S.B.A. No. 570
Award No. 63
Case No. 74

Special Board of Adjustment No. 570

Established Under

Agreement of September 25, 1964

Chicago, Illinois - November 27, 1967

PARTIES TO DISPUTE: System Federation No. 114
Railway Employes' Department
A.F.L. - C.I.O. - Machinists
and
Southern Pacific Company (Pacific Lines)

STATEMENT OF CLAIM: "1. That the Carrier violated Article II of the September 25, 1964 Agreement when it improperly subcontracted out the work of servicing and repairing of Rental Automotive Unit #7713 to an outside firm identified as Cochran & Celli, Oakland, California, on April 25, 1966.

2. That accordingly, the Carrier be ordered to additionally compensate Motor Car Mechanic M. Hayes (hereinafter referred to as the Claimant) on the basis of the number of hours of work of the Machinists' Craft performed by employees of the named outside firm on Rental Unit #7713 on the above date."

Discussion: This case is a companion case to the two cases which eventuated in Awards Nos. 3 and 42. Involved in this case are the same parties, advancing the same sort of claim, and invoking the same provisions of the September 1964 Agreement. Both Awards Nos. 3 and 42 sustained the claims and the Carrier Members filed written dissents to these awards while the Organization Members filed a concurring opinion to Award No. 3.

The operative facts governing the instant claim are that on April 25, 1966, the Carrier sent a leased Chevrolet pick-up truck (Rental Unit #7713) to an outside firm, Cochran & Celli, to have it repaired. The Claimant is a Motor Car Mechanic employed by the Carrier at its West Oakland Shops.

The record indicates that on February 28, 1964 the Carrier entered into a Vehicle Leasing Agreement with the Interstate Vehicle Management, Inc. (IVM) whereby the Lessor agreed to furnish the Carrier-Lessee, on a lease basis, passenger cars and small trucks. In addition to the September 25, 1964 Agreement, the Carrier and Organization are also parties signatory to a collective bargaining agreement dated April 16, 1942, as revised. The last named agreement contains Article 40 setting forth the scope rule for the Machinists employed by the Carrier.

Organization's Position: The Organization contends that Awards Nos. 3 and 42 have finally determined the issue and there is no valid basis for the Board to depart now from the Findings contained in these controlling awards. It states that the issues are identical and that the Carrier has introduced no new evidence that would warrant the rendering of any different Findings than those which were handed down in the two earlier cases. Those two Awards have held that the Carrier improperly subcontracted the repair work to an outside firm in violation of Article II of the 1964 Agreement.

The Organization notes that in the instant claim, the Carrier violated, in addition to the substantive features of the Agreement, the procedural aspects of Article II because it gave the Organization no advance notice of its intention to subcontract the work or did it furnish the Organization with any supporting statements or reasons for its actions.

The Organization also maintains that the Carrier has not demonstrated by any competent proof that its subcontracting action was permissible under any of the reasons stated in Article II, Section 1. It further adds that if the Board were to allow the Carrier to subcontract the work to outside firms, it would be in effect allowing it to close its automotive and work equipment shops and furlough all motor car mechanics. The Organization asserts that mechanics employed by the Carrier have repaired and maintained all types of automotive and work equipment, included rented and leased equipment, such as Jackson Tie Tampers, McWilliams Tie Tampers, Kershaw Scrarifiers, Kershaw Undercutters and Selma Trailers, prior to September 25, 1964. The Organization lists, without attempting to present an exhaustive list, claims which the Carrier had paid motor car mechanics when outside firms worked on leased or rented equipment. These claims are:

(1) July 2, 1963 - Carrier File MCR-152-77

A rental company's mechanic was utilized to repair a rented truck at the Carrier's West Oakland, California, Shops.

(2) January 17-25, 1964 - Carrier File 013-26

Employees of Kershaw Manufacturing Company used to repair leased Kershaw Undercutter at Calfax, California.

(3) October 23, 1964 - Carrier File 012-22(5)921

Carrier utilized its Water Service Department Mechanics to repair "Back Hoe" rented from Case Tractor Company at Ogden, Utah.

The Organization maintains that the payment of these claims to motor car mechanics is recognition that, under the scope rule, the work or repairing and maintaining automotive and work equipment - be it owned or leased - is work that belongs to these mechanics. It states that in the absence of any contractual provision prohibiting the Carrier from utilizing its mechanical forces to service and repair rented or leased equipment, the Carrier is contractually obligated under the existing provisions to use its employees to service and maintain automotive equipment being used by the Carrier.

The Organization denies the Carrier's assertion that repair and maintenance work on leased equipment is not included in the classification of Work Rules of the Crafts that are parties to the September 1964 Agreement or that it is not encompassed within Rule 40 of the Schedule Agreement. The Organization insists that the work involved in this claim comes squarely within the scope rule, and therefore, when the Carrier subcontracted the work, it breached Article II of the 1964 Agreement.

The Organization stresses that the provisions of the 1964 Agreement, particularly, Article II, takes precedence over any leasing agreement covering work which is the subject matter of the present claim. It points out that Award No. 3 specifically ruled that:

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

The Organization summarizes its position by noting that the matter has already been decided twice in its favor; that Article II provides that work in the classification of work rules will not be contracted out except as provided for in Article II; that there are five stated exceptions set forth in Section 1 of Article II and the Carrier has not brought itself within any of these five exceptions, and therefore it is barred from engaging in contracting out the work; that the Carrier cannot make an agreement with a third party that can validly affect the rights of a party signatory to the September 1964 Agreement; that the purpose of the September 1964 Agreement was to change the existing practices as they pertained to subcontracting; that there would have been no purpose in negotiating the 1964 Agreement if the prior to 1964 practices were to be maintained; that even prior to September 1964 Carrier mechanical forces had the contractual right to repair and service leased and rented equipment. It concludes that for all these aforementioned reasons it was an error for the Carrier to subcontract to an outside firm the repair and maintenance of the Unit involved in this claim.

Carriers's Position: The Carrier concedes that the present claim is identical to the claims decided by Awards Nos. 3 and 42. However, it insists that Award No. 3 was grievously in error, and furthermore, the Neutral, in deciding Award No. 42 was wrong in refusing to review the claim involved in that award on its merits, and deciding the case on the grounds of consistency with Award No. 3. The Carrier states that in view of its specific and detailed written dissent to Award No. 3, the Neutral in Award No. 42 was obligated to consider the case, de novo, and on its substantive merits.

The Carrier argues in the present claim that it has rented and leased for many years automotive and work equipment from outside concerns, including construction companies. At no time have Carrier employees ever been considered as having any contractual claim to perform work on these leased or rented pieces of equipment. The contractual authority of its own employees were confined to equipment which it owned. In recent years the Carrier states that it has entered into fleet leasing arrangements for passenger cars and small trucks

in order to take advantage of the large scale economies and capital conservation to be derived from such arrangements, resulting in it now having approximately 1000 cars under lease.

The Carrier points out that the leasing arrangement which covers the truck involved in the present claim, contains a provision which states, among other things, in Section 2 of the Lease:

> "Lessor suring the terms of the Lease shall for each vehicle leased thereunder--
>
> (d) Furnish the Lessee Lessor's credit card authorizing Lessee to charge all mechanical services, lubrication, tire replacement and repairs to the account of the Lessor."

The Carrier states that in addition to the above provision the Manual of Operations and Maintenance supplied by the Lessor with each vehicle leased states:

> "all repairs... are to be made at a franchised dealership selling and servicing that make of vehicle... You are not to charge services to your IVM credit card at other than franchised dealerships."

The Carrier states that it was pursuant to these requirements of the Lease that the leased vehicle in issue was sent to Cochran & Celli, a franchised Chevrolet dealer, for the necessary repairs, and this outside firm in turn sent the bill for the work directly to IVM in Portland, Oregon.

The principal thrust of the Carrier's argument is that no subcontracting has been performed by the transaction in question, and therefore it does not come within the terms of Article II of the 1964 Agreement. It states that repairs were performed on a vehicle which it did not own, and moreover, were performed in accordance with the terms of an agreement which was in effect prior to the execution of the September 1964 Agreement. The Carrier also contends that the servicing of leased automotive equipment is not within the classification of work rules of the crafts signatory to the 1964 Agreement. It insists that the work performed was not exclusively limited to the Claimant's craft under the Scope Rule. There has been no practice that has ever recognized work on leased equipment as belonging exclusively to the mechanical forces.

The Carrier further notes that despite the fact that it has been making leasing agreements for a number of years, Award No. 3 was only able to find as evidence of a prior practice, one claim which it held comparable to the one under present consideration, that is, a situation where a Claimant had his claim allowed when employees of an outside firm worked on Carrier leased equipment. But the Carrier further notes that this claim was allowed because of extenuating circumstances fully known to the Organization when the claim was allowed, namely, that the repair work on the leased automobile was performed on the Carrier's property. The Carrier states that the other allowed claims cited by the Organization are not comparable to the instant case because they involved work on leased heavy work equipment for which there were no facilities maintained by the Lessor to which the equipment could be easily or readily sent for servicing. The Carrier maintains that the record does not support the

Organization's contention that the employees were contractually entitled to perform repair work on leased automotive equipment because of one isolated and "extenuating-circumstances" claim. On the contrary, it asserts the record discloses that prior to September 25, 1964, employees did not contend that they had the contractual right to perform repair work on automotive equipment not owned by the Carrier, when the work was performed off the Carrier property. The Carrier also cites several Second Division Awards which it states have held that work performed by outside firm employees on equipment which the Carrier does not own, is not violative of the contract rights of said Carrier employees because these employees possess no right to work on this sort of equipment.

The Carrier sets forth the facts which it contends would, even under the exceptions enumerated in Article II, Section 1 (1)(2)(3)(4)(5) have permitted it to subcontract the work in question, even if the work was covered by Article II, which it was not. The Carrier stresses the reasons why it was not feasible or economical for it, with its present manpower and facilities, to undertake the financial burden of purchasing and maintaining an additional 1000 vechiles in addition to the 1175 pieces of equipment it already owns and maintains. The Carrier emphasizes that it, and it alone, must be allowed to make the decisions as to where it will invest and utilize its capital in order that it might maximize its efficiency as a transportation business.

The Carrier denies that there is anything in the terms of the 1964 Agreement that prohibits or limits it from making leasing or rental agreements. It notes that Article I, Section 2(d) recognizes that the Carrier has that right, subject to the obligation of making employees, adversely affected by these leasing arrangements, eligible to receive the benefits of the Washington Job Protection Agreement of 1936.

FINDINGS: The Neutral Member of the Board states, by way of preface, that he has reviewed de novo and at considerable length the respective positions of the parties and the evidence adduced in support thereof, including the several dissenting and concurring opinions to Awards Nos. 3 and 42. The Neutral Member agrees that there is great value to the parties to have consistency and stability in awards, nevertheless, he is also convinced that the parties do not wish him to discharge his duties in a perfunctorily manner, or be an instrument for perpetuating gross errors, either his own or those of his colleagues. The most important function that a Neutral can render is to assure the parties that the arguments and evidence they advance, seriously and in good faith, will receive the attention they merit.

It is within this frame of reference that the Neutral Member of the Board has reviewed the lengthy record of this case. He must conclude, after this analysis, albeit somewhat reluctantly, that the record does not support the Findings rendered in Awards Nos. 3 and 42, and therefore he cannot concur and follow the aforesaid Findings. The Findings in this case demand that the claim be denied for the following reasons stated in capsule form: (1) the record shows that there was an established practice on part of the Carrier to make rental and leasing arrangements for automotive equipment prior to September 25, 1964; (2) the record shows no established practice or articulated rule granting the Carrier's motor car mechanics the contractual right to repair or service leased or rented automotive equipment; (3) there is nothing implied or expressed in the terms and provisions of the September 25, 1964 Agreement that precludes or limits the Carrier from continuing its practice of leasing or renting automotive

equipment; (4) that the making of leasing or rental arrangements for automotive equipment does not constitute "subcontracting" with its attendant limitations within the contemplation and meaning of Article II of the 1964 Agreement.

Discussing the conclusions ad seratim in some greater detail: (1) There is nothing in the record of this case to contradict the Carrier's assertion that it has pursued a practice in the past of renting and leasing automotive and work equipment prior to September 25, 1964, and more recently has accelerated the practice by "fleet leasing" of automotive cars and small trucks. The Leasing Contract with Interstate Vehicle Management, Inc. (IVM) which covers the car involved in the instant claim, is dated February 28, 1964 (Carrier Exhibit "A") and it refers, in Paragraph 1, to a Schedule which the parties executed on October 23, 1963. This evidence is conclusive that the Carrier had antecedent leasing and rental arrangements pertaining to automotive equipment; (2) Despite the antecedent arrangements whereby the Carrier obtained and used a considerable number of leased vehicles, there is no record of any established practice or articulated rule whereby the cognizant employees enjoyed contractual rights to repair or maintain these leased vehicles, and conversely, if outside firm employees serviced or repaired these leased units, this laid the ground for the successful prosecution of claims by the affected Carrier employees. The record reveals that only one claim (MCR-152-77), comparable to the instant claim, filed prior to September 25, 1964, was successfully prosecuted by the Claimant. Since one of the principal reasons for the Carrier entering into leasing arrangements was to obviate the necessity of having to maintain and service automotive units, there should have been a host of claims filed by the Organization when the Carrier returned these leased units to the Lessor for repair and service. The record, however, is bereft of such a showing. Award No. 3 cites only one claim allegedly comparable to the instant claim, but the Carrier stated that it was paid because of "extenuating circumstances" which were well known to the Organization at the time of the settlement of the claim, namely, that the Lessor repaired the leased unit on the property of the Carrier. With regard to the other two claims cited by the Organization, the Neutral Member finds them distinguishable from the instant claim. These two claims did not involve work on automotive equipment but pertained to heavy work equipment for which there were no readily available Lessor facilities for servicing and repair work which necessitated the Carrier undertaking this work. But even if the Neutral Member were to grant the full weight to these three claims, it is doubtful whether it could be held that there was an established practice or articulated rule, in light of the volume of work, giving the Carrier's motor car mechanics a contractual right to perform repair and maintenance work on leased equipment not owned by the Carrier, prior to September 25, 1964; (3) The Neutral Member finds that the Organization had no contractual right to perform the work prior to September 25, 1964 and further that no such right was garnered by the execution of the September 25, 1964 Agreement. There is nothing contained within the four corners of the September 25, 1964 Agreement, or for that matter, in the Report of Emergency Board No. 160, that would suggest the 1964 Agreement placed a prohibition or limitation upon the Carrier from continuing its prior practice of leasing automotive equipment without incurring any new contractual responsibilities toward its motor car mechanics regarding the repairing of servicing of leased equipment not owned by the Carrier. It is a reasonable assumption and consistent with the canons of construction pertaining to written documents that, if the parties to the September 25, 1964 Agreement wanted to curtail or prohibit the Carrier's established practice of leasing automotive equipment without being contractually liable for the repair and servicing of these leased units, that they would have so stated it in the said Agreement and not left this

important matter to inference or conjecture. The Neutral Member must hold that, on a matter so vital as the Carrier's right to make capital investments - a matter that is not normally within the purview of scope of collective bargaining - it must be dealt with in the Agreement explicitly and cannot be gleaned by inference or implication. The Neutral Member finds that whatever evidence there is in the 1964 Agreement relating to the leasing of equipment, it tends to indicate that the Carrier's past practices were not banned or limited. In Article I, Section 2(d), for example, it states that employees adversely affected by the leasing of equipment which is to be serviced by the Lessor shall be entitled to the protective benefits of the Washington Job Protection Agreement. It is therefore entirely reasonable to deduce from this cited language that the parties to the 1964 Agreement did not intend to ban or limit the heretofore existing leasing practices, but only subject it to the protective provisions described in Article I. It is also quite clear from reading the 1964 Agreement that the parties were quite capable of limiting or proscribing, if they so wished, a practice like "subcontracting." The Neutral must therefore assume that they could have done the same with regard to "leasing." This is the principal error of Award No. 3, namely, its finding that existing leasing or rental practices were proscribed by the 1964 Agreement unless the terms of the Agreement expressly permitted them. In the first place Article I, Section 2(d) strongly suggests that the practices were not banned, but even if the Agreement did not contain Section 2(d) language, the weight of construction of the given document would have to be that an existing and important business practice, must be deemed to be continued, unless it is barred or limited by express terms and provisions of the Agreement; (4) Lastly, the Neutral Member must hold that, in the lexicon of collective bargaining and industrial relations, the practice of leasing or renting equipment is not considered to be "subcontracting" and therefore this practice would not be within the ambit of Article II of the 1964 Agreement. In order for the Carrier to be able to engage in "subcontracting" it first must legally own, or have dominion over, the subject matter of the "res" of the subcontract. The Carrier cannot legally subcontract a vehicle to which it has not title. To do this it must have the express consent of the Owner-Lessor. The Leasing Agreement denies the Carrier-Lessee this very right. It is obvious that one of the prime purposes for the Carrier negotiating a Lease Agreement was to be able to avoid having to service and maintain vehicles which it was using in its operations. The Organization's contention would nullify the Carrier's objectives without any clear language to that end. The Neutral Member will admit that under certain circumstances leasing arrangements might have adverse effects on employment opportunities of motor car mechanics. But if the parties in interest want to cope with that contingency, they must do so specifically and by direct negotiations. They cannot ban, or find banned, an existing and established practice by inference or seeking a tenous construction of contract language.

AWARD

Claim denied.

Adopted at Chicago, Illinois - November 27, 1967

Jacob Seidenberg
Neutral Member

M. E. Parks

Dissent attached

W. S. Bacsell
Carrier Members

Labor Members

S.B.A. No. 570
Awards Nos. 63 & 64
Cases Nos. 74 & 75

SPECIAL BOARD OF ADJUSTMENT NO. 570

ESTABLISHED UNDER

AGREEMENT OF SEPTEMBER 25, 1964

DISSENTING OPINION OF EMPLOYEE MEMBERS TO

AWARDS 63 AND 64

Based upon the Findings contained in Awards Nos. 3 and 42 of Special Board of Adjustment No. 570 involving identical disputes between the same parties and the reasoning set forth in the Employee Members' Concurring Opinion to Award No. 3, it is apparent that the findings and conclusions of Awards Nos. 63 and 64 are ill-advised and do violence to the spirit and purpose of the agreements. The majority should have followed Awards 3 and 42 and, therefore, with finality, put to rest the particular issue on this property.

For the reasons stated, we dissent.

James E. Yost

Richard E. Martin

Labor Members of Special Board of
Adjustment No. 570.

November 27, 1967.