BEFORE

PUBLIC LAW BOARD NO. 954

AWARD NO. 1

(Case No. 16955)

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLER, EXPRESS AND STATION EMPLOYES

v.

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM:

1. The Carrier violated the established practice, understanding and provisions of the Clerk's Agreement, particularly, the Scope Rule, Rules 4-A-7, 9-A-1, 9-A-2, among others, Memorandum of Understanding No. 2 and Agreement No. 47, when it assigned, required or permitted established Chauffeur work to be performed by a laborer (E. Flynn) who has no seniority rights and is not covered by the Scope of the Clerk's Agreement.

2. This work shall be returned to the Employes covered by the Scope of the Clerk's Agreement upon whose behalf the Agreement was made in accordance with the provisions of the Railway Labor Act to perform this work.

3. The Carrier shall pay Chauffeur Buckley for each Monday of every week, effective June 13, 1966, and Chauffeur L. Walker for each Wednesday of every week, effective June 15, 1966, eight hours pay at the rate of time and one half and for each day thereafter this chauffeuring work is performed by other than employes covered by the Clerks' Agreement until such time as the violations are corrected.

4. The Carrier shall pay Chauffeur E. Blank for each Tuesday, Thursday and Friday of each week, effective June 14, 1966, four hours, overtime at the rate of time and one half and for each day thereafter this carting and chauffeuring work is performed by other than employes covered by the Clerks' Agreement and until such time as the violations are corrected.

5. The Carrier further violated Rule 4-D-1 when it failed to comply with its own provision, reason and understanding (letter dated October 26, 1966) for extending the time limit of the claim.

JURISDICTION

This Board (Public Law Board No. 954) was duly established by Agreement of the parties, executed April 25, 1972, as provided for in Public Law 89-456 (80 Stat. 208) and in compliance with Regulations promulgated by the National Mediation Board by authority of said statute (F. R. Doc. 66-1245 1). The aforementioned Agreement is incorporated herein by reference thereto.

The "AWARD NO. ___" in the caption of this and all subsequent cases within the jurisdiction of this Board represents the order of issuance of the AWARD. The "Case No. ___" which appears in parenthesis under the "AWARD NO. ___" identifies the case as listed in Attachment "A" of the April 25, 1972 Agreement of the parties.

The Board in its consideration of each dispute is by statute required to confine itself to issues timely raised by either party in the course of usual handling of disputes on the property. Railway Labor ACT (RLA) Sec. 3, First (I). As to issues which satisfy that test the parties in paragraph (9) of this Agreement establishing the Board, have stipulated that each of them may, either orally or in writing, present evidence that

is material and relevant to the issues timely raised on the property; and, the Board is authorized "to require the production of such additional evidence ... as it may desire from either party."

The parties have waived the time limitation prescribed in paragraph (10) of their April 25, 1972 Agreement within which the Board was to "render an award within thirty (30) days after the close of hearing of each claim."

OPINION OF BOARD:

This dispute, on April 10, 1967, was referred by petition of BRAC to the Third Division, National Railroad Adjustment Board as provided for in RLA, Sec. 3, First (i). Each party filed with the Division a Submission and a Rebuttal to the Submission of the other. In its Submission, Carrier alleged that International Brotherhood of Electrical Workers (IBEW) had a third party interest in the dispute; and, the Division was without jurisdiction to consider the dispute on its merits in the absence of notices to IBEW with right to intervene. The Division, under date of August 6, 1971, served notice on IBEW of the pending dispute and informed it of its statutory right to: (1) file a written Submission; and, (2) be heard at an oral hearing set for September 14, 1971. IBEW filed a Submission on September 14, 1971. Neither Carrier nor BRAC entered an appearance at the oral hearing. On September 23, 1971, the Executive Secretary of the Adjustment Board forwarded a copy of the IBEW Submission to Carrier and BRAC and informed them that each would be allowed until October 26, 1971, to supplement its original Submission to embody the involvement of IBEW. Each did. Thereafter, on May 11, 1972, Carrier and BRAC, jointly, exercised the statutory right (RLA, Sec. 3, Second) to withdraw the instant dispute from the Third Division and four others (Dockets CL 18127, 18315, 19329

and 18739) for referral to this Public Law Board -- all of which disputes are docketed with this Board.

On June 16, 1972, this Board served notice on IBEW that: (1) the Board would hold hearing on June 28, 1972; and (2) it "will be allowed to participate in said hearing in accordance with the directives of the National Railroad Adjustment Board." IBEW did not appear at the hearing.

We find that IBEW, as an alleged third party in interest, was fully afforded due process as prescribed in T.-C.E.U. v. Union Pacific R. Co., 385 U.S. 157 (1966).

FACTS

The Claim was filed with Carrier's Chief Mechanical Officer on August 8, 1966, with statement of "Position of Employes" as follows:

> The employes contend that the chauffeuring and carting of material between Morris Park Shops and the Dunton Electric Annex has always been performed by the Chauffeurs covered by the Scope of the Clerk's Agreement. Laborer E. Flynn [covered by IBEW Agreement], who has no seniority rights and is not covered by the Scope of the Clerks' Agreement, picks up material, Monday to Friday of every week, at Morris Park Shops, and delivers it to Dunton Annex where he is assigned to work.
>
> The employes further contend that this chauffeuring of material between Morris Park and Dunton Annex was done once before, approximately two years ago by other personnel at Dunton Annex, not covered by the Clerks' Agreement, and was stopped immediately by a meeting between your assistant Mr. E. DeCeck and Local Chairman F. Denzin.
>
> The employes further contend that we do have chauffeurs going between Morris Park and Dunton Annex.
>
> Paragraph (b) of the Scope of the Clerks Agreement reads as follows: Positions and work coming within the Scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions and work from the application of these rules, except by agreement between the parties signatory hereto. (Emphasis supplied.)

Please advise payroll date in which this claim will be paid.

In the event you do not agree to the payment of this claim, please consider this notice in accordance with the provisions of Memorandum of Understanding No. 4, that you will set a date within (10) days of the date you receive this letter for the purpose of discussing this claim.

The Chief Mechanical Officer, in reply to the Claim, made admission as to the right to perform the involved work; and, denied the Claim on September 16, 1966:

Your position that the chauffeuring and carting of material between Morris Park Shops and the Dunton Electric Annex has always been performed by the chauffeurs covered by the scope of the Clerks' Agreement is true and correct, and to further substantiate your position, the carrier did create a position of chauffeur and did hire a truck for the purpose of carting material from Morris Park to Brooklyn Electric Car Shop.

The contention that E. Flynn who has no rights under the scope of the Clerks' Agreement is chauffering and carting material between Morris Park and Brooklyn Electric Car Shop every day is not supported as the carrier maintains a chauffeur and truck for this specific detail.

On the basis that the carrier is carting material in accordance with the provisions of the Agreement, your claim on behalf of the three named claimants is denied. (Emphasis supplied.)

On October 4, 1966, BRAC, in compliance with Rule 4-D-1 (h), submitted to Carrier an "Ex-Parte Statement of Facts":

The Carrier admits that the chauffeuring and carting of material between Morris Park Shops and Dunton (Brooklyn) Electric Annex, has always been performed by the chauffeurs. (See Carriers denial of September 16, 1966)

The Carrier denies that E. Flynn, or any other personnel at Dunton Electric Annex, who have no rights under the Scope of the Clerks' Agreement is chauffeuring material between Morris Park and Dunton (Brooklyn) Electric Annex. This is incorrect, as a check of the records of the Gateman at

> Morris Park Shops and the records of the Stores Attendants at Morris Park Storeroom, show that E. Flynn and/or other personnel from Dunton Electric Annex, come into the shops in their private cars to pick-up material, Monday to Friday, every week.
>
> Chauffeur E. Blanks carts [mateial] between Morris Park Shops and Dunton [(Brookly)] Electric Annex on Tuesday and Thursday.
>
> Chauffeur Buckley is on his relief day, Monday.
>
> Chauffeur L. Walker is on his relief day, Wednesday.
>
> [Ed. note: The three named chauffeurs are Claimants herein.]

Carrier's "ex-parte statement of facts," dated October 20, 1966, states:

> The Carrier created a chauffeur's position and hired a truck for the purpose of supplementing the regular truck assigned to Dunton Electric Car Shop and Brooklyn Electric Car Shop approximately two years ago. The requirements of Brooklyn Electric Car Shop were such that the additional truck made deliveries each week of material from the Morris Park Store Room. Requirements of service are such that a truck assignment of five days a week to Brooklyn Electric Car Shop cannot economically be supported, therefore, this truck is used to supply material to other areas.
>
> The use of other than employees covered by the scope of the Clerks' Agreement has been the practice over many years. (Emphasis supplied.)

Following a meeting on October 26, 1966, Carrier, under date of January 19, 1967, wrote to BRAC's General Chairman:

> At the aforesaid meeting, you were advised that the Assistant to the Chief Mechanical Officer was making a check as to how much material was being transported by other than chauffeurs. This study proved that the amount of material being transported is negligible and, further, that other than Miscellaneous Forces (Chauffers) have been used on occasion to transport material from one shop to another for many years, without protest. (Emphasis supplied.)

In view of the foregoing, there is no basis for this claim and it is, accordingly, denied.

From the above history of the case as handled on the property, by and between Carrier and BRAC, we find the only defenses proffered by Carrier were:

1. IBEW Laborer, Flynn, did not chauffeur and cart material between Morris Park and Brooklyn Electric Car Shop "every day;"
2. A "truck assignment of five days a week to Brooklyn Car Shop cannot economically be supported;"
3. Past practice: Employes other than BRAC chauffeurs have for "many years" performed the work involved;" and
4. The material being transported by other than BRAC chauffeurs "is negligible."

FINDINGS AS TO APPLICATION OF BRAC AGREEMENT

1. Paragraph (a) of the Scope Rule, standing alone, is general in nature. But, paragraph (b) of that Rule is specific. (NOTE: Paragraph (b) is quoted in the BRAC's Claim of August 8, 1966, supra.);

2. The weight of authority of Third Division, National Railroad Adjustment Board case law compels a finding that when the Scope Rule of an agreement encompasses "positions and work" that work once assigned by a carrier to employes within the collective bargaining unit thereby becomes vested in employes within the unit and may not be removed "except by agreement between the parties;"

3. Carrier admits that chauffeuring and carting of materials between Morris Park Shops and the Dunton Electric Annex "has always" been performed by chauffeurs covered by the scope of the BRAC Agreement (see, Chief Mechanical Officer's denial of Claim dated September 16, 1966, supra). Therefore, in the unequivocal language of paragraph (b) of the Scope Rule, the identified work may not be removed from the scope of the Agreement except by agreement of the parties -- no agreement was fashioned relative to the instant dispute;

4. Carrier's defense that the work performed by IBEW Laborer, Flynn, was "negligible" is found wanting for two reasons: (1) the defense is an affirmative one -- Carrier had the burden of proof which it did not satisfy by material and relevant evidence of probative value; and (2) even if proven it would establish, only, that it had assigned work reserved to BRAC chauffeurs (Scope Rule, paragraph (b)) to an employe stranger to the BRAC Agreement. The magnitude and frequency of work unilaterally wrongfully removed from the Scope of the BRAC Agreement is not a justifiable defense;

5. Carrier's alleged defense of past practice fails for the following reasons: (1) a Scope Rule such as paragraph (b) in the BRAC Agreement is not ambiguous in the light of the case law of the Third Division, National Railroad Adjustment Board; (2) parole evidence is admissible, material and relevant in the interpretation of an ambiguous provision of an agreement only to arrive at the intent of the parties; or, to find history, tradition, custom exclusivity of contractual investment of right to work under a scope rule general in nature -- paragraph (b) of the confronting Scope Rule is specific;

6. The economic consequences of a bona fide contract are not

material, relevant or of persuasive value before a forum charged with its interpretation and application. If a party to a collective bargaining agreement finds, by experience, that as to it the term(s) are economically onerous, the remedy is collective bargaining. This Board is without jurisdiction to entertain such an argument and resolve it by fiat.

Carrier raised no issue on the property as to the measure of compensation prayed for in paragraphs 3 and 4 of the Claim.

For the foregoing reasons we find and hold that Carrier violated and violates paragraph (b) of the Scope Rule when it assigned or assigns the work herein involved to an employe not within the collective bargaining unit of the BRAC Agreement. We, therefore, will sustain paragraphs 1, 2, 3 and 4 of the Claim; and, will dismiss paragraph 5 of the Claim.

THE THIRD PARTY ISSUE

IBEW, third party herein, alleges and prays in its Submission:

> We submit that the Carrier properly assigned the Electrical Workers to perform the disputed work and that the work is covered by the Agreement between The Long Island Rail Road Company and System Federation No. 156, International Brotherhood of Electrical Workers. (See Carrier's Exhibit A) which reads in part as follows:
>
> ARTICLE III - DIFFERENTIAL FOR CERTAIN EMPLOYEES
>
> Effective with the signing of this agreement, a differential of thirteen cents (13¢) per hour will be granted to Electricians in gangs who meet the necessary requirements of New York State Motor Vehicle Bureau and who are required, incident to their regular duties, to operate motor trucks. (Emphasis supplied.)
>
> We, therefore, request that your Honorable Board find that the Carrier did properly assign the work in dispute to the employes of the Electrical Workers' Craft.

Carrier argues that: (1) the above quoted Article III of its Agreement with IBEW vests IBEW employes with a contractual right to perform the work involved in this dispute; and, (2) the Article stands as proof that BRAC employes do not have exclusive right to work.

Article III of the IBEW Agreement does not vest the work therein described in IBEW employes. It is merely an undertaking of compensation contractually due an IBEW employe if he is "required ... to operate motor trucks."

Carrier may require any of its employes to perform work of any nature -- crossing craft and class lines -- so long as the work is not patently dangerous or its performance by the assigned employe is barred by law. The assigned employe, if grieved, must comply with the Carrier's directive and seek his remedy through the grievance procedures.

Article III of the IBEW Agreements stands only as proposition of compensation for work specified therein which Carrier may require an IBEW employe to perform; not a vesting in IBEW employes of contractual right to the work.

In the railroad industry employes are often assigned to work not covered by the job assignment or not within the scope of their collective bargaining agreement. Such assignments often come into being because of exigencies faced by a carrier. When such assignments are made, Carrier takes a calculated risk in that it may find itself contractually obligated to compensate the employe assigned for the work performed; and, in addition, pay another employe, contractually eligible, for work not performed by him but as to which he had a contractual vested right. Cf. T-C. E. U. v Union Pacific R. Co., 385 U. S. 157 (1966).

An elementary principle of contract construction is destructive of

IBEW's contention. Article III of its agreement provides a measure of compensation when one of the employes covered therein is "required ... to operate motor trucks." It is uncontroverted that IBEW Laborer, Flynn, used his private automobile to pick up materials from Morris Shops Storeroom and delivered them to Dunton Shops Annex. Q. E. D.: (1) Flynn was not required "to operate motor trucks"; (2) use of an employe's private automobile is not within the contemplation of Article III of IBEW's Agreement.

We find that IBEW, third party intervenor, has no contractual right, on behalf of its members, to the work involved in this dispute. But, if employes covered by its Agreement are "required ... to operate motor trucks" then, regardless as to what craft or class of employes may have a contractual right to such work, the IBEW employe assigned has a contractual right to be compensated as provided in Article III of the IBEW Agreement. We, therefore, on the record before us, will deny IBEW's plea that the Board "find that the Carrier did properly assign the work in dispute to the employes of the Electrical Workers' Craft.

AWARD

1. Paragraphs 1, 2, 3 and 4 of the Claim are sustained.
2. Paragraph 5 of the Claim is dismissed.
3. The third party plea of IBEW is not supported by the Agreement between it and Carrier. It is denied.

ORDER

Carrier is hereby ordered to make effective the AWARD, supra, as of the date of its issuance shown below.

John H. Dorsey, Chairman
Neutral Member

H. M. Chancey vice J. J. Ward
Carrier Member
to be filed

S/ Z. Placksin
Employe Member

Issued at Washington, D. C. this 8th day of September, 1972.