S.B.A. No. 570
Award No. 398
Case No. 460

SPECIAL BOARD OF ADJUSTMENT NO. 570

Established Under

Agreement of September 25, 1964

Chicago, Illinois March 2, 1976

PARTIES TO DISPUTE: District No. 19
International Association of Machinists and
Aerospace Workers AFL-CIO

and

The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: 1. The Denver and Rio Grande Railroad Company, hereinafter referred to as the Carrier, violated the provisions of the Employe Protection Agreement, recognized as the September 25, 1964, Article II Sub-Contracting Agreement, when said Carrier (a) failed to give advance notice, (b) failed to provide supporting, or substantiate data, as per Section (2) of Article II, when the Carrier did allow their Caterpillar # S-B-3 to be repaired by the Wheeler Machinery Company.

2. The Carrier violated Craft Rule #46 of the current Agreement, causing the craft damage, as well as the specific Claimants of the Machinist Craft.

3. We request the following Machinists, employed at the Work Equipment Burnham Shops, hereafter referred to as the Claimants, be made whole to the extent, the Carrier be required to compensate at the pro rata journeyman rate each Claimant in equal portion the exact amount of time charged to the repairs of Caterpillar # S-B-3:

Robt. Sims	99879	G.M. Flenthrope	80465
J.W. Myers	107383	R.G. Branham	44503
P.L. Lawrence	446039	G.L. McCurdy	213470
M.E. Edwards	9357	C.L. Grigsby	19257

4. The Carrier be required to produce actual cost facts and/or bills to the Union in order that compensation can be properly and fairly computed and verified.

FINDINGS:

A Diesel Caterpillar Bulldozer (know as the SB-3 or Wreckmaster Dozer) was being moved on its flat car in a train on September 1, 1972 through Wellington, Utah.

The train was involved in a collision with another train; in addition to other equipment being damaged, the SB-3 caught fire and was severely damaged, and substantially destroyed. Upon instruction of the insurance company, the remains of the SB-3 was loaded on a truck and sent to the Wheeler Machinery Company at Salt Lake City for appraisal and finally renovation. The repaired vehicle was ultimately returned to Carrier.

Petitioner contends that the Carrier completely ignored the Advance Notice Provision of the September 25, 1964 Agreement, contained in Section 2 of Article II. Further, it is urged that the five criteria relating to sub-contracting were not met in this situation: Carrier admitted that the work could have been accomplished in the Burnham Shops. The primary thrust of the Organization's argument is that the Carrier's insurance agreement in no way negates or supercedes the binding Agreement in the instant dispute: the September 25, 1964 Agreement. Petitioner contends that the Carrier may not avoid its obligations under this Agreement by permitting an insurance company to sub-contract the work. The situation is further exacerbated, according to the Organization, by the fact that the locomotives damaged in the collision were indeed repaired at the Burnham Shop.

The Carrier,argues inter alia, that no sub-contracting under Article II of the September 25, 1964 Agreement occurred since that Agreement only covers work that the Carrier has under its control to assign, which was not the case herein. Carrier also raises, among its contentions, certain procedural questions and also asserts that it could not have performed the work with its own employes except at a significantly greater cost than the Wheeler Company charged.

We note that the identical incident under consideration in this dispute was before this Board in Award No. 370. In that dispute, however, the Petitioner was another Organization, The Sheet Metal Workers, which claimed 15% of the work performed by the Wheeler Company, acknowledging that the other 85% was properly assignable

to the Machinist craft. That claim was denied primarily on the basis that the cost of compensation to employes on the property would have been significantly greater than that paid to the Wheeler Company. The dispute herein could probably be disposed of on a number of issues raised by the parties, but they have both indicated keen interest in the problem of the rights of the employes in the light of the insurance agreement. We shall make that issue the paramount one for purposes of our determination. As we said in Award No. 370:

> "Whether the Carrier is exempt from the contracting out provisions in the September 25, 1964 Agreement because of the obligations in the insurance contract is an interesting one to say the least. This Board has not dealt directly with this question. There are no precedents."

The record indicates that for many years, long before the 1964 Agreement, Carrier has carried insurance on its equipment (including rolling stock) against fire and other risk losses. In all of those insurance agreements, including the agreement applicable at the time of this accident, there is a standard "Company Option" clause which provides that in the event of a loss, the insurance company has the option to:

> "....take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time on giving notice of its intention to do so...."

In the case before us the insurance company exercised the option of taking possession of the SB-3 at the wreck site and ordered it sent to the Wheeler Company. In other cases, units of other types damaged and covered by insurance have been repaired by employes at the Burnham Shops.

Petitioner, in a letter dated March 2, 1973 addressed to a Carrier Official, stated, as part of its position:

> "The Carrier has an obligation to the employees under the agreement and should have informed the insurance company that the Carrier will designate where insurance damage claim will be performed at. This work could have been done by employees of the Burnham Shops, and still the insurance company pay the bill."

Although we agree that Carrier has an obligation to its employes under the 1964 Agreement, we cannot agree with Petitioner's reasoning as expressed above. As a matter of right, Carrier cannot, under the law, instruct the insurance company as to how or where to repair any equipment which involves a loss to the insurance company: the work involved was not Carrier's to assign. Carrier's legal interest and ownership of the SB-3 was turned over to the insurance company at the wreck site; such managerial right and action is certainly clear and unequivocal (see Second Division Award 3630, for example). In Award 63 of this Board, in a dispute involving maintenance of a leased vehicle, we said:

> "In order for the Carrier to be able to engage in 'sub-contracting' it must first legally own, or have dominion over the subject at matter of the 'res' of the sub-contract. The Carrier cannot legally sub-contract a vehicle to which it has not title."

This reasoning was extended in following awards, including Award No. 323 which dealt with a power company installing six vapor lights on Carrier's property. In the instant dispute, we are convinced that property over which the Carrier had no control or legal ownership, having turned it over to the insurance company, should be subject to the same reasoning as in Award No. 63. We are aware that it would be possible to abuse this principle in an effort to circumvent the provisions of the Agreement; for this reason we believe it essential that each sub-contracting situation involving insurance carrier must be examined on its own merits. We are hopeful that the good faith of the parties will prevail in the long run. In this dispute, the Claim must be denied, as there is no evidence of deliberate evasion of obligations under the September 25, 1964 Agreement.

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AWARD: Claim denied.

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Petitioner should not be made. The claim is disposed of as set forth in the foregoing award.

Adopted at Chicago, Illinois, March 2, 1976

Irwin M. Lieberman, Neutral Member

W. B. Jones
Carrier Member

attached dissent
E. R. DeHaven
Labor Member

J. M. Harbin
Carrier Member

W. H. Peck
Labor Member

P. C. Carter
Carrier Member

M. F. Cullen
Labor Member

SPECIAL BOARD OF ADJUSTMENT NO. 570

Established Under

Agreement of September 25, 1964

Dissenting Opinion of Labor Members

To Award No. 398

The majority does irreparable damage to the Agreement relating to subcontracting when it adds the 6th criteria by permitting Carrier to subcontract under the guise that the equipment is insured and under the control of the insurance company.

The Carrier presented no proof whatever in this regard on the property, but improperly entered exhibits in their submission purporting to support such a contention. These exhibits were protested by the Petitioner as in direct violation of Article VI Section 11 stating in pertinent part:

> "xxEach written submission shall be limited to the material submitted by the parties to the dispute on the property.xx"

For inexplicable reasons the neutral ignored these proper protests regardless of many prior precedents not only from this Board but other similarly constituted Boards. It is even more astounding that he chose to ignore his own precedents on this issue such as in Special Board of Adjustment No. 570 Award No. 358 stating in pertinent part:

> "The Organization objects to this information being given any consideration since it was not handled on the property. The position of the Petitioner is well taken. Article VI, Section 11 specifies that

> each submission shall be limited to material submitted by the parties on the property. Furthermore, it is well established that:
>
> '...this Board is precluded from considering evidence not considered on the property. There are no exceptions to this rule and none can be implied (Award No. 214).'"

Also as recently as several months before this instant award this same neutral had this to say on this issue in NRAB Third Division Award No. 20895:

> "It is noted that Carrier with its rebuttal Argument before this Board submitted a copy of a lease agreement with the Elevator company dated April 13, 1973. Such evidence cannot be considered since it is well established doctrine that new evidence which was not presented during the handling of the dispute on the property may not be considered by this Board."

The record of the handling on the property readily shows that the Carrier merely asserted the existence of an insurance contract. They repeatedly failed and/or refused to furnish the contract as proof to support their assertion. Then it appears as Exhibit A of their submission consisting of the cover page and Page 2 along with an Exhibit B consisting of a statement from the Carrier Manager of Insurance. Neither of these were presented to the Petitioner on the property and, therefore, improperly presented to this Board as herein before stated. The majority chose to ignore previous rightful rulings that such material could not be considered as quoted herein. Additionally, the same majority held in Third Division Award No. 20895 in pertinent part:

> "xxIt is noted that Carrier with its rebuttal argument before this Board submitted a copy of a lease agreement with the Elevator company dated April 13, 1973. Such evidence cannot be considered since it is well established doctrine that new evidence which was not presented during the handling of the dispute on the property may not be considered by this Board.xx"

If the majority had complied with these precedents, also the agreement, then clearly a sustaining award would have been rendered. This is an irrefutable fact since it was proven that none of the proper agreement criteria were applicable in this instant case as supported and complemented by the lead case decision in Award No. 370.

The majority attempts to justify such erroneous reasoning by the suggestion that for many years prior to the September 25, 1964 Agreement the Carrier had been insuring its equipment (the insurance contract in the instant dispute which the majority improperly considered since it was not handled on the property) shows that it was effective January 1, 1972 to January 1, 1973. That fact refutes any contention that it predated the September 25, 1964 Agreement. But if it had, the majority failed to take stock of the fact that the Carrier had agreements with its Shop Craft employes originating as far back as 1920, the last revision being September 1, 1940, which contracts the work to the Employes.

The September 25, 1964 Agreement is simply an instrument by which Carrier may subcontract work notwithstanding the Classification of Work accruing to the crafts provided it meets the criteria (5) set forth in that Agreement. Insured equipment is not one of the five (5) criteria.

This Board said in part in Award No. 300:

> "The Carrier emphasizes that it no longer owned the materials at the time they were removed. But Carrier was not helpless in this respect. It did have ownership at the time it made the decision that determined the assignment of work. It had the option of sale in place for a price covering value of the materials less purchaser's cost of removing them or sale after removal for the full value of the materials. That was the decision that determined the assignment of the work, and Carrier had ownership at the time that decision was made. If it had recognized that the work belonged to its employees, it had complete freedom to assign it to them."

The majority here departed from that long accepted concept.

Arbitration proceedings and courts of law have long held that a party to an agreement cannot properly make an agreement with a third party to the detriment of the first party. See for instance, Third Division Award No. 5865 where the majority held in part:

> "If a Carrier should sign Agreements with A to perform certain work and then contract with B for the performance of the same work, then it follows that A and B are each entitled to the things for which they individually contracted, or else act in lieu thereof. A Carrier should not be permitted to act in such a manner and then come to this Board and ask that it be freed from its obligation to one party because it has contracted the same work to another, ..."

The majority should be reminded that the prohibition against subcontracting set forth in Article II of the Agreement includes Unit Exchange. If Carrier had turned the questioned equipment over to the insurance company and received in its place a different piece of equipment, it must be construed as subcontracting. Here the insurance company (allegedly) repaired and returned the same piece of equipment.

The majority recognized the damage this Award can inflect upon the employes, but attempts to alleviate the conditions with the following:

> "We are hopeful that the good faith of the parties will prevail in the long run."

The majority is acting very naive with such remarks. The history on subcontracting since the September 25, 1964 Agreement became effective, and with which the majority should be familiar, reflects that many Carriers have extended more and more work to subcontractors so long as they can avoid liability to their own employes. This Award places another loophole at the Carrier's disposal.

The thrust of the September 25, 1964 Agreement was to diminish subcontracting of the Shop crafts work by the Carriers. This was expressed in the Emergency Board No. 160 report recommending guidelines for this agreement's provisions as stated in pertinent part:

> "xxxthis 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 xxx 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 need require xxx"

This Board then recommended rules to place certain limitations on the right of the industry to engage in various forms of subcontracting. Nowhere in that report, nor the eventual agreement, was any mention made that insurance coverage was, or should be, any of stipulated criteria under which the industry could have relief for subcontracting.

The majority quotes only a portion of what was said in prior Award No. 370 dealing with this same occurence and the insurance question. Referee Dobnick said therein in pertinent part:

> "xxxWhether the Carrier or the insurance company hired the Wheeler Machinery Company, either is an act of subcontracting. That being so, Article II of the same Agreement, dealing with subcontracting, becomes relevant in either event.xxx"

We have again one of the many times in this instant award where prior precedents are ignored. While ignoring this precedent the issue of no notice is also not dealt with. Yet another inexplicable action of the neutral since attention was called to a plethora of awards from this Board holding that a lack of notice was a violation. Further amazing is that not in only disdaining them is the neutral's own decision on this issue, in similarly worded agreements, such as his Third Division Award No. 19574 in pertinent part:

> "xxThis Board, in Award No. 18305 (followed by a long line of concurring decisions) refused to accept the argument that the Organization must prove "exclusivity" prior to Carrier being required to give notice under Article IV. We reaffirm that reasoning and therefore sustain Part 1 of the claim.xx"

The majority's attention was directed to the fact that this agreement had been in effect for approximately 11 years, so if insurance coverage (all Carriers have it on every piece and part) negated the agreement provisions, then why hadn't the Carriers' raised this issue before. The answer is obvious that the parties to the agreement fully realized that no such exception was in the agreement. Again this neutral departs from previous precedents including his holdings on this issue of exceptions in his Third Division Award No. 20693 in pertinent part:

> "In Award 18287 this Board said:
>
> > 'It is also a principle of contract construction that expressed exceptions to general provisions of the contract must be strictly complied with and no other exceptions may be inferred. Were we to digress from those principles we would exceed our jurisdiction.'
>
> This principle has been followed consistently over the years (see, for instance, Awards 19158, 19189, 19976 and 20372). In this dispute we may not exceed the particular exceptions set forth in Article V(d) of the Agreement.xx"

The majority is further well aware of the holdings of all Boards, without exception, to the point that Carrier cannot with impunity remove work from agreement covered employes and assign it to others. Such as his Third Division Award No. 20358 stating in pertinent part:

> "xxxOur conclusion therefore is that the claims must be sustained. Carrier may not with impunity remove work which is reserved to employes covered by the Agreement and assign such work to other non-agreement employes.xxx"

This same principle was enunciated in his Third Division Award No. 20726 wherein is cited Third Division Awards 1296, 3606, 10871 and 20358.

It is, of course, evident that insurance coverage might be a proper business procedure, however, this cannot be to the detriment of the employes' contractual rights as all Boards have held with Referee Blackwell's Third Division Award No. 20376 states to this point:

> "xxxThus, that the Carrier had a sound and conventional business objective in this dispute is not difficult to perceive. However, a proper business objective must be compatible with an employe's agreement right.xx"

The majority in this present case then expressed the same principles in the above quoted Third Division Award No. 20358.

The majority is well aware of the countless holdings that no Board has the power to rewrite agreements. Among a multitude of holdings Third Division Award No. 20383 by Referee Dorsey is to the point wherein is stated:

> "This Board has no equity powers (jurisdiction) vested by the Railway Labor Act (RLA). In the instant dispute the Board's jurisdiction is confined to the interpretation or application of agreements (between the parties herein) concerning rates of pay, rules, or working conditions! RLA, Section 3, First (i). It matters not what stranger agreements provide for; nor, does industry practice when the wording of the confronting agreement is not ambiguous; nor, what may be our sense of equity.
>
> It is hornbook that this Board may not enlarge upon or diminish the terms of a collective bargaining agreement. If either party finds the terms of such an agreement not to its liking it must seek a remedy through collective bargaining. RLA Section 6."

In the face of all these precedents the majority apparently is disdainful of all such previous holdings including the principles of stare decisis. The petitioner can only conclude that for inexplicable reasons the majority was grasping vainly for an excuse to deny this case irrespective of common sense, precedents, and agreement language. By so doing, irreparable agreement damage is attempted and nothing other accomplished than to add further chaos to the industry.

We vigorously dissent.

G. R. DeHague

M. J. Cullen

C. E. Wheeler

Labor Members