SPECIAL BOARD OF ADJUSTMENT NO. 1069
SOUTHERN PACIFIC TRANSPORTATION COMPANY
AND IAM&AW, ET AL.
OREGON BRANCH LINES II ARBITRATION
RICHARD R. KASHER, ARBITRATOR
JUNE 18, 1994

Case 2

In the Matter of an Arbitration Between the

SOUTHERN PACIFIC TRANSPORTATION COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS
and
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION

Special Board of Adjustment

Appearances:

William G. Mahoney, Esquire
John O'B. Clarke, Jr., Esquire
L. Pat Wynns, Esquire
Donald F. Griffin, Esquire
Highsaw, Mahoney & Clarke
for the Organizations

Wayne M. Bolio, Esquire
Southern Pacific Transportation Company
for the Carrier

Introduction:

As the result of a decision by the Southern Pacific Transportation Company (hereinafter the "Carrier" or the "SP") to lease various of its branch lines in the state of Oregon to the Willamette & Pacific Railroad, Inc. (hereinafter the "W&P") and to the Willamette Valley Railway Company (hereinafter the "WVRY") and to sell certain other branch lines in the state of Oregon to the Molalla Western Railway (hereinafter the "MWRY") and in view of claims by the International Association of Machinists and Aerospace Workers, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, the International Brotherhood of Electrical Workers, the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers and the Sheet Metal Workers International Association (hereinafter the "Shop Crafts" or the "Organizations") that those branch line transactions violated the "contracting" provisions of the September 25, 1964 National Agreement and thereby deprived the members of the Shop Crafts of certain work which they ordinarily performed, this arbitration was convened as the second phase of a bifurcated proceeding.

In the initial proceeding the below-signed Arbitrator, who was selected to serve as the "Board", issued an Opinion and Award on August 9, 1993 which addressed the Organizations' claims that the above-referenced leasing and sale of branch lines in the

State of Oregon by the Carrier to various rail carrier entities violated the scope and seniority provisions of the collective bargaining agreements applicable to all of the standard Railway Labor Organizations.

The Shop Crafts' claims regarding the violation of the contracting provisions of the September 25, 1964 National Agreement were the subject of a hearing before the Board on February 23, 1994, which hearing was held at the offices of the National Mediation Board in Washington, DC.

Prior to the commencement of said hearing, in accordance with arrangements between the Board and the parties' counsel, the Carrier and the Organizations filed pre-hearing submissions which included statements of position and relevant exhibits. At said hearing the parties were afforded a full opportunity to present evidence through the testimony of witnesses and in documentary proofs, and counsel engaged in cross-examination. Counsel were also afforded the opportunity to file post-hearing briefs, which were submitted to the Board on or about April 15, 1994.

Background Facts

Nearly all of the relevant background facts are contained in this Board's decision of August 9, 1993, and are hereby incorporated by reference. These facts will be assessed in the

context of Articles I and II of the September 25, 1964 National Agreement which provide, relevantly, as follows:

ARTICLE I - EMPLOYEE PROTECTION

Section 1 -

The purpose of this rule is to afford protective benefits for employees who are displaced or deprived of employment as a result of changes in the operations of the carrier due to the causes listed in Section 2 hereof, and, subject to the provisions of this Agreement, the carrier has and may exercise the right to introduce technological and operational changes except where such changes are clearly barred by existing rules or agreements.

* * *

Section 2 -

The protective benefits of the Washington Job Protection Agreement of May, 1936, shall be applicable, as more specifically outlines below, with respect to employees who are deprived of employment or placed in a worse position with respect to compensation and rules governing working conditions as a result of any of the following changes in the operations of this individual carrier:

a. Transfer of work;

b. Abandonment, discontinuance for 6 months or more, or consolidation of facilities or services or portions thereof;

c. Contracting out of work;

d. Lease or purchase of equipment or component parts thereof, the installation, operation, servicing or repairing of which is to be performed by the lessor or seller;

e. Voluntary or involuntary discontinuance of contracts;

f. Technological changes; and,

g. Trade-in or repurchase of equipment or unit exchange.

* * *

ARTICLE II - SUBCONTRACTING

The work set forth in the classification of work rules of the crafts parties to this agreement will not be contracted except in accordance with the provisions of Sections 1 through 4 of this Article II.

Section 1 - Applicable Criteria

Subcontracting of work, including unit exchange, will be done only when (1) managerial skills are not available on the property; or (2) skilled manpower is not available on the property from active or furloughed employes; or (3) essential equipment is not available on the property; or (4) the required time of completion of the work cannot be met with the skills, personnel or equipment available on the property; or (5) such work cannot be performed by the carrier except at a significantly greater cost, provided the cost advantage enjoyed by the subcontractor is not based on a standard of wages below that of the prevailing wages paid in the area for the type of work being performed. Unit exchange as used herein means the trading in of old or worn equipment or component parts, receiving in exchange new, upgraded or rebuilt parts, but does not include the purchase of new equipment or component parts.

Sections 2, 3 and 4 of Article II address the "Advance Notice" required when subcontracting is contemplated, requests for information when no such advance notice is given and the machinery for resolving disputes regarding the application of the rule.

Mr. Paul Larson, a thirty-seven year employee of the SP and a Machinist at Eugene, Oregon for thirty-five of those years, testified that, as Local Chairman of the IAM&AW, he was familiar with the operation of the Eugene Shop, which operated three shifts, seven days a week. Mr. Larson described the work performed in diesel service and in the roundhouse and back shop. Mr. Larson testified that at the end of August, 1993 both the roundhouse and the back shop were closed, as the result, in his

opinion, of the reduction in work caused by the leasing of the Oregon Branch Lines to various lessees.

Mr. Larson described the work which previously had been performed in Eugene by Shop Craft employees engaged in a variety of work, including the servicing, maintenance and repair of locomotives. Mr. Larson testified that, aside from the loss of work attributable to the leasing of the branch lines, work was also "transferred out of Eugene and performed elsewhere on the system".

Mr. Larson described the concept of "point seniority" which is applicable to Shop Craft employees; and discussed this concept in the context of the Carrier's offering employees at Eugene the opportunity to work at Roseville, Oregon, Denver, Colorado and other locations on the system.

Mr. Darcy Porter, Director of Labor Relations for the Carrier and responsible for labor relations matters involving the Shop Craft Organizations, testified regarding the Carrier's implementation of the so-called "New York Dock provisions" in circumstances where there was a "rearrangement" of Shop Craft work. Mr. Porter testified that in addition to the standard protective conditions the SP offered furloughed Shop Craft employees, who were willing to transfer to other points on the Carrier's system, a $4,000 payment and the services of a moving van.

Mr. Porter also testified regarding the Carrier's decline in business in Oregon, and opined that Eugene and Roseville were the two points most affected by the rearrangement of work.

The Organizations have stated the issues before the Board as follows:

> 1. Was the Carrier required by Article I, Section 4 of the Shop Crafts' Agreement of September 25, 1964, to give those Shop Craft Organizations which are parties to this Arbitration Agreement the notice required by that provision before it abolished jobs of employees represented by those Organizations at Eugene, Oregon, and at other locations in Oregon as a result of:
>
> (a) the long-term discontinuance of services at a portion of its facilities in Eugene, and West-Side branch line locations;
>
> (b) the contracting out of its operations and equipment maintenance responsibilities to the W&P, WVRY and MWRY; and
>
> (c) the leasing of equipment to the W&P and other newly-formed carriers for those carriers to operate, service and repair in conjunction with performing work which the Organizations maintain is work of the Carrier?
>
> 2. Did the Carrier violate Article II of the Shop Crafts' Agreement of September 25, 1964, by entering into and consummating the lease of its West-Side branch lines to the W&P and WVRY and the sale of its branch lines to the MWRY?
>
> 3. Are employees of the Carrier who are represented by those Organizations which are parties to this Agreement to Arbitrate, and who have been affected by the job abolishments referred to above and/or by the actions complained of above entitled to the protective benefits provided by Article I of the Shop Crafts' Agreement of September 25, 1964?

The Carrier states the issue somewhat differently and asks, generally, whether the Carrier by entering into the lease/sale arrangements regarding the Oregon Branch Lines violated the contracting provisions of the September 25, 1964 Shop Crafts' Agreement.

The parties' positions, in general, regarding the contractual relationship between the leases/sale and the scope and seniority provisions in the collective bargaining agreements of all of the standard Railway Labor Organizations were discussed in detail in this Board's decision of August 9, 1993. Accordingly, those positions and the Board's analysis of those positions will not be repeated here. Rather, the Board will focus exclusively upon the question of whether the leases/sale constituted "contracting" and whether, if they did constitute contracting, the Carrier failed to comply with its obligations under the September 25, 1964 Shop Crafts' Agreement.

Position of the Organizations

In its pre-hearing submission, the Organizations contend that the lease/sale agreements are, in essence, contracting-out agreements. The Organizations submit that the Carrier's decision in this case was to contract out its "gathering and distribution" functions, and not to leave the markets the SP served. In support of this contention, the Organizations rely, in part, upon the testimony and exhibits submitted at the hearings conducted on June 3 and 4, 1993 in the "scope and seniority" provisions arbitration, focusing upon car loading statistics.

The Organizations argue that the evidence of record establishes that the lease/sale agreements were the method by

which the SP implemented its decision to contract out its gathering and distribution functions on the Oregon Branch Lines so as to strengthen its position in the markets served by those lines.

The Organizations maintain that the SP structured the leases and partial sale of its branch lines in a manner by which it continues to handle the long haul of all branch line traffic generated by the new operators. The Organizations analyze the work performed by the various incumbents of the Shop Crafts on the equipment that was previously owned and operated by the SP, and point out that the work which had been performed by the Carrier's Shop Craft employees, who have been furloughed, is now performed by employees of the new operators.

The Organizations submit that the Carrier's Service Track at Eugene has been reduced from forty-four (44) employees to twenty-eight (28) employees as a direct result of the contracting of work under the lease/sale agreements.

The Organizations list the forty (40) Shop Craft employees who the Organizations claim have been adversely affected by what they allege was contracting by the Carrier, and who they submit should be compensated in accordance with the September 25, 1964 Agreement.

The Organizations rely upon the definition of "contract" as found in Black's Law Dictionary, Fifth Edition, in support of

their contention that the leases and sale had the contractual effect of removing work from under the terms of the collective bargaining agreements and giving that work to contractors, without adhering to the requirements of the 1964 Agreement which was thereby violated. The Organizations analyze Articles I and II, Employee Protection and Subcontracting, of the September 25, 1964 Agreement and assert that the Carrier violated that Agreement which clearly prohibits the contracting of SP employees' work to another carrier. The Organizations point out that the Special Board created under P.L. 102-29 observed that the 1964 Agreement as amended in 1991 was designed to protect against "novel arrangements . . . which have the effect of removing work historically done by bargaining unit members."

The Organizations maintain that the lease/sale agreements are agency contracts by which the "lessees" perform branch line work for the benefit of the SP. The Organizations observe that the question of the "lease form of subcontracting" has not been presented to Special Board of Adjustment No. 570, the Special Board of Adjustment established pursuant to the September 25, 1964 Agreement, very often during the past thirty years; but observes that in Award No. 63, issued by Neutral Jacob Seidenberg in 1967, it was held that an arrangement did not constitute subcontracting because the Carrier did not "first legally own, or have dominion over, the subject matter of the 'res' of the

subcontract." The Organizations argue that in the instant case the SP not only had, but continues to have, legal ownership and dominion over the "res" of the leases; and submits that to its knowledge there has never been so restrictive a lease arrangement as the one which now is the subject matter of this Board's inquiry. Reviewing the provisions of the leases, the Organizations argue that there can be no serious question that the lessees are agents of the SP by virtue of the unique restrictive nature of said leases. In further support of this contention, the Organizations analogize the instant case to decisions by the Interstate Commerce Commission (hereinafter the "ICC") and the federal courts in which the principle of "agency" was decided, and which the Organizations submit establish that the SP should be found to be the principal on behalf of whom the lessees are performing service/work.

The Organizations conclude their arguments in the pre-hearing submission by asserting that the SP failed to comply with the terms of the 1964 Agreement, and they request that the Board conclude that those SP employees adversely affected by the contracting be recompensed pursuant to the terms of the Agreement.

In its post-hearing brief, expanding upon the points made during oral argument, the Organizations contend that they established that the subject leases are effectively contracts

between the SP and what they characterize as the "independent contractor" railroads. The Organizations point out that the independent contractor/lessees, by maintaining and servicing their own locomotives, have deprived Shop Craft employees of work on twenty-five locomotives which they had previously performed.

The Organizations submit that the SP maintained a ratio of employees to locomotives at the Eugene shop, which from 1990 until the time of the leases was .82 employees per locomotive; and that as a result of the leases this so-called "Blue Line" ratio required the reduction of twenty-one (21) Shop Craft employees at Eugene. Accordingly, the Organizations contend that Shop Craft employees were adversely affected by the lease/sale arrangements entered into between the SP and the branch line operators, and further argue that in light of the "uniquely restrictive character" of the leases this Board should conclude that such leases fall within the "novel arrangements" which Special Board 102-29 had in mind when it prohibited the use of such arrangements by carriers "to circumvent the contracting out limitations" of the 1964 Agreement.

Based upon the foregoing facts and arguments, the Organizations contend that the subject lease arrangements are in effect, and in reality, nothing more than contracts to perform SP work through others with the major fruits of that work all flowing to the SP. The Organizations maintain that the direct

result of these arrangements was the elimination of twenty-one (21) positions at the Eugene Locomotive Shop, and therefore they request that their claims be sustained.

Position of the Carrier

In its pre-hearing submission, the Carrier maintains that the instant claim should be denied because the Organizations have previously sought, through collective bargaining, to limit short line transactions. The Carrier believes that the efforts of those Shop Craft Organizations to obtain through collective bargaining limits on short line transactions, which efforts failed, indicates that the original 1964 Shop Crafts' Agreement did not contain such limitations. The Carrier further argues that the moratorium clauses in the parties' agreements bar the Organizations' attempt to impose protection in the instant short line transactions. The Carrier contends that the August 9, 1993 decision by this Board, holding that the Agreement does not prohibit short line transactions, bars the Shop Crafts' claim in the instant case.

The Carrier points out that the railroad industry, since approximately 1985, has seen an explosive growth in the creation of short line and regional railroads. The Carrier states that to the SP's knowledge no decision has been issued by any Public Law Board or Special Board of Adjustment holding that short line sale

and lease transactions violate the 1964 Shop Crafts' Agreement. Therefore, the Carrier argues that none of the short line and regional rail transactions which have been engaged in by all Class I railroads could have occurred if such transactions, in and of themselves, violated the 1964 Agreement. The Carrier submits that the past practice in the industry and at the SP, as set forth in the prior proceeding before this Board, could not have occurred if those transactions violated the Shop Crafts' Agreement.

The Carrier maintains that the instant claims under the Shop Crafts' Agreement are an attempt by the Organizations to by-pass the statutory remedies established by the ICC, the administrative forum established for the purpose of challenging short line transactions. The Carrier points out that at least one of the Organizations involved in the instant proceeding, the International Association of Machinists and Aerospace Workers, is currently prosecuting a petition to revoke the Section 10901 exemption before the ICC; and that that proceeding is ongoing and has not yet been resolved. The Carrier posits that, to the extent the Organizations object to the absence of labor protection in the context of short line transactions, those concerns are best addressed through the ICC, and that the ICC procedures should not be collaterally attacked by the utilization of the grievance procedure.

In addressing the provisions of the September 25, 1964 Agreement, the Carrier submits that that Agreement was not intended to apply to sale and short line lease transactions; and relies, in part, upon the history of Presidential Emergency Board No. 160, the Board whose recommendations and findings resulted in the 1964 Shop Crafts' Agreement. The Carrier points out that the 1964 Shop Crafts' Agreement, in general, granted protection to employees who were adversely affected as a result of technological and modernization changes, and was not intended to address situations involving short line sale and lease transactions.

The Carrier submits that the short line transactions in the instant case do not trigger protection under Article I, Section 2 of the 1964 Shop Crafts' Agreement. In support of this contention, the Carrier relies, in part, upon decisions of Special Board of Adjustment No. 570, which the Carrier asserts have held that a subcontracting claim will lie only in cases where the Carrier has control and title over the equipment in question; a circumstance the Carrier argues is not present in the instant case.

The Carrier further contends that there is no causal connection between the sale/lease transactions and the furlough of any Shop Craft employees. The Carrier points out that the leases establish the SP's obligation to maintain the locomotives

which were temporarily leased to one of the carriers, the W&P. Thus, the Carrier contends that the temporary lease of twenty locomotives could not have had any adverse impact upon the involved employees. In any event, the Carrier maintains that the furloughs which occurred in Eugene were attributable to overall reductions in the work force being effected by the Carrier, which impacted Shop Craft employees located at other locomotive repair shops on the system.

Based upon the foregoing facts and arguments, the Carrier submits that the instant claims have been resolved by this Board's decision of August 9, 1993, which the Carrier asserts established that neither Presidential Emergency Board No. 219 nor the Special Board established pursuant to Public Law 102-29 imposed limits on line transfers, despite the concerted efforts of the Organizations to obtain such limits. The Carrier further contends that the September 25, 1964 Shop Crafts' Agreement was not intended to cover the situation presented by deregulation and the ICC exemption procedures which have resulted in the growth of the short line and regional rail segment of the rail industry. If the Board reaches the merits of this dispute, the Carrier argues that the furloughs of any Shop Craft employees at Eugene, Oregon was unrelated to the lease/sale transactions, and thus submits that the claims should be denied.

Findings and Opinion

As will be more fully discussed below, this Board previously acknowledged in its August 9, 1993 decision regarding scope and seniority issues that the question of line sales/leases has been the subject of considerable concern to all of the standard railway labor organizations. It should be observed that that concern has been vigorously expressed for a significant period to time in active advocacy in and before several other forums. Specifically, the Organizations have sought to protect their constituents from the adverse affect of line sales/leases in the collective bargaining forum, before the appropriate administrative agencies, before a Presidential Emergency Board and a Special Board created by the United States Congress, and in the federal courts.

Leases and sales of rail lines are transactions that have been historically subject to the regulatory authority of the ICC. If, as some argue, the ICC has, over the past ten years or so, abandoned its practice of ensuring that rail employees adversely affected by the sale or lease of rail lines are protected, that battle is properly waged before the ICC, in the federal courts, in the collective bargaining arena, and/or in the United States Congress.

If, on the other hand, it could be shown that the transactions regarding the Oregon branch lines were not bona fide

sales or leases, but rather that the lessee and purchaser operators were de jure or de facto subcontractors, then there would be a justiciable dispute properly joined before this Board.

However, as this Board has previously concluded, based upon the review and consideration of a very weighty evidentiary record, there is insufficent evidence to conclude that the new operators were alter egos of the SP over whom the SP had control, as a contractor would have over a subcontractor. Specifically, in addressing the issue of control and bona fides, this Board stated as follows in its August 9, 1993 decision:

> Thirdly, there is insufficient evidence in this record to establish that the W&P, the WVRY and/or the MWRY are not bona fide carriers engaged in the business of railroading for the purpose of obtaining a profit through their operating efforts. This Board has no factual basis to challenge the evidence in the record regarding the independence of the shortline operators or the Carrier's assertion that it entered into long-term leases with reputable and established shortline operators for the East and West Side Lines. Nor is there preponderant evidence which would establish that the SP exercises control over the operations on those lines, or that the SP has an ownership interest in the shortline operators or their parent companies, or that the SP is involved in the management and/or supervision of the shortline operators' employees. Accordingly, there is no reason for this Board to conclude that there is a "corporate veil to be pierced" for the purpose of establishing that the W&P, the WVRY and/or the MWRY are controlled by the SP. (Pages 25 to 26, August 9, 1993 decision.)

This Board also found merit in the Carrier's arguments to the effect that the subject matter of line sales/leases was a bargainable matter which likely would be raised during negotiations in the future. In addressing the issue of where the dispute should properly be joined, this Board, in its August 9, 1993 decision, stated as follows:

> In spite of this well-articulated equitable plea and similar positions advocated by other rail labor organization representatives, the Special Board, in a report issued on July 18, 1991, rejected rail labor's request to modify PEB No. 219's moratorium provisions, and thus the subject matter of line sales/transfers was reserved for bargaining in the next round of negotiations under the provisions of the Railway Labor Act.
>
> The above-quoted excerpt can lead to no other conclusion but that rail labor was seeking to establish "a uniform set of procedures and protections which would apply in such situations"; showing rail labor's recognition that it needed some facility to address "issues of the carriers' ability to engage in line sales and similar transactions over the unions' objections". Additionally, there is recognition that "There remains no other effective way for the unions to obtain any consideration for their members affected by a line transfer". In this Board's opinion, if rail labor had a clear and unequivocal remedy in the various scope and/or seniority provisions of applicable collective bargaining agreements, it is unlikely that it would have cast its prayer for relief from the moratorium in the context of its members having no way to obtain "any consideration" for a line transfer. (pages 28 to 29, August 9, 1993 decision)

Even in the face of these apparently dispositive findings, one cannot help but be impressed by the carefully-crafted arguments presented by counsel for the Organizations, in which the Organizations posit that the relationship between the SP and the new operators is that of principal and agent or principal and contractor. The plea and the contentions presented in this case by the Organizations are equitably persuasive. However, in order to prevail the Organizations, who carry the burden of proof, are obligated to establish that their claims are supported by specific contract language found in the September 25, 1964 Agreement and/or that the parties to that Agreement mutually intended, when the terms were negotiated, to have the provisions of the Agreement apply to circumstances such as the leases and sale which were consummated in the instant case. That effort, that is to carry the burden of proof, is an uphill struggle; and

as sympathetic as an arbitrator may be to strong equitable claims, his/her jurisdiction is circumscribed by the words of the contract and by a fair, dispassionate analysis of the facts.

Unfortunately, from the perspective of the Organizations, neither the contract language nor the facts support their position. This Board is of the opinion that the Carrier is correct when it argues that the September 25, 1964 Agreement does not by its specific terms establish protection for employees who are adversely affected by line sales/leases. Article I, Section 1 speaks to affording protection to employees who are displaced or deprived of employment as the result of "changes in the operations" of a carrier due to seven specific enumerated causes listed in Section 2 of the Article. "Line sales or leasing of lines" is not one of the listed causes which would require the application of the Agreement. General rules of contract construction, such as expressio unius est exclusio alterius and ejusdem generis, frequently applied by arbitrators in determining whether specific subject matters or activities are included or excluded from the coverage of collective bargaining agreements, militate against a finding in this case that leases or sales of rail lines fall within the parameters of the agreements here under consideration.

Additonally, the evidence does not support a finding that the parties, who negotiated the Agreement in 1964, contemplated that its provisions would apply in cases of line sales/leases.

Article II establishes what has come to be reasonably standard language prohibiting contracting out of craft or class or bargaining unit work, except in certain limited circumstances; such as the unavailability of qualified personnel or necessary equipment or when a contractor's employees can perform the involved work at a significantly reduced price. This Article has no application unless it can be established that there is "contracting" involved; and, as this Board previously concluded, the evidence does not support a finding that the new operators of the Oregon branch lines are "sham" entities.

Accordingly, this Board is constrained to conclude that the claims are not supported by preponderant evidence which would establish that there is a subcontracting arrangement in existence between the SP and the new operators, and thus the provisions of the September 25, 1964 Agreement are not triggered. Therefore the claims must be denied.

Award: The claims are denied in accordance with the above findings. This Award was signed this 18th day of June, 1994

Richard R. Kasher

Richard R. Kasher, Chairman
Special Board of Adjustment No. 1069