SPECIAL BOARD OF ADJUSTMENT NO. 570

Established Under

Agreement of September 25, 1964

SBA No. 570
Award No. 917
Case No. 972

Parties to Dispute: (Brotherhood of Railway Carmen of the United States and Canada
(and
(The Baltimore and Ohio Railroad Company

STATEMENT OF THE CLAIM:

"1. That the Baltimore & Ohio Railroad Company violated the contractual rights of claimants herein when on the date of January 3, 1984 through February 13, 1984, carrier allowed employes of an outside concern, Raleigh Junk Company out of Huntington, West Virginia, to come onto the property of Benwood, West Virginia for the purpose of dismantling freight cars, in violation of Agreement Rules 50 and 138, and Article II-Subcontracting- of the September 25, 1964 Agreement, as amended effective January 12, 1976.

2. That accordingly, Carrier be ordered to compensate and make whole all claimants herein for all time lost as a result of such violations as follows: Claimants:

R.O. Wood - January 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30 and 31;

J.J. Wagner - January 3, 4, 5 and 6;

P.I. Brown - January 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30 and 31;

each claimant eight (8) hours per day at the carmen's straight time rate of pay.

R.O. Wood - February 1, 2, 3, 6, 7, 10 and 13;

P.I. Brown - February 1, 2, 3, 6, 7, 8, 9, 10 and 13, 1984;

each claimant eight (8) hours per day at the carmen's straight time rate of pay."

FINDINGS:

The relevant facts of this claim may be briefly stated. In the fall of 1983, Carrier entered into an agreement with the Raleigh Junk Company in Charleston, West Virginia for the sale of thirteen second-hand or damaged freight cars designated by the Carrier as beyond repair. A copy of the sales order, Number 4535, was attached as Carrier's Exhibit "A", and states:

> ...13 wrecked and damaged freight cars located at Benwood, WV. See the attached sheets* for details, F.O.B. C & O/B & O tracks, any junction - scrap only - second hand material - collect from origin
>
> * The attached sheets referred to hereinabove were not supplied to the Organization during the handling of this dispute on the property.

As a result of this action, the Organization filed a claim contending that members of its craft should have been used to perform the work of dismantling and scrapping freight cars. Carrier denied the claim and since the matter could not be resolved on the property, it is now before the Board for adjudication.

The Organization maintains that Carrier's failure to assign the disputed work to carmen violated the Agreement, specifically Rules 50 and 138, and Article II, which relates to subcontracting. Rule 138 is the Carmen's Classification of Work Rule, which reads in pertinent part as follows:

> Carmen's work shall consist of building, maintaining, dismantling, (except all-wood freight train cars); painting, upholstering and inspecting all passenger and freight cars, both wood and steel; planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work, carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks; building, repairing, removing and applying locomotive cabs, pilors, pilot beams, running boards, foot and headlight boards, tender frames and trucks...an all other other work generally recognized as carmen's work." (Underscoring added.)

Rule 50 of the controlling agreement provides:

> Scrapping Equipment
>
> Work of scrapping engines, boilers, tanks, and cars of other machinery, will be done by crews under the direction of a mechanic. (Underscoring added.)

The foregoing rules clearly establish, in the Organization's view, that the work here in question accrued to the carmen's craft, and specifically to the Claimants who were able to perform the work and were on furloughed status at all relevant times. The Organization maintains that the terms of the sales agreement

demonstrates that Carrier authorized the salvage of air brakes, equipment, and gears and therefore violated Article II of the September 25, 1964 Agreement, which states:

> The work set forth in the classification of work rules of the crafts parties to the Agreement or in the scope rule if there is no classification of work rule, and all other work historically performed and generally recognized as work of the crafts pursuant to such classification of work rules or scope rules were applicable, will not be contracted except in accordance with the provisions of Sections 1 through 4 of this Article 11. In determining whether work falls within a scope rule or is historically performed and generally recognized within the meaning of this Article, the practices at the facility involved will govern. (Underscoring added.)

Carrier, on the other hand, denies that it violated the Agreement. Carrier asserts that once the sales agreement with Raleigh Junk Company was consummated, and Carrier relinquished title to the car bodies, Rules 50 and 138 were no longer applicable. In support of its position, Carrier cites Second Division Award 5732, Award 140, SBA 570, and Third Division Award 10826, all cases in the Board denied the claim on the basis that when ownership of the property was vested in the purchaser, the disputed work no longer belonged under the terms of the schedule agreement.

Carrier further argues that the rationale expressed in the above awards has been accepted in the on-property handling of past disputes between the identical parties now before the Board. In August 1974 and October 1978, Carrier entered into sales agreements with Gilbert Iron & Steel Co. and Midwest Steel Co., respectively, for the purchase of freight car bodies in terms similar to those in the instant case. Claims filed in both of these instances were declined and none appealed further, Carrier notes.

Finally, Carrier denies the Organization's assertion that the cars were not sold on an "as is, where is" basis, but were part of a salvage operation. In Carrier's view, the Organization's assertion is just that - assertion and conjecture - and does not constitute the proof necessary to sustain the claim.

In making our determination, this Board notes at the outset that Carrier, like all viable Carriers in the railroad industry, is involved in the purchasing, rebuilding and repairing of freight cars. Carrier acknowledges that when, because of excessive wear or damage, the rebuilding or repair of a particular freight car is not economically feasible, Carrier is faced with two options - (1) to dismantle reusable air brakes,

couplers, draft gears, etc., from the freight car body and sell the car as scrap, or (2) to sell the car body as scrap on an "as is, where is" basis with the aforementioned appurtenances still attached.

There appears to be no serious dispute that the first option would involve "dismantling" work expressly reserved to the Organization's craft under Rule 138 of the Agreement. Carrier has argued, however, that it employed the second option in the instant case by passing ownership of the freight cars to Raleigh Junk Company per purchase Order No. 4535. Indeed, Carrier contended that this case is no different from prior awards and instances on this property in which sales agreements entered into by Carrier did not infringe upon the Organization's craft jurisdiction since the work performed involved only the scrapping of cars.

Unfortunately, from the record evidence before us, we cannot agree that Carrier has satisfactorily shown that the cars were sold as scrap without reclamation of salvageable parts. From our examination of the record, we note that there is a crucial distinction between prior awards cited by Carrier and prior agreements entered into by Carrier on the one hand, and the instant matter on the other hand. All prior instances referred to by Carrier were cases in which the terms of the purchase were

made on an "as is, where is" basis. Unlike prior instances in which purchase agreements were entered into with Gilbert Iron & Steel Co. and Midwest Steel Co., which clearly reflect that the terms of the purchase were on an "as is, where is" basis, the sales order in the instance case reflects merely that the sale is "scrap only."

Of course, the Carrier is correct when it states that the burden is upon the Organization to prove all essential elements of its claim. In this case, we find the Organization has met that burden by establishing that the work of dismantling is work reserved to it by express language in the contract and by further establishing that this was not an "as is - where is" sale in which appurtenances were still attached to the freight cars. We note, too, that aside from Carrier's general denial that any salvage took place, it never provided further information concerning the terms of the sale, despite the Organization's requests. Thus, Carrier's contention is not supported by its own sales agreement, and absent any other probative evidence in the record, we find that Carrier did violate the Agreement as claimed.

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to Claimants be made. Carrier is directed to make payment to Claimants above within thirty (30) days from the date hereof.

AWARD:

Claim sustained.

Adopted at Chicago, Illinois, the 5 day of May 1988.

Dissent attached — Elliott H. Goldstein, Neutral

D. V. Vaughn

Robert L. Hicks

Michael C. Lesnik
Carrier Members

E. W. Williams

W. J. Cullen

Don L. Davis
Labor Members

SBA 570 - AWD 817

DISSENT OF CARRIER MEMBERS
TO
AWARD 817, CASE 972
(REFEREE GOLDSTEIN)

In Award 781 of this Board, we had the identical claim for November-December, 1983, whereas the present claim involved January-February, 1984 time period. In that decision we concluded:

> "Absent any evidence presented by the Organization to the contrary, the Board finds a reasonable inference may be made from the Sales Order No. 4535 that the sale was for the scrap of 13 wrecked and damaged freight cars in their entirety....Further, the Organization does not contend that the scrapping operation alone (absent any evidence of reclamation) belonged to the Claimants due to either their classification of work rule, or as work historically performed and generally recognized as work of the carmen craft." (Page 3).

> "The issue of whether a violation of the carmen's classification of work rule occurred must be answered in the negative. As further noted above, the record is devoid of evidence that such work was 'historically performed and generally recognized' as carmen work. Based upon the facts of this case and relevant awards of this Board and the Second Division, the Board concludes that no violation of Article II of the September 25, 1964 Agreement was committed." (Page 6).

Award 781 also cited Second Division Award 10413 which involved the identical issue on this property, and had concluded:

> "The evidence of record clearly establishes that ownership of the cars passed to Midwest Steel and Alloy Corporation as per purchase order No. 4629 of Carrier dated May 29, 1980. Other than the assertion that air brakes and equipment, couplers and draft gears were salvaged, the record contains no probative evidence to support such a claim."

The Carrier on the property advised the Organization in this case:

> "On October 28, 1983, 13 second-hand and damaged freight cars were sold to Raleigh Junk Company, Charleston, West Virginia, on an 'as-is-where-is' basis to be removed by the purchaser. The cars were dismantled by the purchaser in order that they could be removed from the property. It is apparently your contention that the work in question in this instance accrues to

SBA 570-AWD 817

"claimants and was contracted by Carrier to Raleigh Junk Company....The fact that the Purchaser had the cars dismantled by its employees on Carrier property in order to facilitate their removal did not constitute sub-contracting, violate any agreement rule, or deprive any carman of work to which entitled. Additionally, as evidence that the work was handled in this instance as has been often the case in the past, refer to previous correspondence under our file numbers 2-GMG-1847, a similar case which was not appealed, and 2-CMG-2201 and 2-CMG-2651, similar cases which were withdrawn based on the merits of the cases." (Emphasis added).

To all of the foregoing the Organization's only response in the record of Award No. 781, and this case, was the following:

"It is my understanding that some of this material is being sold back to the railroad, couplers, draft gears, air brake material, etc."

Yet the Majority concludes at Page 6 of the Award that:

"....we cannot agree that Carrier has satisfactorily shown that the cars were sold as scrap without reclamation of salvageable parts."

It is the Organization that must substantiate to this Board with evidence that the Carrier reclaimed salvageable parts. (Awards 790, 731, 714, 677, 612, 475).

Assertions, no matter how frequently and vehemently made, are no substitute for actual hard evidence. The Majority has relied for its conclusion that salvageable parts were reclaimed on pure conjecture and assumption.

Not a single item was ever shown to have been reclaimed. The sale was for "13 wrecked and damaged freight cars....scrap only - secondhand material...." Nothing more!

SBA 570 -AWD 817

Finally, Award 781 was rendered on January 26, 1988. This dispute was in the hands of the referee at the time that Award 781 was issued. There is no material difference in the on-the-property handling, and they should have received the same result.

We Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost