Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 4677
Docket No. 4662
89-4-87-4-63

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

PARTIES TO DISPUTE: (CSX Transportation, Inc.
((Formerly the Chesapeake and Ohio Railway Company,
(the Seaboard Coast Line Railroad Company and The
(Baltimore and Ohio Railroad Company)
(
(The American Railway and Airway Supervisors Association
(a Division of the Transportation Communications Union)

STATEMENT OF CLAIM:

Was the Carrier in violation of the Scope Rules of the applicable Schedule Agreements 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.

The parties to said dispute were given due notice of hearing thereon.

This dispute is identical to that considered in Fourth Division Award 4675, except that the Scope Rules are at some variance. In this instance, the Scope Rules read as follows:

For the former C&O and B&OCT

"RULE 1 - Scope

These rules, effective October 1, 1946 (and other dates as indicated), will govern rates of pay and working conditions of foremen and supervisors below the rank of general foreman employed in the Maintenance of Equipment Department and the Maintenance of Way Department, where applicable, as certified in National Mediation Board Case R-3092, dated October 24, 1956, but not including those who are covered within the scope of agreements with other organizations.

For the former SCL

RULE 1 - SCOPE

These rules will govern rates of pay and working conditions of Foremen and Supervisors of Mechanics (including regularly established Relief Foremen or Supervisors who may be assigned to work at one or more points) below the rank of General Foreman who are exclusively employed in the Mechanical Department as certified in National Mediation Board Certificate R-1693 dated October 15, 1946, but not including those who are covered within the scope of agreements with other organizations.

(Where the word 'Foreman' is hereinafter used, it applies to Supervisors and it refers to those covered in the Scope Rule)."

The Board reaches the same conclusions here as in Fourth Division Award 4675.

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

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) further 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

> 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 <u>in reality</u> 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

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.

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.

Carrier Members' Concurring
and Dissenting Opinion to Awards
4675 & 4677; Dockets 4659 & 4662

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga