Special Board of Adjustment, No.1096

In the Matter of the Arbitration Between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES - and - CSX TRANSPORTATION, INC. (System Tractor-Trailer Operator Dispute)	**OPINION AND AWARD**

Appearances:

For the Union:

Steven V. Powers, Esq.

For the Carrier:

Mark D. Selbert,
Manager Employee Relations

By an Agreement dated May 16, 1997, the Parties established a Special Board of Adjustment to hear and determine the following dispute:

> Did the Carrier violate the agreements between the parties when it abolished the System Tractor-Trailer Operator (STTO) positions and then contracted out the STTO work to other than qualified STTO's? If the agreements were violated, what shall be the remedy?

After my appointment as Board Chairman and the receipt of initial and rebuttal submissions, I held a hearing on this matter in Chicago, Illinois on November 13, 1997, at which time both Parties were afforded

full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. The Parties then orally summarized their respective positions.

The Background

The Carrier, sometimes referred to here as "CSXT," is the result of a 1987 merger of the Chessie System (the C&O, the B&O and the Western Maryland (WM) railroads) and the Seaboard System (the Louisville & Nashville railroads and the Seaboard Coast Line). The history of this dispute, the recitation of which will be as brief as possible, primarily involves the Chessie System. There is some disagreement over the facts, but little that affects the Parties' primary quarrel, which is essentially over the interpretation of an agreement signed on October 8, 1987 (the STTO Agreement) and the asserted application of a document known as the Hopkins/Berge Letter, which was executed as part of a BMWE/National Carriers' Conference Committee National Agreement on December 11, 1981.

Briefly, the Union contends that both agreements prohibit the elimination of the STTO positions, which were established in 1987, and the transportation by outside contractors of on-track equipment used by BMWE employees for track construction and repair. The Carrier contends that neither Agreement prohibits its use of outside contractors and further contends that the Hopkins/Berge letter, executed in 1981 at a time when BMWE-represented employees were not even doing the work at issue, is inapplicable.

Though each railroad on the Chessie System had a separate bargaining agreement, agreements began to be reached in the early 1980's to allow the use of on-track roadway maintenance equipment (such as bulldozers, endloaders and the like) on a system-wide basis. For short distances, this equipment was moved from place to place under its own power. For longer distances, it was placed on a flat car and transported by rail to the location where it was needed. At some point, the carrier decided that transportation by truck was more efficient and hired contractors to do that work.

Because contractors did not always have tractors and lowboy trailers readily available for the transport of the Carrier's equipment and for other reasons of cost and efficiency, the carrier decided to buy tractors-trailers and hire contractors to operate them on an as needed basis. A February 11, 1985 memorandum (Union Exhibit 4) advised that, as of that date, there were three such Tractor-Trailer rigs on the Chessie System, that the rigs at Huntington, West Virginia and Columbus, Ohio would be handled by an outside contractor and that the third at Cumberland, Maryland would be operated by a Western Maryland employee. Some time between 1995 and 1987, the Carrier acquired three additional rigs and hired outside contractors to drive those vehicles.

Even before the acquisition of these rigs, the Parties discussed the possibility of creating STTO positions within BMWE ranks. A draft agreement to that effect (Carrier Exhibit B) was rejected by the Carrier in late 1984 because it provided, in Section 7 thereof, that the Carrier would "not contract for the services of a Tractor-Trailer except where it has no

alternative." In March 1985, the BMWE filed a grievance alleging that the Carrier was contracting the driving of tractor-trailers to outside personnel, that BMWE-represented employees were qualified to operate such equipment and that driving such equipment was BMWE work. The grievance specifically claimed that an employee named Arvin Johnson was qualified to operate the equipment and should receive the appropriate pay beginning with the time the outside contractor began to operate the rig (Carrier Exhibit C).

On May 21, 1985, the Carrier replied as follows:

> Without prejudice to the above claim, we note that nothing in the Scope Rule, Rule 1, 3 or 4 of the C&O Maintenance of Way Agreement gives the work of driving tractor trailers to C&O Maintenance of Way employees. Furthermore, we note that there is no past practice whereby C&O Maintenance of Way employees have driven such tractor trailers. Accordingly, we find there has been no violation of the Agreement by the Carrier in this case and that your claim is without merit, and therefore declined in its entirety.
>
> (Carrier Exhibit C, p.3).

The Union continued to insist that driving such equipment was BMWE work and the Carrier insisted to the contrary (Carrier Exhibits C, pp. 4 & 5). By early 1997, there were six rigs, all but one being operated by contractors. In February 1997, The BMWE suggested that the parties "negotiate an agreement whereby employees of the C&O and B&O can operate these lowboys for the benefit of the railroad company and the members of this Organization" (Carrier Exhibit C, p. 6). The Carrier, hoping to extend its ability to operate defined equipment on a Chessie-System wide basis, expressed interest.

The upshot of this overture was the STTO Agreement of October 8, 1987. The signatories were the C&O, which had taken over the B&O and the WM, and the BMWE General Chairmen for the three Carriers. The Agreement (Union Exhibit 1 and Carrier Exhibit A) established the STTO position, provided for training of personnel, their rates of pay, vacations and so on. As relevant here, the Agreement reads:

> Whereas, the Carrier has taken delivery of Tractor-Trailers which require considerable skill to operate effectively and safely:
>
> Whereas, the Carrier desires to have position classifications to operate this equipment, anywhere it is used, witnesseth:
>
> **IT IS AGREED:**
>
> **Section 1.**
> There shall be established a position classification of System Tractor-Trailer Operator (STTO). The principal duties of such position are to operate the truck, to load, unload and transport equipment and materials. Additionally, it will be the responsibility of the STTO to insure that his Tractor-Trailer is properly maintained, and to perform normal maintenance and repairs, that are within the capabilities of the STTO.
>
> **Section 2.**
> The establishment of such positions does not establish any exclusive right to transport material and/or equipment to any class of employee. This notwithstanding, it is not the intent of this provision to have these trucks operated by other than qualified Tractor-Trailer Operators except when Carrier's employees or equipment are not available....
>
> **Section 8.**
> (a) Employees assigned STTO positions will retain and continue to accumulate seniority that they held at the time they became STTO's. In the event a position is abolished due to a Tractor-Trailer becoming permanently inoperable, the Operator of such Tractor-Trailer may exercise seniority rights over a junior STTO.

After this Agreement was executed, the Union continued to press the Johnson grievance. However, on October 20, 1987 the Company denied the grievance once again, saying in the course thereof:

> As you know, on October 8, 1987, agreement was reached establishing system tractor-trailer operator positions. It is our position, which has not changed since the claim was originally filed, that the contractors had historically operated tractor-trailer rigs over the entire system and the fact that we entered into an agreement with your Organization to cover such work clearly shows that our position was proper. Had Mr. Johnson been entitled to the work, there would have been no need to reach an agreement with you covering this work.
> (Carrier Exhibit C, p. 7)[1]

As a result of the STTO Agreement, the Carrier created six regular and six relief positions (Carrier Exhibit D, p. 1). However, the number of positions that were activated was not always sufficient for the work involved and outside contractors continued to be used, though the extent of that use in the early days of the STTO Agreement is in dispute. At some point prior to 1991, there were fourteen rigs on the property. Some of those rigs were not on the Chessie System. They wer on the L&N and Seaboard territories where they were operated by employees of those railroads without the negotiation of a special STTO Agreement and outside the ambit of that document.

In 1991-1992, the Carrier reorganized its operating divisions and consolidated its equipment shops at four locations. This was followed by another shop consolidation in which all of the repair work was moved to Richmond, Virginia. It is not clear whether this took place in 1994 or

[1] There is no indication that the Johnson claim was subsequently pursued.

1995 as the Union asserts or in 1993. What is clear is that after the consolidation there were five STTO positions in Richmond. The STTO at Columbus and the STTO at Fairmont were moved there. A third tractor-trailer position that had been at Hamlet, North Carolina on the Seaboard line also moved to Richmond. However, that position had never been occupied by a STTO. Nor was the incumbent a BMWE-represented employee. His union was the International Brotherhood of Fireman and Oilers. Another incumbent, an employee stationed in Waycross, Georgia, also on the Seaboard line, choose not to transfer and a new employee was hired in his stead, with the Carrier adding him to the STTO ranks.

In 1995, the Carrier reduced the number of trucks it owned by about 20% and abolished all STTO positions except the five at Richmond. Additionally, it did not fill the position of a former Seaboard incumbent stationed at Richmond who had resigned. The Carrier contends that its abolition of the non-Richmond positions occurred without protest from the Union. However, it's clear that the Union asked for information and a meeting with respect to the Carrier's actions (Union Exhibit 8), to which there was evidently no response.[2]

At some point in 1995, the Carrier began to examine the possibility of abolishing the remaining positions and contracting out all the work as it had done in the past. In January 1986, the Union was advised, as "a matter of information," that the Carrier intended to "contract with

[2] Though the Carrier began "contracting out significant levels of tractor-trailer work" shortly after the positions were abolished (Union Submission, p. 11), the Union contends that the reason it did not file individual grievances was that it received no notice of those actions and was also unable to track the contracting out because of the vastness of the system. (Union Exhibit 13,Rebuttal Submission.).

Customized Transportation, Inc. [CTI] for highway transportation of roadway equipment between field locations on CSXT System and Richmond Roadway Shop." (Carrier Exhibit E). From this point on, contracting out increased (Carrier Exhibit M) and the four remaining positions were ultimately abolished in February 1997 after the employees had spent some time advising and training the contractor's employees on the use of the rigs (Union Exhibit I7, all of which took place over the Union's objection. Ultimately, the Parties agreed on this arbitration to resolve their dispute.

The Contentions of the Parties

As stated, the Union in contending that the Carriers violated the agreements between the Parties, relies primarily on the STTO Agreement. As counsel put it, this is a "plain language case...supplemented by the Hopkins/Berge Letter." The Carrier also relies on the STTO Agreement as a justification for its action. Though both assert that the Agreement is clear and unambiguous, they offer different interpretations of its words. The critical sections of the STTO Agreement are Sections 1 and 2, which are repeated here. They read:

Section 1.

> There shall be established a position classification of System Tractor-Trailer Operator (STTO). The principal duties of such position are to operate the truck, to load, unload and transport equipment and materials. Additionally, it will be the responsibility of the STTO to insure that his Tractor-Trailer is properly maintained, and to perform normal maintenance and repairs, that are within the capabilities of the STTO.

Section 2.

The establishment of such positions does not establish any exclusive right to transport material and/or equipment to any class of employee. This notwithstanding, it is not the intent of this provision to have these trucks operated by other than qualified Tractor-Trailer Operators except when Carrier's employees or equipment are not available.

Before expanding on the arguments over this Agreement, a word about the Hopkins/Berge Letter of December 11, 1981 on which the Union also relies. That Letter, written to O.M. Berge, the President of the BMWE, by Charles Hopkins, the Chairman of the National Railway Labor Conference, dealt with the matter of contracting out. It began as follows:

During negotiations leading to the December 11, 1991 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in those discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

The Letter went on to establish a Labor-Management Committee, which would meet and develop "mutually acceptable recommendations that would permit greater work opportunities for maintenance of way

employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees." The substantive portion then concluded with the following sentence on which the BMWE relies in this proceeding:

> The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

To return to the STTO Agreement, the Union contends that Section 2 is key. According to the Union, what the first sentence of Section 2 means is that, even though the STTO classification was created to transport equipment by tractor-trailer, other employees of the Carrier could continue to transport equipment by other means, such as the transport of "Ditchwitch" machines on small trailers by Signalmen. Since that sentence makes no reference to outside employees, it does not, contrary to what the Carrier says, give it the right to use outside contractors to drive tractor-trailers. That use, the BMWE asserts, is circumscribed by the second sentence of Section 2, which allows limited use only when the "Carrier's employees or equipment are not available." There would have been no need to specify this exception to the rule that only STTO's would operate tractor-trailers if the first sentence itself created that exception, or as the Carrier contends, preserved an unrestricted right to "contract out STTO work."

The Union also argues that the sense of the Agreement is that the position of STTO would continue as would the Carrier's possession of

tractor-trailers for STTO's to operate. Though only a few STTO's were trained at the outset, the Agreement contemplated the maintenance of a STTO classification on a continuing basis, with the abolition of a position conditioned, as Section 8 provides, on a Tractor-Trailer becoming "permanently inoperable." In the Union's view, the selling of tractor-trailers to others so that they may operate them surely does not fall within that language.

The Union concedes that the Carrier could have abolished the positions if it decided to return to transporting the maintenance equipment by flat car as it had in the past. What it cannot do, now that the STTO classification exists, is abolish those positions and have the equipment moved by tractor-trailer by persons other than qualified STTO's. Since the STTO Agreement conferred that work on the STTO's, what the Carrier must do is continue and therefore return the "customary continuum of STTO work to employees in the BMWE bargaining unit."

The Union also contends that the Carrier blatantly violated its obligations under the Hopkins/Berge Letter. While the Union could not have relied on the Letter to require the Carrier to establish the STTO classification, once the Carrier agreed to that classification, the Letter required its continuance. Failure to continue the classification is, in the Union's estimation, inconsistent with the Carrier's "good-faith" obligation "to reduce the incidence of subcontracting and increase the use of [its] maintenance of way forces, to the extent practicable."

The Carrier reads the language of the STTO Agreement quite differently. It contends that no agreement "requires CSXT to retain STTO positions or to own tractor-trailers for STTO's to operate, nor is there any proscription against contracting out transporting maintenance of way equipment." The STTO Agreement was not designed to "create an entitlement for BMWE employees or to expand their scope of work." It must be recalled, the Carrier notes, that the BMWE sought such restrictions in 1984 when it proposed that "The Carrier will not contract for the services of a Tractor-Trailer except where it has no alternative." At the time that language was proposed and rejected, BMWE employees had not been responsible for transporting maintenance of way equipment over the highway under the Schedule Agreement on the Chessie System. That is to say, they never had the work, either by agreement or practice.

Thus, the exclusivity the BMWE sought in 1984 was eliminated and what was ultimately agreed to was the first sentence of Section 2, which provided that "The establishment of [STTO] positions does not establish an exclusive right to transport material and/or equipment to any class of employee." That sentence does not say "between classes," as the BMWE would read it. It says that the transporting of equipment is not exclusive to "any class," including the STTO.

In the Carrier's view, the Agreement must also be read in context. The Agreement recited the fact that the Carrier had "taken delivery of Tractor-Trailers" and went on to outline the circumstances "these trucks" could be driven by others. But the Agreement contained no commitment by the Carrier to operate trucks forever. That being the case and since

BMWE had never gained the exclusive right to transport maintenance of way equipment, CSXT, which, the Carrier notes, is in the railroad business not the trucking business, could dispose of the trucks for justifiable business reasons and contract for transportation services. Indeed, even though some of the trucks were replaced from time to time, Section 8 contemplated from the outset that they might not be replaced when they became permanently inoperable. If replacement of a permanently inoperable truck was mandated by the Agreement, there would be no need to abolish positions. This is another clear indication that the STTO Agreement reflected the present way of doing things, not a method that was unchangeable.

The Carrier also notes that throughout the time STTO positions were in existence, tractor-trailer work was also being performed by other Carrier employees, such as the IBFO-represented driver, the Seacoast line drivers and the division drivers, none of whom were governed by the STTO Agreement. Beyond this, throughout the time STTO positions were in existence, contracting out continued. While the Union may dispute the extent of that activity in the early stages of the STTO Agreement, there is no doubt that it took place since, from the beginning, there were more rigs than active STTO employees. In fact, the Union conceded as much. The Union must also concede that over the course of years, as consolidations took place, STTO positions were progressively abolished while the use of outside employees steadily increased.

In the Carrier's view, all of this demonstrates that the operation of tractor-trailers was never reserved exclusively to STTO's and that there

was never any intent that STTO's would have such work, as against all others, in perpetuity. When management determined, contrary to its earlier belief, that it would be more efficient to have outside contractors transport equipment over the highway, it exercised its managerial prerogative to get out of the trucking business and to rely on others for that service. In the Carrier's estimation, the STTO Agreement did not stand as a bar to that decision.

The Carrier also contends that the Hopkins/Berge Letter has no application to this dispute. By its terms, that Letter, executed in 1981, dealt with "work within the scope of the applicable schedule agreement." The work at issue here was not within the scope of any schedule agreement in 1991 and, as the evidence makes clear, never came within the scope of any schedule agreement thereafter. As a consequence, the Hopkins/Berge letter is, as the Carrier puts it, "absolutely irrelevant."

Discussion and Analysis

Given the gradual elimination of the STTO position and the increasing use of contractors, the Union never fully explained how one would measure and determine the "customary continuum of STTO work" to be restored if it prevailed. That, however, only goes to the remedy if the Union succeeds in this proceeding and I am persuaded, on the basis of this Record, that it cannot.

I begin with the situation as it was before the STTO Agreement. Though the Union protested the use of contractors once the Carrier

acquired some tractor-trailers, the fact is that contractors were transporting maintenance of way equipment before the Carrier purchased trailers of its own. Thus, from the beginning BMWE-represented employees had not performed that work on the Chessie System. They also did not perform the work after the trucks were acquired, that performance beginning only after the STTO Agreement was executed. Prior to that Agreement, the Union sought in 1984 to reserve that work to its members, but the Carrier clearly resisted.

Thus, one of the questions here is whether, against this backdrop, the STTO Agreement unambiguously reserved that work to BMWE-represented employees against all others including contractors who had performed the work in the past. The other question is whether the Agreement unambiguously required that the Carrier continue to own trucks and operate them with its own employees. In my estimation, both questions must be answered in the negative.

The Union's interprets the first sentence as meaning that "no single class of carrier employee may claim an exclusive right to transport material and/or equipment as between itself and any other class of the carrier's employees." But why would such a sentence, if that's what it meant, be necessary? There was no indication that by virtue of the STTO Agreement, the BMWE was seeking other work or that the work of other classifications was somehow in jeopardy.

I read the first sentence of Section 2 as stating that no employee, including the STTO, has the exclusive right to transport material or equipment and that the establishment of the STTO position does not

change that. Contrary to the BMWE's reading, there is no intent in that sentence to confer exclusivity on BMWE-represented employees or to include the work of driving tractor-trailers within the scope of BMWE work. If that had been the intent, it could easily have been expressed. What the sentence means is that by establishing the SSTO positions the Carrier was not giving the STTO's exclusive right to the work involved. To be sure, it was the intent of the second sentence to have the STTO's drive the acquired trucks in the normal course. Yet, others, i.e., contractors, could drive them in certain circumstances. And, as we have seen, contracting out regularly occurred. Thus, the premise on which the BMWE's position necessarily rests — that the work belongs to its employees—cannot be sustained.

The Union seeks to avoid the essential nature of this premise by arguing that it is the Carrier which must show that the first sentence unequivically allows it to "contract out." But this reverses the usual burden. It is not the Carrier that bears the burden of proving that it did not violate the agreement or agreements between the Parties; it is the Union that must prove a violation. And when the Union says that the question is whether the Carrier can "contract out STTO work," it necessarily assumes that Section 2 awarded such work to the BMWE. I do not so read the first sentence of Section 2.

Apart from this, the STTO Agreement lacks the sense of permanency the Union seeks to impart to its terms. The Agreement deals with specific trucks, none of which were required to be replaced. If there were a commitment to perpetuate and make permanent a particular

method of operation, a promise of that nature, given all of what went before, had to be reflected in clear and unmistakable terms.

Here, the reasonable implication to be drawn, both from the Agreement's language and the context in which it was reached, is that there was no such commitment. This conclusion is also borne out, in my judgment, by what took place after the Agreement, namely the continued use of contractors and their increasing utilization as time went on.

In a word, the Union has not borne its burden of convincing me that the STTO Agreement is supportive of its position.

I am also of the opinion that the Hopkins/Berge Letter does not aid the Union's cause. That Letter is keyed to work clearly falling within the scope of an organization's jurisdiction. Here, the work at issue is not of that nature. Thus, the Letter does not really bear on the questions at hand.

To conclude, I am persuaded, based on this Record, that neither the Hopkins/Berge Letter nor the STTO Agreement required the Carrier to continue its ownership of trucks or the use of STTO's to operate tractor-trailers. As a consequence, the question posed must be answered in the negative and, therefore, no remedy can be ordered. The Award that follows so provides.

The Undersigned, acting as the Chairman of Special Board of Adjustment No. 1096 and having duly heard the proofs and allegations of the Parties, renders the following

AWARD

The Carrier did not violate the agreements between the parties when it abolished the System Tractor-Trailer Operator (STTO) positions and then contracted out the STTO work to other than qualified STTO's.

George Nicolau, Chairman

ACKNOWLEDGMENT

On this 12th day of February, 1998, I, George Nicolau, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing as my Opinion and Award in the above matter.

George Nicolau