S.B.A. No. 570
Award No. 3

SHOP CRAFTS SPECIAL BOARD OF ADJUSTMENT NO. 570

ESTABLISHED UNDER

AGREEMENT OF SEPTEMBER 25, 1964

Chicago, Illinois - September 30, 1965

PARTIES TO DISPUTE: System Federation No. 114
Railway Employes' Department
AFL-CIO - - Machinists
and
Southern Pacific Company (Pacific Lines)

STATEMENT OF CLAIM: That the Carrier violated Rule 40 of the current Labor Agreement and Article II, Sections 1 and 2, of the September 25, 1964 Agreement, when it improperly subcontracted out the work of servicing Chevrolet rental Unit 4001 to the firm of Cochran & Celli of Oakland, California, on the date of January 29, 1965.

That the Carrier be ordered to compensate Motor Car Mechanic E. Pruski, West Oakland A & W E Shop, on the basis of the number of hours of work of the Machinists' Craft performed by Cochran & Celli on Unit #4001 on January 29, 1965.

FINDINGS: The Claimant, Motor Car Mechanic E. Pruski, is employed at the Carrier's West Oakland A & W Shop.

On January 29, 1965, the Chevrolet Agency of Cochran & Celli at Oakland, California, serviced a 1963 Chevrolet passenger car which the Carrier leased from the Interstate Vehicle Management, Inc. (formerly the General Lease Corporation), and which car bore the Carrier identification of "leased unit 4001".

The Organization's principal contentions are that:

1. The "repair work performed by this outside firm ... falls within the purview of Rule 40 of the current agreement";

2. "The Carrier's Motor Car Mechanics have the experience and skill to perform the work in question";

3. "The Carrier's shop facilities at Western A. & W. E. Shop, (sic) are abundantly sufficient to handle the work in question";

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4. "The work in question has been performed by Carrier's Motor Car Mechanics heretofore, in the above shops as well as in other like Carrier shops";

5. "There is nothing contained in the terms of the leasing agreement ... which inferentially or specifically restricts the servicing or repairs to the particular equipment here involved to firms other than the Carrier";

6. "... it is highly improbable that Interstate Vehicle Management, Inc. -- the Lessor in this dispute -- would insist that as part of a leasing arrangement the Lessee (Carrier) would be required to have Lessor's equipment services (sic) by its competitor";

7. The Carrier also failed to give "notice of intent to contract out the work and the reasons therefor, together with supporting data" as is required by Article II, Sections 2 and 3, of the Agreement.

8. "Carrier's action therefore violates Rule 40 of the current collective agreement, including Article II, Section 2, of the September 25, 1964 Agreement".

The Carrier's principal contentions are that:

1. Since unit 4001 "is a leased vehicle" and "not owned by the Carrier", the "service charges in dispute were billed to the Lessor under leasing agreement which provides in pertinent part as follows:

'Lessor during the term of this lease shall * * * *

'Furnish to Lessee **** card authorizing Lessee to charge all mechanical services, lubrication **** and repairs, to the account of Lessor.'"

2. "The Lessor's operations and maintenance manual further requires the type of service as here involved to be performed by franchised dealerships handling the make of cars given such service";

3. The "Lessor is required to furnish its credit card to cover costs of maintenance of leased equipment for which the lessor is billed by the Company performing said service";

4. The services performed on unit 4001 are covered by practices in effect prior to September 25, 1964, and inasmuch as the work in question was not of a type currently performed by the Carrier, it is not subject to the restrictive provisions of Article II of the September 25, 1964 Agreement.

5. The service "on equipment not owned by the Carrier and performed on the basis of the owner's responsibility and policy, does not constitute a violation of Article II, or any other portion of agreement dated September 25, 1964".

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The following rules are those principally involved in this dispute:

Rule 40 (of the May 1, 1948 Labor Agreement, as revised,) reads in pertinent part as follows:

"Machinists' work shall consist of ... adjusting ... assembling, maintaining, dismantling and installing engines (operated by steam or other power), ... machinery, ...; and all other work generally recognized as Machinists' work."

ARTICLE II - SUBCONTRACTING (September 25, 1964 Agreement):

Section 1 - Applicable Criteria - reads in pertinent part as follows:

"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...."

Section 2 - Advance Notice - Submission of Data - Conference -

"If the carrier decides that in the light of the criteria specified above it is necessary to subcontract work of a type currently performed by the employes, it shall give the general chairman of the craft or crafts involved notice of intent to contract out and the reasons therefor, together with supporting data. Advance notice shall not be required concerning minor transactions. The General Chairman or his designated representative will notify the carrier within ten days from the postmarked date of the notice of any desire to discuss the proposed action. Upon receipt of such notice the carrier shall give such representative of the organization at least ten days advance notice of a conference to discuss the proposed action. If the parties are unable to reach an agreement at such conference the carrier may, notwithstanding, proceed to subcontract the work, and the organization may process the dispute to a conclusion as hereinafter provided."

Section 3 - Request for Information When No Advance Notice Given -

"If the General Chairman of a craft requests the reasons and supporting data for the subcontracting of work for which no notice of intent has been given, in order to determine whether the contract is consistent with the criteria set forth above, such information shall be furnished him promptly. If a conference is requested by the General Chairman or his designated representative, it shall be arranged at a mutually acceptable time and

place. Any dispute as to whether the contract is consistent with the criteria set forth in Section 1 may be processed to a conclusion as hereinafter provided."

The principal questions to be answered are as follows:

1. Was the work in question "of a type currently performed by the employes" in keeping with the provisions of Article II, Section 2, of the September 25, 1964 Agreement?

2. Did the lease agreement for unit 4001 take precedence over the September 25, 1964 Agreement?

3. Did the Carrier have the right to subcontract the work in question?

The Carrier claims that it had the right to subcontract the work in question, because such work had not "heretofore been performed in Carrier's Shops under applicable agreements", and that "equipment of the nature involved has been rented or leased on this property prior to the effective date of the Agreement of September 25, 1964".

The record, however, indicates that prior to September 25, 1964, the Carrier on two different occasions allowed certain claimants compensation when employees of outside companies performed repairs on leased Carrier equipment. One of those claims -- in which the Carrier allowed a claimant 3 hours' compensation -- is identifiable with the instant case inasmuch as it involved work performed on July 2, 1963, on a Carrier-leased lift truck. The Carrier offered no reason for its action other than stating that "consideration was given to extenuating circumstances".

Thus, it appears that the Carrier, in recognizing the validity of the above claims, also gave recognition to Rule 40 of the current Labor Agreement.

If prior practices and special lease terms for rental equipment were to be permitted under the September 25, 1964 Agreement, such exceptions or restrictions should have been set forth in that Agreement. Inasmuch as no such exceptions or restrictions appear in the Agreement, it must be concluded that the Agreement takes precedence in this case over prior practices and prior lease rental equipment provisions.

It is significant that the Agreement fully sets forth the conditions under which subcontracting may be performed. How then can it be successfully argued that prior practices and rental equipment provisions, which are not mentioned in the Agreement, are acceptable under it?

It is true that under certain conditions, which conditions are set forth in Sections 1 and 2 of Article II of the September 25, 1964 Agreement, the Carrier has the right to subcontract. However, in defense of its action, the Carrier did not claim, on the property, any of the "Applicable Criteria" -- set forth in Article II, Section 1, of that Agreement -- which specify the conditions under which subcontracting may be done. Consequently, it must be concluded that the work in question does not fall within any of the Agreement's exceptions or restrictions and that the Carrier violated that Agreement.

Furthermore, when the Carrier permitted the organization's Assistant General Chairman merely to review, at a conference, the lease provisions and certain portions of the Lessor's Operations Instruction Manual, it (Carrier) did not meet the demands of Section 3, Article II of the September 25, 1964 Agreement, namely, to furnish to the organization the supporting data requested. (Underscoring supplied)

To sustain the claim, in this particular case, without invoking a penalty would be an act of doubtful or even useless value. Therefore, the Carrier is directed to pay the Claimant, at the proper straight-time hourly rate, the actual number of hours taken by Cochran & Celli to perform the work in question.

Claim sustained in accordance with above Findings.

Employee Members	Carrier Members

Neutral Member

J. Harvey Daly

Date: September 30, 1965

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DISSENT OF CARRIER MEMBERS

STATEMENT OF FACTS

On January 29, 1965, a carrier-leased Chevrolet passenger automobile was serviced at a filling station, garage or other similar establishment, at Oakland, California, identified as "Cochran & Celli." The services in question included "periodical lubrication, tune up, oil and filter change, and related servicing" (Carrier Submission, p. 3), more specifically identified in the billing of the service station (Ib. Ex. M). The station's charges were billed by Cochran & Celli to Interstate Vehicle Management, Inc., the owner and lessor of the automobile, pursuant to the provisions of the least that

> "2. Lessor during the term of this lease shall for each vehicle leased hereunder ----
>
> '(d) Furnish to Lessee Lessor's credit card authorizing Lessee to charge all Mechanical services, lubrication, tire replacement and repairs to the account of the Lessor.'

and procedural requirements set forth in an accompanying Operations and Maintenance Manual reading:

> '1. GENERAL - All repairs are to be performed in franchised dealerships handling the make of car you are driving. All general services and maintenance, where practical, should be obtained from the dealership that delivered your car to you. Do not buy services which are to be paid for you with your IVM Credit Card from other than franchised dealership and ALWAYS BE SURE THEY ARE CHARGED TO THE ACCOUNT OF IVM, AND YOUR UNIT NUMBER.'" (Ib. p. 3)

The claim of E. Pruski is stated in the Union Submission to the special board as follows:

> "That the Carrier violated Article II of the September 25, 1964 Agreement when it improperly subcontracted out the work of repairing Chevrolet rental Unit #4001 to an outside firm at Oakland, California, identified as Cochran & Celli, on the date of January 29, 1965." (P. 1)
>
> "The overall cost of repairs itemized above amounted to $78.06, included in this amount was $23.15 for labor.
>
> "Claim filed by the Organization on behalf of the claimant here involved was for the number of hours work Machinists Craft performed by Cochran & Celli on Unit #4001, January 29, 1965." (P. 2)

The claim was sustained by the special board "in accordance with... Findings." (Award, p. 5)

The preamble to Article II of the September 25, 1964 Agreement is as follows:

"The reference to other types of leased equipment as referred to ... relate primarily to heavy on-track equipment such as tie tampers, etc. Carrier's employes have not performed all maintenance and repairs to all such equipment as alleged, either on leased or Company-owned equipment.

"However, certain heavy leased on-track equipment has been repaired in Carrier's shops (not serviced on road) by Carrier employes, for obvious reasons, including that it would be impractical to endeavor to ship or transport such heavy equipment to manufacturer plants or agencies, some of which are in the East." (Carrier Submission, p. 8)

Obviously, the repair of a carrier-leased lift truck is not "identifiable with" the servicing of a carrier-leased passenger automobile under an agreement requiring the lessor to pay "service charges" and requiring the lessee to have such services performed by "franchise dealerships." However, to conclude that a single such case, whether identifable or unidentifiable, establishes a practice over a period of years approaches the ridiculous.

It is a well settled rule of law that

"... evidence of other acts, even of a similar nature, of the party whose own act or conduct or that of his agents and employees is in question, of other similar transactions with which he has been connected, of a former course of dealing, of his conduct or that of his agents and employees on other occasions, or of his particular conduct upon a given occasion is not competent to prove the commission of a particular act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars."

See Volume 20, American Jurisprudence, pages 278 and 279, and authorities cited. How then can the settlement or compromise of a single doubtful claim be construed as recognition of the validity either of the prior claim or of the claim involved in the instant dispute?

The submissions of the parties do not disclose the nature of the "extenuating circumstances" which the award associates with the payment of 3 hours' compensation when employees of another company repaired a carrier-leased lift truck, but these circumstances were known to the union (Carrier Submission, Ex. F). Whatever such circumstances may have been, "the law favors the amicable settlement of controversies, and ... rather to encourse than discourage parties in resorting to compromise as a mode of adjusting conflicting claims. The nature or extent of the rights of each should not be too nicely scrutinized" (11 Amer. Jur. 249). Hence, to use the compromise and settlement of a single prior claim as conclusive proof of liability in a subsequent (even identical) case does violence to all rules of evidence and principles of equity and public policy.

"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." (Agreement, p. 9)

The pertinent provisions of the classification of work rules and of Sections 1 through 4 of Article II of the September 25, 1964 Agreement are set forth on page 3 of the award.

DISCUSSION OF THE AWARD

1. Prior Practice of the Carrier

The findings and conclusion of the special board relating to the prior practice of the carrier are as follows:

"The Carrier claims that it had the right to subcontract the work in question, because such work had not 'heretofore been performed in Carrier's Shops under applicable agreements,' and that 'equipment of the nature involved has been rented or leased on this property prior to the effective date of the agreement of September 25, 1964.'

"The record, however, indicates that prior to September 25, 1964, the Carrier on two different occasions allowed certain claimants compensation when employees of outside companies performed repairs on leased Carrier equipment. One of those claims -- in which the Carrier allowed a claimant 3 hours' compensation -- is identifiable with the instant case inasmuch as it involved work performed on July 2, 1963, on a Carrier-leased lift truck. The Carrier offered no reason for its action other than stating that 'consideration was given to extenuating circumstances.

"Thus, it appears that the Carrier, in recognizing the validity of the above claims, also gave recognition to Rule 40 of the current Labor Agreement." (Award, p. 4)

The fact is that the submissions of the parties disclose only two occasions, prior to September 25, 1964, when the carrier "allowed certain claimants compensation when employees of outside companies performed repairs on leased carrier equipment." It is conceded in the Award that only one of these cases can be claimed to be "identifiable with the instant case." The carrier denies that either (or any) are "identifiable with the instant case," and states that

"... no contention or factual evidence has been furnished to date to indicate that Carrier's employes have maintained or serviced leased passenger automobiles and Carrier denies that such work has been done by its employes at its West Oakland or any other Carrier shops.

emergency board thus reappear in the agreement between the parties, and can be resolved only by reference to all of the findings and conclusions in the report of the emergency board dealing with subcontracting. (Report, pp. 22-24)

Reference to such findings and conclusions discloses that the unions and the board were primarily concerned with "the practice of many carriers to subcontract building, rebuilding, overhauling and maintenance of equipment to outside manufacturers." (Report, p. 22) It is improbable that either the board or the parties had in mind or proposed to prevent a carrier from having its passenger automobiles, whether leased or otherwise, serviced at filling stations or other like establishments. Parenthetically, one is compelled to wonder whether the union claims or will claim a monopolistic right for its members to refuel the carrier's passenger automobiles.

But apart from this aspect of the question of contract construction, it is apparent that the emergency board did not intend to recommend a rule that would interfere with prior practices or established procedure in the field of contracting out work. The emergency board, in explaining the purpose of its recommendation, stated that

> "Although it is not possible or feasible to recommend that carriers which have scrapped their repair facilities should restore or re-establish them, this Board is of the opinion that the public interest would be served by measures which would help to arrest the decline in railroad shop facilities." (Report, p. 23)

The board then described the intent and purpose of the recommended rule, which was copied into the Agreement of September 25, 1964, as follows:

> "All these considerations lead us to recommend a rule which is largely procedural but which would represent a modest step forward in preventing some of the abuses which have arisen in the area of subcontracting. While this would provide an opportunity to the unions to be consulted before new forms of subcontracting are undertaken by a carrier, it would allow the carrier to pursue the goal of efficient operation by letting out contracts subject to possible challenge through the grievance procedure as to the propriety of its action under stipulated criteria." (report, p. 24)

Thus, there cannot be the slightest question but that the intent and purpose of the proposed rule was to place limitations on "new forms of subcontracting." Note also that the rule was intended to be "largely procedural" -- in other words, its purpose was not to change existing practices or the rights or obligations of the parties as established by prior practice, but to establish a procedure which would "provide an

The fact that the union could cite only one case which the special board found to be "identifiable with the instant case" is convincing evidence that the circumstances involved in that case were exceptional and that the prevailing practice is to the contrary. Certainly this one exceptional case, which in fact cannot be identified with the instant case, does not negate the representation of the carrier (which is not denied by the union) that

> "... no contention or factual evidence has been furnished to date to indicate that Carrier's employes have maintained or serviced leased passenger automobiles and Carrier denies that such work has been done by its employes at its West Oakland or any other Carrier shops."

2. Application of the September 25, 1964 Agreement

It is the position of the carrier that Article II of the Agreement of September 25, 1964, has no application to and does not restrict or otherwise affect prior practices of the carrier relating to contracting work.

On this issue the findings of the special board were as follows:

> "If prior practices and special lease terms for rental equipment were to be permitted under the September 25, 1964 Agreement, such exceptions or restrictions should have been set forth in that Agreement. Inasmuch as no such exceptions or restrictions appear in the Agreement, it must be concluded that the Agreement takes precedence in this case over prior practices and prior lease rental equipment provisions.
>
> "It is significant that the Agreement fully sets forth the conditions under which subcontracting may be performed. How then can it be successfully argued that prior practices and rental equipment provisions, which are not mentioned in the Agreement, are acceptable under it?" (Award, p. 4)

Unfortunately, the purpose and intent of Article II of the Agreement of September 25, 1964 is not entirely clear from the language appearing in the agreement. The provisions of the agreement were intended to effectuate the report and recommendations of Emergency Board No. 160. When negotiations between the parties for this purpose were unfruitful and a nationwide railroad strike was threatened, the emergency was resolved, with the Secretary of Labor, the Assistant Secretary and members of the National Mediation Board participating, by copying (with minor modifications) the recommendations appearing in the report of the emergency board into the agreement between the parties. Certain ambiguities and uncertainties appearing in the recommendations of the

accordance with the provisions of Sections 1 through 4 of this Article II," and Section 1 which follows captioned "Applicable Criteria." The conclusion expressed in the award overlooks two important and controlling considerations, as follows:

1. The scope and effect of Article II of the agreement is thus limited to "work set forth in the classification of work rules." These classification of work rules must be read and interpreted in the light of prior practice, in other words, as the parties themselves have applied and interpreted such rules. As stated in American Jurisprudence:

> "In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be." (12 Amer. Jur. 787-789)

2. It is clearly the intent of the preamble that Sections 1 through 4 of Article II shall be read and construed together -- each section is to be construed and applied in the light of the provisions contained in each of the other sections. Though obviously misplaced (as it was in the recommendations of the emergency board) the criteria specified in Section 1 have application only when subcontracting "work of a type currently performed by the employees," that is, "new forms of subcontracting," involving work which is not covered by the classification of work rules as they have been defined and construed by prior practices of the carrier and the interpretation placed upon such rules by the parties.

3. Compliance with the September 25, 1964 Agreement

Assuming that Article II of the Agreement of September 25, 1964 is applicable to the transaction involved in this dispute, which it most certainly is not, the carrier complied with the provisions of that article, although not required to do so. No advance notice of the proposed servicing of the passenger automobile involved was required in view of the provision of Section 2 that "advance notice shall not be required concerning minor transactions." The labor charges involved amounted to only $23.15. (Union Submission, p. 2) The carrier also furnished the general chairman with all pertinent information and all relevant data upon which the carrier relied in refusing to pay the claim. (Ib. Ex. A, p. 11)

In this connection the following appears in the award of the special board:

opportunity to the unions to be consulted before new forms of subcontracting are undertaken" and "possible challenge through the grievance procedure as to the propriety of its (the carrier's) action under stipulated criteria."

The rule recommended by the emergency board to make effective its purpose and intent contained the following language which was copied verbatim into the agreement of September 25, 1964:

> "... if the carrier decides that in the light of the criteria specified above it is necessary to subcontract work of a type currently performed by the employees, it shall give the general chairman of the craft or crafts involved notice of intent to contract out and the reasons therefor..." (Report, p. 25)

The words "of a type currently performed by the employees" clearly has reference to the findings and conclusions of the board heretofore cited, and is intended to limit the application of the rule to "new forms of subcontracting." Any other construction of the proposed rule would make the report meaningless -- even ridiculous.

The rule of law compelling this construction of the September 25, 1964 Agreement is concisely stated, with ample supporting authority, in Volume 12 of American Jurisprudence, pages 784 to 786, as follows:

> "In the interpretation of an agreement, the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning, but not for the purpose of adding a new and distinct undertaking. In interpretating an agreement, a court should, to the best of its ability, place itself in the situation occupied by the parties when the agreement was made and avail itself of the same light which the parties possessed when the agreement was made so as to judge of the meaning of the words and of the correct application of the language to the things described. The usual definition of a single word is not a conclusive test of the meaning to be attributed to it in the connection in which it is found; the sense in which the parties employed the word must be ascertained from an examination of the entire instrument, read in the light of the circumstances surrounding its execution. It is said that the circumstances in which the parties to a contract are placed may generally be considered when they will throw light upon the problems to be solved. General or indefinite terms contained in a contract may be explained or restricted by the circumstances surrounding its execution. The scope and application of most words vary according to the nature of the subject under discussion and the circumstances under which they are used."

It is stated in the award that "it is significant that the Agreement fully sets forth the conditions under which contracting may be performed." Reference is apparently made to the preamble to Article II providing that "the work set forth in the classification of work rules of the crafts parties to this agreement will not be contracted except in

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"It is true that under certain conditions, which conditions are set forth in Sections 1 and 2 of Article II of the September 25, 1964 Agreement, the Carrier has the right to subcontract. However, in defense of its action, the Carrier did not claim, on the property, any of the "Applicable Criteria" -- set forth in Article II, Section 1, of that Agreement -- which specify the conditions under which subcontracting may be done. Consequently, it must be concluded that the work in question does not fall within any of the Agreement's exceptions or restrictions and that the Carrier violated that Agreement." (Award, p. 5)

Assuming for the moment that the premise of this monstrous syllogism is true, it is crystal clear that the conclusion is wholly unwarranted. The fact that the carrier took the position "on the property" that the transaction in question did not come within the scope of Article II of the Agreement of September 25, 1964, is no evidence whatsoever "that the work in question does not fall within any of the Agreement's exceptions or restrictions and that the Carrier violated the Agreement." To urge one (and a good) objection to a claim cannot be construed as an admission that the claim is not also objectionable for other reasons.

However, the submissions of the parties do not support the premise found in the award. In its submission filed with the special board, the carrier claims repeatedly that, without conceding the applicability of the September 25, 1964 Agreement

"... said duties would still be excluded from those Carrier's employes would otherwise be entitled to perform under that portion of item (5) of Section 1, Article II of the Agreement of September 25, 1964, reading:

'... such work cannot be performed by the Carrier except at a significantly greater cost...'"

(Carrier Submission, pp. 6, 7, 9, 10)

As appears from its submission, the facts relied upon by the carrier in support of this position were fully disclosed to the union while the dispute was "on the property." (Ib. Ex. B, D, F, I, L)

Nevertheless, the special board refused to consider or rule on the sufficiency of this evidence.

The award also contains the following erroneous finding and conclusion:

"Furthermore, when the Carrier permitted the organization's Assistant General Chairman merely to review, at a conference, the lease provisions and certain portions of the Lessor's Operations Instruction Manual, it (Carrier) did not meet the demands of Section 3, Article II of the September 25, 1964 Agreement, namely, to furnish to the organization the supporting data requested." (Award, p. 5)

The fact is that the carrier supplied the union with all relevant supporting data and with all information requested by the union except that the carrier did not make copies of the leasing agreement and the lessor's operating instruction manual for the union when requested to do so in a letter dated May 17, 1965. (Union Submission, p. 4) This letter was written following conferences during which these documents were produced by the carrier and examined by representatives of the union. The union had previously been supplied with written copies of their pertinent provisions. (Union Submission, p. 4; Exhibit A, pp. 10-11) The union cites no provision of either document upon which it places reliance that was not fully disclosed and explained to its representatives on the property.

4. The Penal Provisions of the Award

It is conceded in the award that the claimant involved in this dispute was fully employed on the day that the Chevrolet passenger automobile leased by the carrier was serviced, that he was fully compensated for his services performed on that date and that he suffered no wage loss as a result of the fact that the car was not serviced by the carrier's employees. (Cf. Carrier Submission, p. 7, and Award, p. 5)

Section 14 of Article IV of the Agreement of September 25, 1964 provides that

"Section 14 - Remedy -

"If there is a claim for wage loss on behalf of a named claimant, arising out of an alleged violation of Article II, Subcontracting, which is sustained, the Board's decision shall not exceed wages lost and other benefits necessary to make the employee whole." (Agreement, p. 13)

Here there is no uncertainty or ambiguity as to the language contained in or the purpose or intent of the agreement. Nevertheless, the special board found and directed that

"To sustain the claim, in this particular case, without invoking a penalty would be an act of doubtful or even useless value. Therefore, the Carrier is directed to pay the Claimant, at the proper straight-time hourly rate, the actual number of hours taken by Cochran & Celli to perform the work in question." (Award, p. 5)

The board is not charged with the responsibility of determining whether its award is "of doubtful or even useless value," and is unauthorized to base any of its findings or conclusions upon the opinions that it may hold on this subject. The jurisdiction of the board is specifically stated in Section 8 of Article VI of the agreement as follows:

> "Section 8 - Jurisdiction of Board -
>
> "The Board shall have exclusive jurisdiction over disputes between the parties growing out of grievances concerning the interpretation or application of Article I, Employee Protection, of Article II, Subcontracting." (Agreement, p. 12)

The board is charged with the responsibility of interpreting the agreement and determining its application to the facts involved in disputes submitted to it under the provisions of the agreement. It has no right or authority to change the agreement or make a new agreement.

There can be no question about the proper interpretation and application of the agreement insofar as punitive damages are concerned. The special board is specifically prohibited from "invoking a penalty." Only compensatory damages may be awarded by the special Board. The carrier is not to be treated as a criminal and punished as such when it has misconstrued or misapplied the agreement. The extent of its liability is "to make the employee whole."

The rule of law clearly applicable in the instant case is stated with supporting authority in American Jurisprudence as follows:

> "Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties -- that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed." (12 Am. Jur. 749-750)

The complete rejection by the board of the clear and unambiguous language of the agreement is particularly inexcusable in view of the fact that Emergency Board No. 160 did not recommend the adoption of a rule requested by the union which might have been construed as authorizing the assessment of punitive damages. The union's proposal, attached as Appendix C to the report of the emergency board, contained the following provision:

> "In case of any violation of this rule, the employee or employees who would have performed such work if it had been performed without violation of this rule, shall be compensated on the same basis as if they or he had performed the work."

The emergency board did not recommend the adoption of this rule, and it does not appear in the agreement. Rather, the penal implications of the requested rule were specifically negated in the agreement.

The prescribing of penalties is a legislative function (23 Am. Jur. 626), not a function of special boards of adjustment.

> "It is a general rule of statutory construction that penal statutes are to be strictly construed. Statutes imposing penalties are subject to this rule of strict construction. They will not be construed to include anything beyond their letter, even though within their spirit." (23 Amer. Jur. 631)

What then can be said for the prescription of a penalty by a special board of adjustment when the agreement which it has been created to apply specifically prohibits such penalties.

CONCLUSION

The findings and conclusions of the special board are not supported by the facts disclosed by the submissions of the parties to the dispute. The conclusions and award of the board are contrary to law. The award ignores the clear and unambiguous language of the agreements between the parties, disregards the surrounding circumstances at the time the agreements were made, does violence to the intent and purpose of such agreements, and rejects the interpretations placed upon such agreements by the parties.

The special board, in and by its award, has exceeded its authority and jurisdiction, usurped prerogatives belonging exclusively to the parties or to legislative authority, and deprived the carrier of property and contractual rights contrary to law.

The award of the board cannot and will not be accepted as a precedent or as having evidential or legal significance in any other dispute or disputes.

E. H. Hallman

W. S. Magill

Carrier Members of Special Board of Adjustment No. 570

Chicago, Illinois
September 30, 1965

Shopcraft Special Board of Adjustment No. 570
Established Under Agreement of September 25, 1964

CONCURRING OPINION OF EMPLOYEE MEMBERS

The employee members of Board No. 570 wish to supplement the opinion of neutral member J. Harvey Daly. We think the opinion of Mr. Daly is correct in all respects but the carrier dissent, dated September 30, 1965, requires us to comment. The dissent is based upon a fundamental misconception of Article II of the Agreement of September 25, 1964, between the carriers and Railway Employes' Department AFL-CIO and its member organizations.

We feel it important first to put into focus the problems which gave rise to the report of Emergency Board 160 and the agreement of September 25, 1964. The dispute began on October 15, 1962, when the six shopcraft organizations served notices on individual carriers pursuant to Section 6 of the Railway Labor Act to obtain changes in existing labor agreements. These changes were designed to promote stabilization of employment, to protect employees against contracting out practices of the carriers, and to achieve other goals. The practice of the carriers in subcontracting work formerly done by carrier employees was a major goal of the organizations. Emergency Board 160, appointed by the President, stated at page 12 of its report: "One of the major reasons for the decline in shopcraft

employment in the past decade, according to the unions, is the practice of many carriers to subcontract building, rebuilding, overhauling and maintenance of equipment to outside manufacturers." The board recognized the justice of the employees claim, stating at page 13 of the report: "To the extent that subcontracting has played a part in the steady erosion of shop employment it has contributed to the draining away of a skilled labor pool from the railroad industry. The current shortage of railroad freight cars highlights the inability of the industry to meet the nation's needs for transportation, the inability which has aggravated some of our domestic and foreign problems. The national interest would be better served by maintaining the capacity of the railroad industry to keep its equipment in good working order and to expand its operations as needs requires."

The board concluded: "All these considerations lead us to recommend a rule which is largely procedural but which would represent a modest step forward in preventing some of the abuses which have arisen in the area of subcontracting. While this would provide an opportunity to the unions to be consulted before new forms of subcontracting are undertaken by a carrier, it would allow the carrier to pursue the goal of efficient operation by letting out contracts subject to possible challenge through the grievance procedure as to the propriety of its action under stipulated criteria."

Under the Railway Labor Act, the report of an emergency board is not binding upon the parties. Rather, in accordance with the American tradition of free collective bargaining the report of

the neutral board serves as a statement of its view of a dispute between the carriers and their employees. It is a basis upon which the parties may hammer out their own agreement.

Such was the practice in this case. The report of Emergency Board 160 was rendered August 7, 1964. Not until six weeks later did the parties enter into the agreement of September 25. During the interval there were numerous prolonged negotiating sessions between the parties. These commenced on August 18, 1964, in Chicago after the parties had time to study carefully the report of the board. After a preliminary exchange of views, on August 25, the parties exchanged drafts of a proposed agreement including a proposed agreement relating to subcontracting. Thereafter the drafts of each party were subjected to intensive scrutiny by the other side. As negotiations continued, their pace accelerated until finally, agreement was reached at a session which began Sunday evening, September 20, and continued with a number of recesses until about 3:00 P.M. on September 21.

We turn now to the relevant agreements. There is no question that the work done falls within the scope of the machinist trade. See Rule 40 of the May 1, 1948, Labor Agreement as revised, set out on page 3 of Mr. Daly's opinion. The carriers do not suggest to the contrary.

Next we consider Article II, Subcontracting, of the September 25 agreement. Preceding Section 1, "Applicable Criteria," quoted by Mr. Daly appears the following sentence which we think important to this case: "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 to 4 of this Article II." Then follows the three sections quoted by Mr. Daly on pages 3 and 4 of his opinion, followed by Section 4, "Machinery for Resolving Disputes," which reads as follows: "Any dispute over the application of this rule shall be handled as hereinafter provided."

The very first words of Article II of the agreement constitute a solemn undertaking by the carriers that work in the classification of work rules of the crafts will not be contracted except as provided in Article II. Exceptions, five in number, are set out in Section 1 of Article II entitled "Applicable Criteria." It follows therefore that unless the carrier can bring itself within one of the exceptions of Article II, that the general rule barring contracting out is applicable. This simple proposition is the case before us in a nutshell. A contract between the carrier and the labor organization representing its employees is entitled to the same dignity as any other contract, no more and no less. The obligation voluntarily undertaken by a carrier in such a contract should be respected to the same degree that obligations voluntarily undertaken in any other agreement are respected. It is of no concern to the labor organization what agreements the carrier may have made with third persons not parties to the agreement of September 25. A labor organization would not be permitted to invoke an agreement with a third party as excuse for non-performance of a contract with a carrier. The rule works both ways.

When we review the exceptions to the ban against contracting out, set out in Section 1, we see that not a single one is applicable to the case before us. There can be no question that managerial skills (if any were required) were available on the property, that skilled manpower was available, that essential equipment was available, that the required time of completion could be met with the skills, personnel or equipment available. The record is barren of evidence to support a contention that the work could be performed except at significantly greater cost. In fact, as the carrier itself recognizes, the amount charged by Cochran and Celli was too high for the work done.

Under these circumstances contracting out the maintenance work on the Chevrolet automobile was a clear violation of the September 25 agreement.

In light of the above let us examine the carriers' dissent. The key argument of the carrier is presented under point 2, pages 4-7. The carriers contentions there represent an ingenious effort to erode substantially all of the hard fought gains achieved with so much difficulty by the labor organizations as a result of the 1962 rules movement. We think it worthwhile to demonstrate the fallacy of the carrier contentions under its point 2 because acceptance of the contentions there advanced would substantially nullify the subcontracting restrictions of the September 25 agreement. The essence of the carrier contention is that the "intent and purpose" of Article II of the September 25 agreement "is not entirely clear from the language appearing in the agreement." (p. 4) Hence, we must look to past practice and prior procedures. Since under past

practices and prior procedures the labor organization had very little voice in restricting subcontracting it follows that they have no greater rights now than they had before. Such an interpretation would, of course, destroy Article II of the agreement. The fact of the matter is that the agreement must be enforced according to its terms. It was the whole purpose and intent of the agreement to change past practice with respect to subcontracting. It was the purpose of the agreement to give the labor organizations and the employees they represent new protections which they did not hitherto enjoy. When we examine the agreement in the light of this fact, we must grant full effect to the introductory clause of Article II specifically prohibiting subcontracting except where one of the exceptions set forth in Section 1 is applicable.

While the carrier makes a claim of ambiguity in Article II it points to no clause of that article which is in fact ambiguous and which requires interpretation for resolution of the case before us. The plain fact of the matter is that the article is transparently clear with respect to this case, but that the carrier is not happy with the results pursuant to the terms of that article. Hence under the guise of interpreting the agreement it attempts to modify it unilaterally by adding to Section 1 an exception which the written document does not contain. Indeed the quotation from American Jurisprudence set out on page 6 of the dissent helps the labor organization rather than the carrier for it states that in the interpretation of agreements, surrounding circumstances should be

considered for the purpose of ascertaining its meaning "not for the purpose of adding a new and distinct undertaking."[1] Surely it is a cardinal rule of the interpretation of contracts that a construction should be adopted which gives effect to the primary purposes of the parties, rather than a construction which would nullify the result they sought to accomplish. Yet the carriers interpretation, if adopted, would snuff out meaningful vitality from Article II.

Under its point 2, the carrier commits another serious error: it confuses the substantive rights accorded the labor organizations under Article II with the procedural mechanism established for the effectuation and enforcement of those rights. Thus at page 5 of the dissent the carrier seeks to make much of the board statement that the rule that it recommended was "largely procedural." Again it is important to observe that the contract between the parties is the agreement of September 25 and not the board's report or its recommendations. The plain fact is that the agreement of September 25 includes the substantive limitation embodied in the sentence preceding Section 1 of Article II. Sections 2 and 3 relate to procedural obligations imposed upon the carrier before subcontracting work. Under Section 2 advance notice is not required concerning "minor transactions." Section 3 provides for the situation where the carrier has not given an advance notice of subcontracting as required by Section 2. In such case the general

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[1] The dissent at page 10, when discussing another topic, quotes another portion of American Jurisprudence which states the rule forcefully, "Interpretation of an agreement does not include its modification or the creation of a new or different one."

chairman may demand the data therein specified. That section closes with the significant language, "Any dispute as to whether the contract is consistent with the criteria set forth in Section 1 may be processed to a conclusion as hereinafter provided." Thus the only significance of the question whether the transaction in issue was a "minor transaction" goes to the question whether the carrier was obliged to give the appropriate notice under Section 2. At this stage of the proceedings that question is irrelevant. The relevant point is that under the last sentence of Section 3 a dispute as to whether the contract is consistent with the criteria set forth in Section 1 may be processed to a conclusion.

In light of the above we can quickly dispose of the carriers contention 1, pages 2-4, relating to prior practice of the carrier. As we observed above, the agreement of September 25 was intended to confer new rights upon the labor organizations and the employees they represent. If they were restricted to their rights under past practice there would be no purpose served in writing the agreement. The past practice is relevant to the case simply to show carrier recognition even prior to the September 25 agreement that employees had craft rights to perform work on equipment even though it was leased. Since there was such carrier recognition it follows that there is an unqualified right to such work in light of the unmistakeable language of Article II.

Part 3 of the dissent, peges 7-9, likewise can be disposed of quickly. The neutral member ruled that the carrier did not

contend on the property that any of the five exceptions in Section 1 of Article II were applicable to this case. The carrier takes the position apparently that it is not obliged to advance all of its objections while the dispute is still on the property but may advance new contentions at subsequent stages in the proceedings. It is not necessary for us to discuss this question because the carrier at page 8 of its dissent fails to advance a single contention that any of the five exceptions of Section 1 are in fact applicable. The most that can be said is that it makes a half hearted attempt at justification on the ground of exception five in Section 1 " . . . such work cannot be performed by the carrier except at a significantly greater cost . . .". The short answer to this contention is that not a scrap of evidence was submitted to show that it would have been more costly to do the work in a carrier shop than to have the work performed at the Cochran and Celli Garage. As to the furnishing of data, the carrier concedes that up to the present moment it has not furnished the organization with the supporting data requested. It merely permitted an organization representative to look at the auto lease and portion of the operating instructions of lessor. There is a vast gulf between letting a party examine a document in the custody of the opposing party and furnishing the complete text. Copies of the documents should have been furnished as the agreement requires so that the organization could study them at length.

We come now to the question of the monetary award under Article VI, Section 14, which reads: "If there is a claim for wage

loss on behalf of a named claimant, arising out of an alleged violation of Article II, Subcontracting, which is sustained, the Board's decision shall not exceed wages lost and other benefits necessary to make the employee whole." Since the garage had possession of the car for only 7 hours and 20 minutes, from 7:45 a.m. to 3:05 P.M., the total hours of labor charged cannot exceed and no doubt was far less than that time. The dissent asserts that claimant was "fully employed" on the day the Chevrolet was serviced and hence it claims he suffered no wage loss. This contention overlooks completely his right to perform the work on overtime. Under Rule 7 of the agreement between the parties, effective May 1, 1948, claimant would be entitled to time and one-half, with a minimum of one hour if he had been required to work overtime. Of course, the overtime provisions of the contract are not here at issue since the monetary award was on a straight time basis. Our point is simply that there was a wage loss to claimant. Hence the monetary award is not only within but, in fact, is less than that permitted by Section 14. Under Section 14, the award may not exceed the "wages lost and other benefits necessary to make the employee whole." Clearly, this language covers overtime pay. The award, however, orders pay only "at the proper straight-time hourly rate." (Award p. 5)

On the facts, there is no need to reach the question whether the board has power to impose a penalty on the carrier. Since the dissent argues the point, a brief comment is in order. It is not true, as the dissent claims (p. 10), that "the special

board is specifically prohibited from 'invoking a penalty.'" No such language appears in the agreement. On the contrary, the grant of exclusive jurisdiction to the special board, conferred by Article VI, Section 8, undoubtedly carries with it by implication authority to provide appropriate relief to the aggrieved party including a penalty. The limitation of Section 14 applies only to the specific circumstances referred to in that section.

The carriers' final point (p. 10) is that the Emergency Board did not recommend the union's proposal regarding relief. The fact is that the Board did not address itself to the issue, thus leaving the issue to the parties. The carriers can base no argument on the Board treatment of the issue.

Employee Members:

James E. Yost

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Paul J. Mannell

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DATED: October 14, 1965