Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9487
Docket No. 9187-T
2-MP-EW-'83

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated Rules 1 and 24(a) of the Communications Agreement effective August 1, 1977; and, Article III of the September 25, 1964 Agreement when Joe Benton, Conductor, did perform communications maintainers' work, thus, denying Communications Maintainer C. E. Grise, Jr. at Newport, Arkansas his contractual rights under the Agreements.

2. That, accordingly, the Missouri Pacific Railroad Company be ordered to compensate Communications Maintainer C. E. Grise, Jr. three (3) hours at the punitive rate for February 28, 1980.

Findings:

The Second 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 employe 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.

In this matter, the United Transportation Union was notified as a party with possible third party interest.

As stated by the Carrier without contradiction, the incident giving rise to this claim was as follows:

> "At about 11:30 A.M. on Thursday, February 28, 1980, the Conductor on train CHZ, while at Bald Knob, Arkansas, removed the radio from the trailing unit of his locomotive consist and installed it on diesel unit 1772, the leading unit of his locomotive consist. The purpose of exchanging the radios was to have an operating radio on the lead unit during their tour of duty operating the Bald Knob traveling switch engine ..."

The Organization argues that the task performed by the Conductor is exclusively Communications Maintainers' work. The applicable Scope Rule (Rule 1) reads in pertinent part as follows:

> "This Agreement governs the rates of pay, hours of service and working conditions of all employes in the Communications Department specified in this Agreement engaged in the construction, installation, maintenance, repairs, inspection, dismantling and removal of telephone and telegraph transmission and switching systems and associated equipment such as telephone, telegraph and teletype equipment, fixed and mobile radio used for railroad operational purposes, (including microwave systems), closed circuit television, interoffice communications systems, yard speaker systems, and all work generally recognized as communications work; provided, however, that this will not prevent others acting under the direction of a Communications Supervisor or District Officer from utilizing spare equipment limited to plug-in modular units requiring no specialized knowledge or skills to restore service in cases of emergency ...."

The Carrier first makes the defense that the Conductor "took it upon himself to swap radios on two units" and that he was acting "contrary to Carrier's instructions". These are quotations from the Carrier's responses to the claim on the property. No evidence is in the record, however, as to such instructions. The Board does not find the Carrier's assertion, by itself, sufficient to settle the matter.

In its final response on the property, however, the Carrier offered the following defense:

> "The fact that train and enginemen can and do change radios illustrates that the radio is a modular type device in which the cables to the radio plug in and are easily connected and disconnected. When it becomes necessary for train and enginemen to change a radio, it falls into the category of a plug-in modular unit and comes within the exception to the Scope Rule."

Discussion now must turn to the exception to the otherwise broadly stated Scope Rule. This provides that "others acting under the direction of a ... District Officer" may "restore service in cases of emergency" to "spare equipment limited to plug-in modular units requiring no specialized knowledge or skills". The Board finds that the radio replacement in this instance meets the definition of this exception. Necessarily involved, however, is an "emergency".

The Organization argues that the Carrier makes no reference to "emergency" until its submission to the Board -- too late under Railway Labor Act procedure to be considered. The Board does not agree with this view. The Carrier -- somewhat latterly on the property -- did refer to the Scope Rule exception. The circumstances of the replacement were known to all. The switch in radios was on an operating train, and a radio in use was obviously required to promote

efficient and safe completion of the run. Were the replacement to be delayed, it would have either delayed the train or required the train to complete its run without a working radio.

This instance meets the exception which had been bargained into the Scope Rule. The need for any "specialized knowledge or skills" was not demonstrated. Without in any way impinging upon the general reservation of duties to Communications Maintainers, the Board finds no violation of the rule in these particular circumstances.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 18th day of May, 1983.

LABOR MEMBER'S DISSENT

TO

Award No. 9487

Docket No. 9187-T
(Referee Herbert L. Marx, Jr.)

Award No. 9487 is in contradiction to many sound current awards of this Board.

Circular No. 1, National Railroad Adjustment Board requires that all data submitted to the Second Division must have been presented on and made part of the particular question in dispute during the handling on the property. The record shows that the carrier submitted one exhibit to their submission that being a copy of Second Division Award 7920 and nothing more in support of their position.

Further the Referee stretched when he stated on page two as follows:

> "The Carrier ...somewhat latterly on the property—did refer to the Scope Rule exception."

At this point we direct attention to the Board's Circular No. 1, in particular, that portion found under Form of Submission, Position of Carrier: which clearly and unequivocally states in pertinent part as follows:

> "...all data submitted in support of the Carrier's position must affirmatively show the same to have been presented to the employees or the duly authorized representative thereof..."

It is to be noted the circular states, "must affirmatively show", therefore, the Referees statement "somewhat latterly", is

not consistent with or in accordance with the Board's Circular No. 1.

Rule 1 of the agreement is unambiguous and very specific on the issues of this case. However, it was completely ignored here when the arbitrary findings were made.

"Rule No. 1

> This Agreement governs the rates of pay, hours of service and working conditions of all employes in the Communications Department specified in this Agreement engaged in the construction, installation, maintenance, repairs, inspection, dismantling and removal of telephone and telegraph transmission and switching systems and associated equipment such as telephone, telegraph and teletype equipment, fixed and mobile radio used for railroad operational purposes, (including micowave systems), closed circuit television, interoffice communications systems, yard speaker systems, and all work generally recognized as communications work; provided however, that this will not prevent others acting under the direction of a Communications Supervisor or District Officer from utilizing spare equipment limited to plug-in modular units requiring limited to plug-in modular units requiring no specialized knowledge or skills to restore service in cases of emergency."
>
> (Emphasis added)

(1) The work involved was not performed under the direction of a Communications Supervisor or District Officer.

(2) No emergency existed, in fact the Carrier never claimed an emergency existed during the handling on the property.

Under the provision of the rule cited above, employes must not only be acting under the direction of a Communication Supervisor or District Officer to plug-in modular units but an emergency must also exist.

The Carrier admitted the conductor who performed the communication work was not acting under the direction of a Communication Supervisor or District Officer when they stated, during the handling on the property, that the conductor, "took it upon himself to swap radios on two units". In fact, they said that he was acting "contrary to Carrier's instructions."

The Carrier never contended during the handling on the property that an emergency existed. Even if the Carrier had asserted that an emergency existed, this Board has ruled numerous times--that when a party to a dispute asserts an affirmative defense, some probative evidence must be submitted.

Award No. 8810 provides in part:

> "The Board notes that Rule 1 and the 1960 Memorandum must be read in 'pari materia' and each construed in reference to one another. Together they stipulate that the 'replacement of hand sets' is the normal work of the 'communications maintainers', but in an emergency those hand sets, which are of a 'plug-in modular' species, can be replaced by 'others', under the direction of a Communications Supervisor or District Officer.
>
> The evidence presented in the instant dispute is found to be inconclusive as to whether or not a bona fide emergency existed sufficient to permit the discretionary action taken by the Carrier. The record is not clear if the disputed work of replacing an inoperative hand set was a known condition requiring routine replacement or an emergency under Rule 1; requiring action necessary to restore service.
>
> The Carrier has failed to prove its assertion and defense by competent evidence that an 'emergency' existed. Absent some proof by the Carrier of an emergency, which required prompt action and which could not wait to be handled as routine communication maintainers work as per the Agreement, that Agreement is found to have been violated."

Second Division Award No. 5484 held:

thus is raising an affirmative defense, and the burden is upon Carrier to prove such defense by competent evidence. No factual evidence was adduced by Carrier to support this allegation of an 'Emergency'. Mere assertions cannot be accepted as proof. Therefore, we must reject said contention of Carrier that an 'Emergency' did exist in this instance.

It is the opinion of this Board that Carrier violated the Agreement when it failed to call Claimant for overtime work on Trailer Nos. 504403 and 40604.

AWARD

Claim sustained."

The Carrier never contended that an emergency existed during the handling on the property as the parties are required to do. The Carrier did for the first time raise the emergency issue in their submission before the Board. Many awards of this Board have ruled that it is not permissable to raise issues for the first time in the submission and precludes the Board from considering them.

Second Division Award 9329 held:

"Secondly, the Claimant raises the issue that because the heraing officer issued an immediate determination at the investigation, without actual review of the prepared transcript, that the Carrier did not follow usual procedures. We, however, decline to rule on this point since this issue was not raised on the property. It is well settled that this Board cannot determine nor consider issues raised for the first time before this Board."

(Emphasis added)

Second Division Award 7853 held:

"Petitioner raised two issues relating to procedure: the lack of specificity in the charges against the Claimant, in that no dates were indicated; and the multiplicity of roles of the hearing officer. This Board is precluded

" In asserting that an'Emergency' existed, Carrier from considering either of these issues since neither one was raised on the property. It is well established by Boards in this industry and the NRAB that issues which are not raised during the handling of disputes on the property may not be raised initially before these Boards, which are solely appellate in function."
(Emphasis added)

Other similar awards for easy reference are Third Division 2556, 11964, 12072, 12398, 12942, 13139, 15941, 14994 and Second Division 5131, 5513 and 5943.

In an identical case Award 8810 (Carey) between the same parties the Carrier argued that the failure to have an operative radio "creates an emergency if the train is delayed by reason of the crew refusing to leave the terminal." The Board in Third Division Award 10965 (Dorsey) defined an emergency as an unforeseen combination of circumstances which calls for immediate action. Award 8810 then held that:

"The Board notes that Rule 1 and the 1960 memorandum must be read in 'pari materia' and each construed in reference to one another. Together they stipulate that the "replacement of hand sets" is the normal work of the "communications maintainers", but in an emergency those hand sets, which are of a "plug-in modular" species, can be replaced by "others", under the direction of a Communications Supervisor or District Officer."
(Emphasis added)

It must be pointed out here that in the instant case neither condition was met by the Carrier. The radio was not replaced under the direction of a Communication Supervisor or District Officer and the Carrier neither claimed or proved that an "emergency" existed.

Award 8810 then went on to hold:

"The Carrier has failed to prove its assertion and defense by competent evidence that an emergency existed. Absent some proof by the Carrier of an emergency which required prompt action and which could not wait to be handled as routine communication maintainers work as per the Agreement, that Agreement is found to have been violated.

Absent the showing of an emergency, and given the Board's conclusion that the Carrier violated the Agreement, this determination by the Board should serve as a caution against such assignments in the future. However, the evidence reveals that the disputed work is sufficiently minimal so that the Board finds without prejudice that no compensatory award is deemed warranted for this particular infraction.

AWARD

Claim sustained to the degree and limits specified in the Findings."

(Emphasis added)

The following Second Division Awards, all which involved the identical issues between the same parties and all which cautioned the Carrier against such assignments in the future are; Award Nos. 8810, 8811, 8815, 8816, and 8817 (Carey); Award No. 8908 (Vernon); Award Nos. 9254, 9256, 9257 and 9258 (Schienman); and Award No. 9346 (Sickles).

The Board is limited to the interpretation and application of the Agreements. This subject has been dealt with many times some of which are as follows:

Third Division Award 5079:

"This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation and application of agreements as agreed to between the parties. Award 1589. We are without authority to add to, take from, or

write rules for the parties. Awards 871, 1230, 2612, 3407, 4763."

Third Division Award No. 6757:

"***The parties themselves must stand or fall on what they have agreed to through the medium of collective bargaining as subsequently reflected by the terms of the contract to which they have agreed. We cannot legislate or make them a new contract. By the same token we can neither write out something they have included therein nor can we write in something that is not there."

Third Division Award 6365:

"It is the duty of this Board to interpret the rules of the agreements as they are made. We are not authorized to read into a rule, that which is not contained, or by an award add or detract a meaning to the agreement which was clearly not the intention of the parties. Many awards have been made by the Board on this subject, and we refer to only a few as affirming our position. See Awards 4493, 5864, 5971, 5977."

Third Division Award 17605:

"It is well established that this Board has no authority to expand or enlarge the terms of the controlling agreement."

Third Division Award 4763:

"This Board is without authority to revise or expand the Agreement between the parties, but must construe and apply agreements as the parties enter into them, and it has no authority to change them to avoid inequitable results. Awards 1238, 2612, 2765, 4295. This Agreement does not restrict the assignment of the employes as set forth in this claim and it will be denied."

It is therefore obvious that in reaching the erroneous decision in Award 9487; the majority of the Board ignored, overlooked and rejected Board Circular No. 1, the Agreement between the parties and precedent awards.

While the Carrier's arguments were properly and adequately

refuted on the property it is impossible to defend against positions not presented on the property during handling but taken by a Referee in the Carrier's defense in an award at the peril of the employes.

It is our position that Referee Marx, in writing the findings of the majority did exceed his authority when he failed to confine himself to matters within the scope of the Board's jurisdiction set forth in the Act.

Norman D. Schultz
Labor Member