

The Fourth Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(CSX Transportation, Inc. (Formerly the Chesapeake and  
( Ohio Railway Company, the Seaboard Coast Line Railroad  
( Company and the Baltimore and Ohio Railroad Company)

PARTIES TO DISPUTE: (

(Joint Council of General Chairmen

STATEMENT OF CLAIM:

Was the Carrier in violation of the Scope Rule of the applicable Schedule Agreement when it abolished a number of supervisors positions and established lead carman positions?

FINDINGS:

The Fourth Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On October 1, 1987, the Carrier notified the General Chairman of the Carmen (and others) of its forthcoming reduction in the number of Foremen and the establishment of a number of Lead Carman positions. Upon request of the General Chairman, the Carrier agreed to a meeting on October 19, 1987, in the meantime delaying its Foreman force reduction until October 31, 1987 (except for those reductions already in effect).

The meeting occurred as scheduled, involving the General Chairman and the Carrier's Director of Labor Relations. After an exchange of information and views, the parties agreed to submit the issue of the abolishment of Foreman positions to an expedited Public Law Board. The General Chairman (as well as representatives of ARASA, also involved) further agreed to another meeting on November 12, 1987, "...to discuss the arbitration agreement."

The November 12 meeting took place, at which time certain arrangements concerning the Public Law Board arbitration were further discussed. Rather than proceed with the establishment of a Public Law Board, the B&O Joint Council of General Chairmen and ARASA, through the Transportation Communications Union, jointly applied on November 18, 1987, to the National Mediation Board for mediation services. The Carrier then submitted the issue

to this Board on December 22, 1987, for adjudication, alleging the existence of an unresolved minor dispute.

In the meantime, the Organizations submitted claims to the Carrier on behalf of individual Claimants, arguing rules violation in the abolishment of the Foreman positions.

The Organization argues that this Board lacks jurisdiction to hear and decide the question put forth by the Carrier, contending that the Carrier's claim "...is purely a hypothetical question . . . deliberately put forth in an effort to deny the Employes the right to handle various claims in the usual manner and perfect them by introducing evidence to establish a violation of the Agreement." The Organization also argues that the Carrier has failed to follow established procedure in that there had been no filing of any dispute with the Carrier's highest designated representative, nor was there any conference on the property regarding such dispute. Thus, the Organization contends that the Board may not consider the Claim because of the Carrier's failure to follow the prescribed procedure of the Railway Labor Act and the Board's Circular No. 1.

The Board must therefore address two procedural matters before it can reach consideration of the merits of the question posed by the Carrier. The first question is whether or not referral of a dispute to the National Mediation Board necessarily defeats an attempt to resolve a contractual issue through this Board. The second is whether the Carrier, in progressing its question to the Board, followed the proper procedure in doing so.

As to the first question, the Board recognizes that the TCU, on behalf of the Organization, has asked for National Mediation Board services in reference to the allegation that the Carrier has "...abolished throughout the system the entire class of Train Yard Foremen...", thus implying the existence of a dispute as defined by Section 152, Seventh, of the Railway Labor Act. This, of course, is a question quite separate from that presented to this Board by the Carrier. Thus, the action of the Organization in seeking NMB mediation in a separate question does not preclude this Board from its review of the question before it, based as it is on the interpretation of the Scope Rule of the Agreement.

The Board does, however, find difficulty in determining that the Carrier has followed the proper steps in presenting its question here. At the same time (December 1987) that the Carrier submitted its issue to the Board, there were initiated various individual claims by affected employees. The Board has not been advised of the status of these individual claims, which may now be in the claims handling process and which may or may not reach the Board for review. Presumably these claims, if processed here, would concern interpretation of the Scope Rule and possible other Agreement provisions.

When the Carrier presented the Board with its question (limited simply to the Scope Rule), it in effect produced the consequence of interfering with the orderly processing of individual claims on the same subject.

The Carrier argues that the two meetings and exchange of correspondence which were to lead to Public Law Board adjudication can serve to meet the requirements of handling a dispute "in the usual manner." The Carrier's concern at the unanticipated rupture in the Public Law Board arrangement is easy to comprehend. At this point, however, there had been no specific claim set forth by the Organization, nor had such precise dispute been placed in conference, as required. Such "conference" as occurred was concerned only with the request for information and the general nature of what might have been presented to a Public Law Board.

Thus, the limited question posed by the Carrier (Was there violation of the Scope Rule?) cannot be said to have been handled "in the usual manner." Indeed, it is difficult to determine how it would have been possible for this to occur, because the question seeks only an affirmation by the Board as to the Carrier's own action, already accomplished. While the question is not entirely "hypothetical," as the Organization alleges, it does appear to seek a declaratory judgment. If there is a "dispute" here, as required by the Railway Labor Act and Circular No. 1, it is clearly one to be raised by the Organization, and such has been done in the various claims by individual employees forwarded to the Carrier in December 1987.

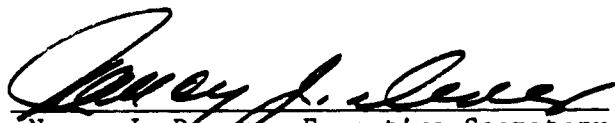
The Board finds, therefore, that the Carrier's question is, at best, premature. In so finding, the Board is precluded from reviewing the arguments as to possible Scope Rule violation.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1989.

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION  
TO  
AWARDS 4675 & 4677; DOCKETS 4659 & 4662  
(Referee Herbert L. Marx)

We concur with the finding of the Majority that:

"...the action of the Organization in seeking NMB mediation in a separate question does not preclude this Board from its review of the question before it, based as it is on the interpretation of the Scope Rule of the Agreement."

However, we must strongly dissent to the rest of the Majority's findings for the following reasons. First of all, the Majority held:

"When the Carrier presented the Board with its question (limited simply to the Scope Rule), it in effect produced the consequence of interfering with the orderly processing of individual claims on the same subject."

In our view, the Carrier did not interfere with the orderly processing of claims, for as the Majority noted at the outset of Award 4675:

"On October 1, 1987, the Carrier notified the General Chairman of the Carmen (and others) of its forthcoming reduction in the number of Foremen and the establishment of a number of Lead Carman positions. Upon request of the General Chairman, the Carrier agreed to a meeting on October 19, 1987, in the meantime delaying its Foreman force reduction until October 31, 1987 (except for those reductions already in effect).

The meeting occurred as scheduled, involving the General Chairman and the Carrier's Director of Labor Relations. After an exchange of information and views, the parties agreed to submit the issue of the abolishment of Foreman positions to an expedited Public Law Board."

If, in fact, the established procedure for the orderly processing of claims was interfered with, the Majority's own findings confirm that the Organization, and not the Carrier, initiated such action, by immediately requesting a conference with Carrier's highest designated officer. It should go without saying that the contracting parties can agree to waive certain provisions of their Agreement, and that is

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exactly what happened here on October 19, 1987, when, as the  
Majority noted:

"...the parties agreed to submit the issue of the  
abolishment of Foreman positions to an expedited  
Public Law Board. The General Chairman (as well  
as representatives of ARASA, also involved) fur-  
ther agreed to another meeting on November 12, 1987,  
'...to discuss the arbitration agreement.'"   
(Emphasis added)

Then, on November 18, 1987, almost one month after agreeing  
"...to submit the issue of the abolishment of Foreman positions  
to an expedited Public Law Board...", the Organizations, for  
reasons not set forth in the record, jointly applied to the National  
Mediation Board for mediation services. As previously noted, the  
Majority correctly determined that such action did not preclude  
this Board from its review of the narrow question before it. The  
Majority also acknowledged that:

"The Carrier's concern at the unanticipated rupture  
in the Public Law Board arrangement is easy to  
comprehend."

By rendering this palpably erroneous decision, the Majority  
sanctioned the Organizations' unilateral termination of the parties'  
bona fide agreement "...to submit the issue of the abolishment of  
Foreman positions to an expedited Public Law Board." Such action  
on the part of the Majority flies in the face of Section 152, Second  
of the Railway Labor Act which promotes the expeditious resolution  
of disputes.

As evidenced by the foregoing, the Majority's conclusions that:

"...no specific claim (had been) set forth by the  
Organization, nor had such precise dispute been

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placed in conference, as required, (and) such 'conference' as occurred was concerned only with the request for information and the general nature of what might have been presented to a Public Law Board..."

misrepresent the facts.

The Majority apparently recognized just how unsound such conclusions are, for they concluded that "...the question (Was the Carrier in violation of the Scope Rule of the applicable Schedule Agreement when it abolished a number of supervisors positions and established lead carman positions?) is not entirely 'hypothetical,' as the Organization alleges..."

Ironically, the Majority found that the Carrier's question was, at best, premature and erroneously concluded:

"If there is a 'dispute' here, as required by the Railway Labor Act and Circular No. 1, it is clearly one to be raised by the Organization, and such has been done in the various claims by individual employees forwarded to the Carrier in December 1987."

Had the Majority more carefully analyzed the circumstances, they would have found that in reality there was nothing to preclude the Board from considering the Claim as presented by the Carrier and reaching a decision in relation thereto.

The record clearly shows that there were two meetings with the highest officers of both parties present, in which there was agreement by the parties to resort to adjudication through an expedited Public Law Board. After such agreement, the parties failed to perfect the arrangement for such Public Law Board review solely due to the fact that the Organization unilaterally decided to request the National Mediation Board to intercede. This left the Carrier with no choice

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but to seek resolution by unilaterally referring the matter to this Board.

Obviously, the Carrier did not at the outset initiate a claim on the property in reference to its own proposed action. The issue was, however, clearly joined in the October 19, 1987 meeting requested by the Organization, the follow-up meeting on November 12, 1987 and in the decision, confirmed in writing on October 23, 1987 to present the dispute for Public Law Board review. The Carrier's action in referring the matter to this Board -- in the face of the Organizations' apparent termination of the agreement and abandonment of the Public Law Board arrangement -- was a logical consequence.

The substance of the various individual claims made by affected employees which were in the claims handling process at the time the Carrier's Notice of Intent was filed with the Board on or about December 22, 1987, may or may not have been addressed by the question here posed by the Carrier. If such proved to be the case, the Board's findings would not necessarily have been dispositive of such claims.

Nevertheless, as evidenced by the Organizations' requests for meetings with Carrier's highest designated officer and their subsequent, unexplained request for National Mediation Board intervention, there clearly should have been no doubt that a dispute did, in fact, exist. The Carrier's question was real, and it deserved an answer on the merits.

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As for the merits, the issue here was simply whether the Scope Rule precludes the Carrier's action in abolishing Foreman positions and creating an equal or lesser number of Lead Carman positions. Virtually the identical issue has been resolved by Fourth Division Awards 2010 and 3310 involving ARASA and The Chesapeake and Ohio Railway Company. Under the doctrines of res judicata and stare decisis, the Board's answer to the question posed by the Carrier should have been a resounding "No."

The Majority's findings here are particularly difficult to rationalize when one considers the findings in Second Division Award 9051 wherein the Washington Terminal Company was the Petitioner. Therein the Board, with this same Referee, held, in relevant part, as follows:

"The claim is procedurally out of the ordinary. It is first of all, a claim by a Carrier to seek, in effect, a declaratory judgment that its action on termination of Scroggins under Rule 18 was not in violation of the current agreement. The position of the Organization has been not to file a claim against the employe's termination, but rather to insist that Award No. 7876 has not been executed properly by the Carrier. The dispute is nevertheless a genuine one, and the Board does not find it so procedurally deviant so as to prohibit a finding on the merits. The parties have exchanged their views at the highest level and remain in disagreement. The Board will thus not dismiss the matter on procedural grounds." (Emphasis added)

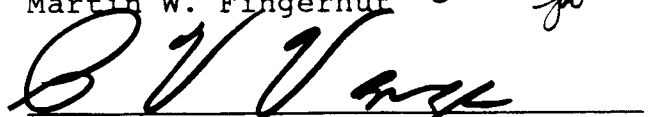
The Organization challenged the Carrier's actions, the highest designated officers of both parties agreed in conference that a dispute existed, and this Board should have resolved it on its merits.



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