion case. In addition to setting forth the work actually performed by the contractor and the equipment used, it also indicates that in a conversation with the BRS local chairman he stated that once the tubs were retired they became part of the right of way maintenance work, and the BRS has no claim to do the work or right to stop a contractor.

Carrier argues that the disputed work is associated with signal batteries and tubs, not track or structures work, and falls within the jurisdiction of the BRS under its scope rule which includes "...maintenance of signals or signal systems with all appurtenances on or along the railway tracks .... repairing, reconditioning and reclaiming all signal devices and appurtenances, and other work in connection therewith..." Carrier notes that such specific scope rule applies over the Organization's general scope rule, citing Public Law Board No. 1844, Award 39. Carrier asserts that in a class or craft dispute, the reason for the work performance is determinative, citing Third Division Award 10051. Since the work is not encompassed under the Organization's Scope Rule, and was not shown to be performed by BMWE employees exclusively on a system-wide basis, Carrier contends that the notice provisions do not apply. Finally, Carrier notes that Claimants were fully employed on the claim dates, and that, on this property, a monetary remedy for a contracting violation would only apply to furloughed employees, relying on Third Division Awards 30281, 31652, 31264, 31288, 31171.

The Organization argues that a sustaining award is required based solely upon Carrier's notice violation. Third Division Award 32862. It also contends that Carrier presented no evidence challenging the number of hours claimed, but that if there is any doubt about the accuracy of the

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number of hours worked by the contractor's employees, that the matter should be remanded to the parties to conduct a joint review of Carrier's records.

For purposes of deciding whether the Organization sustained it burden of proving a violation of Rule 1 in this case, the Board accepts as fact that Carrier failed to serve a notice of its intent to contract out the disputed work for the reasons raised. There was no copy of a notice furnished to the Organization upon its request or included in the record, and Carrier appeared to withdraw from its position that notice was furnished later in the claim processing in favor or its argument that no notice was required.

The primary issue presented by this case is whether the disputed work is encompassed within the scope of the BMWE Agreement and is the type of work which has customarily and historically been performed by BMWE employees, or whether the disputed work is encompassed with the scope of the BRS Agreement. If the Board finds that the work is of the type or performed for a purpose associated with the functions covered by the BRS Agreement, there is no obligation by Carrier to either provide prior notice or conference the issue of its contracting. Public Law Board No. 1844, Award 39. However, if the work sought by this claim is separable from the battery removal functions admittedly encompassed within the BRS Agreement, and can be considered right of way maintenance or the dismantling of track structures, then Carrier's failure to provide notice to the Organization of its intention to contract out this project would itself be a violation of Rule 1 of the Agreement, regardless of the legitimacy of the reasons for contracting. Third Division Award 37314.

In support of its claim, the Organization relies upon the following language from Rule 1:

> (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 ...maintenance ... and dismantling of tracks, structures and other facilities ...
>
> .... such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, ...
>
> In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, ...

Carrier initially argued during its processing of the claims on the property that it gave notice and that employees did not have the appropriate training or skills due to the hazardous nature of the materials. In its final denial, Carrier raised the argument that this was a jurisdictional dispute, relying upon the following language of the BRS Scope Rule:

> 1. Installing, maintaining, renewing and servicing -
>
> (b) All batteries, including storage battery plants, charging outfits, and power panel equipment.

In its submission to the Board, and as noted in the BRS Submission, Carrier relies as well on the following sentence in the BRS Scope Rule:

> (k) Repairing, reconditioning, and reclaiming all signal devices and appurtenance, and other work in connection therewith....

The thrust of Carrier's argument lies in its assertion that removing the disputed battery tubs and boxes is part of the work of renewing the signal system, which is clearly Signal Department work. Carrier relied upon the fact that it is not required to piecemeal the project of dismantling the old system, including removal of the batteries and battery boxes and tubs. This affirmative defense assumes that the contract was for the entire project, including both removal of the batteries (which the Organization admits is BRS work) and the battery boxes and tubs, and related track work. Carrier referred to the disputed work as falling under a system-wide contract for the removal and disposal of batteries.

Absent possession of a notice identifying the work involved in the contract, the Organization requested a copy of the service order involved, which Carrier failed to furnish. It is not part of the record. Thus, the Organization's understanding that the batteries were removed from the boxes and tubs some time previously by BRS employees in compliance with Carrier's Battery Disposal Environmental Policy, which speaks only to battery removal and not disposal of battery tubs and boxes which housed them in the past, and that the contractors only performed that aspect of the disputed work without any apparent protective clothing or equipment, has not been factually disputed by Carrier. Further, the claims have always made clear that the work which the Organization asserts falls under its Agreement is the removal of retired and abandoned battery tubs which no longer play any role in Carrier's signal system and the required right of way maintenance to restore the roadbed. The BRS Scope Rule clearly contemplates performance of many tasks associated with an ongoing

signal system. As supported by the letter from Crane Operator Nystrom attached to the Organization's response to the BRS Submission, it is certainly arguable that once the tubs were retired they were no longer part of the signal system over which the BRS Scope Rule applied.

In these circumstances, it was incumbent upon Carrier to prove that the removal of both the batteries as well as the battery boxes and tubs were accomplished under one contract by contractor employees skilled in the performance of such work and were part of the overall renewal of the signal system. It failed to meet that burden in this case. While the Organization's evidence does not prove system-wide performance by BMWE employees of this type of work, it certainly specifies what work the contractor employees were doing, with what equipment, and that no apparent certification or environmental protections were used.

The disputed work can arguably be considered "dismantling of track structures" along the right of way, which is encompassed within the Organization's Scope Rule, unlike the situation in Public Law Board No. 1844, Award 39 which found that the salvaging work in issue was distinct from track maintenance work covered under the Agreement. This is not a class or craft dispute as existed in Third Division Award 10051. There is no evidence that this type of work (removal and disposal of retired and abandoned battery tubs) occurs frequently or has been routinely or traditionally performed by any one class of employees or by contractors. The record does show that similar work has been done by BMWE employees in the past. In these circumstances, the Organization need not establish exclusive system-wide performance in order for the notice provisions of Rule 1(b) to apply. Third Division Awards 4888, 23578, 26174, 26301, 27011, 30970, 32862.

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The fact that Carrier belatedly argued that the disputed work fell under the BRS Agreement, not the BMWE Agreement, does not convert this case to a jurisdictional dispute or remove it from the applicability of Rule 1(b) since the matter was dealt with on the property from the start as a contracting dispute, and we have found that Carrier failed to prove otherwise. As was the situation in Third Division Award 37314, Carrier argued throughout the claim processing that the work was environmentally sensitive and required removal of hazardous materials in compliance with its policies, and that BMWE employees did not possess the special training required to perform it. In sustaining the claim on the basis of Carrier's notice violation, the Board relied upon the following rationale which is equally applicable herein:

> The dispute on these critical points provides strong evidence for the need to comply with the notice provisions of Rule 1(b). Irrespective of Carrier's contention that it acted properly because its employees did not possess the skills and qualifications to adequately handle the work, nevertheless, before those kinds of issues can be addressed, Rule 1(b) imposes a threshold obligation upon the Carrier to give the Organization advance notice of its intent to contract out the work. Such advance notice is supposed to provide the opportunity for good faith discussion of precisely the kinds of issues which are now disputed by the parties on the merits.

Having found that Carrier violated Rule 1(b) by failing to give the Organization advance notice of its intent to contract, or an opportunity to discuss the issues of whether special skills and equipment were required or whether the work was better classified as signal appurtenance reclamation under the BRS Agreement, the question remains as to the

appropriate remedy. Carrier relies upon cases establishing precedent that monetary damages are not appropriate for a notice violation for fully employed claimants, Third Division Awards 30281, 31652, while the Organization cites cases for the proposition that Carrier is required to make a monetary payment for a notice violation even to fully employed claimants, Third Division Awards 32862, 37314.

What these cases have in common is that they rely on notice language contained either in Article IV (former MP Agreement) or Rule 52 (UP Agreement) which is similar to that contained in Rule 1(b) of this former CNW Agreement. The genesis for the rationale for awarding monetary compensation to fully employed claimants for a notice violation is set forth in detail in Third Division Award 32862. Briefly it notes that prior to 1991 Carrier had been repeatedly admonished for its notice violations but no monetary relief was furnished except to furloughed employees based upon the Organization "sleeping on its rights" for a lengthy period of time. The cases relied upon by Carrier herein all deal with contracting transactions which took place between 1987 and 1991. However, as noted in Third Division Award 32862, by 1991 Carrier had been advised that future failure to comply with the notice provisions would subject it to potential monetary damage awards regardless of the status of claimants. See, Third Division Awards 29825 and 29792. As was the situation in Third Division Award 32862, and other cases cited therein, the instant contracting occurred in 1998, well after Carrier was put on notice of the potential monetary consequences of failing to comply with the notice provisions prior to contracting.

Thus, since the very purpose of Rule 1(b) was frustrated by Carrier's failure to provide notice in a case where it repeatedly asserted that it fell

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under one of its exceptions, we deem it appropriate to fashion an award similar to that directed by the Board in Third Division Award 37314. The case is remanded to the parties for a joint check of Carrier's records to establish the number of hours it took the contractor's employees to perform only the disputed work of removing retired and abandoned battery tubs from the right of way and restoring the roadbed. Claimants are to be made whole for an equal proportionate share of such hours at their straight time rates of pay regardless of whether they were fully employed at that time to compensate them for the missed work opportunity involved.

AWARD:

The claim is sustained in accordance with the Findings.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

Brandt W. Hanquist
Brandt W. Hanquist
Carrier Member

Don D. Bartholomay
Don D. Bartholomay
Employee Member

Dated: 3/24/06

Dated: 3-24-06

CARRIER DISSENT TO
PUBLIC LAW BOARD 6867 AWARDS 1 & 2
(Referee Newman)

This case involved the removal of old signal battery tubs along the right of way that had been installed by the Signal Department. The Brotherhood of Maintenance of Way Employes (BMWE) submitted a claim alleging the work of removal and disposal of the battery tubs was their work and therefore the agreement was violated.

In reaching a decision, the Referee described the work in the dispute as "*...the removal, loading and hauling of signal battery tubs and boxes which were part of the old signal system ...*". With this depiction of the work involved there should have been no question that the BMWE claim to the signal battery tub removal work was misplaced. However, in the award, the Referee erroneously found that those "battery tubs" which had housed the batteries for the signal system became a part of the "track structure" once the batteries had been removed. This was apparently premised on one statement from one BMWE individual who said he had been involved in removal of those tubs in the past.

Carrier cannot agree with the Referee's finding that because a BMWE employee may have removed some battery tubs in the past, the work could be considered to be transferred to the BMWE agreement. To apply the Referee's rationale once any part of the signal system becomes inoperable or not functional it becomes "a track structure". For example, switch heaters that the Signal Department installs in the track and maintains would become a track structure if they are removed or retired. Retarders which are also installed in the track by Signal employees would become a track structure at the time of being retired and removed. Similar to the battery tubs along the right of way, crossing gates at a closed crossing or the pole lines replaced with microwave which were along the right of way would become track structures. Or, a signal house would become a track structure, and so on. Obviously, the Referee's rationale that if ever a Maintenance of Way employee assisted a Signal employee the work could be considered to be covered under the BMWE Scope Rule because of it being along the right of way is not a correct interpretation.

The issue was clearly a jurisdictional dispute. The Brotherhood of Railway Signalmen (BRS) weighed in on the case with a submission and reinforced the work was under the Scope of their collective bargaining agreement. Since the tubs were signal appurtenances there was no Notice of Subcontracting required to be served to the BMWE General Chairman. The fact that the battery tubs were no longer a working part of the signal system or because they were on the right of way did not convey the work to the BMWE employees. As pointed out above there are numerous signal appliances (crossing gates, retarders, signal houses, signal masts, etc.) along the right of way and in the track. At no point are they ever conveyed to the Track Subdepartment or become a "track structure" as the Referee found the "battery tubs" to be on page 10 of the Award.

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One thing the Carrier does agree with the Referee is that the Carrier could have done a better job in responding to the claim. However, the claim of the BMWE was still a raid by the BMWE on arguably BRS work. This Award is akin to creating an Intercraft work jurisdiction rule, which the BMWE has consistently fought. As stated, the Board is not empowered to transfer work from one craft to another. It would take the three principal parties to transfer the work (the Carrier, the BMWE and the BRS). For these reasons the decision in the award is flawed. While the Carrier will pay the Claimants the requested remedy the award to dispose of the claim, we do not consider them to establish precedent nor to be an accurate interpretation of the agreement. We therefore dissent.

For the Carrier,

B. W. Hanquist

B. W. Hanquist
Asst. Director Labor Relations

ORGANIZATION MEMBER'S RESPONSE TO

CARRIER MEMBER'S DISSENT TO

AWARDS 1 AND 2 OF PUBLIC LAW BOARD NO. 6867
(Referee M. Newman)

This dissent in nothing more than a regurgitation of its position presented during oral arguments. Those same arguments were rejected in the awards and the dissent does not distract therefrom. Therefore, the awards are precedent on this issue and will be used as same by the Organization.

Respectfully submitted,

D. D. Bartholomay
Employe Member
PLB No. 6867