Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13109
Docket No. 12954
97-2-94-2-98

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(International Association of Machinists and Aerospace
(Workers
PARTIES TO DISPUTE:(
(Metro-North Commuter Railroad
(
(Transport Workers' Union of America

STATEMENT OF CLAIM:

"In accordance with past practice and the collective bargaining agreements between Metro-North and IAM&AW and Metro-North and TWU, which employees should be assigned to the repair, maintenance and inspection of MU electric equipment at the Carrier's Brewster, New York, Shop Facility?"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Background

This dispute has a long arbitral and judicial history. The dispute has its origin in 1984, when the Carrier attempted to allocate the work of maintenance and repairs on multiple unit electrical equipment (MUs) between employes represented by the IAM and employes represented by the TWU at Brewster, New York. This equipment, which is powered by an electrified third rail, had just been put into service. Previously, these employes had performed maintenance and repairs on diesel locomotives and diesel powered self-propelled vehicles (SPVs). Members of the IAM performed floor level maintenance and repair work on the diesel locomotives and SPVs, while TWU members repaired and maintained the bodies, windows and interiors of the equipment. Maintenance and repair work on standard coaches was also performed by members of the TWU. The particular work in dispute is work on MUs below the floor line, *e.g.*, repairs and maintenance on brakes, wheels, draft gear, air compressors and air brake systems. This is work that is not covered by either the IAM or TWU Agreements.

Carrier's first approach was to allocate the work in such a manner that the IAM performed repair work on the MUs at the Brewster Engine House, while the TWU performed work in Brewster Yard. This arrangement generated claims from both Organizations. In 1987, the Carrier adopted a proportional allocation, giving 60 percent of the repair work to the TWU and 40 percent to the IAM. Again, both crafts filed claims.

The TWU claims were presented to Special Board of Adjustment No. 935 as Case No. 175. The Statement of Claim in that dispute read as follows:

> "1.) Carrier has been violating ever since March 17, 1987 the Scope and Classification of Work Rules of its Agreement with the T.W.U. by assigning forty percent of the multiple unit equipment inspection and repair work at its new Brewster, New York, facility to machinists rather than to carmen.
>
> "2.) This is a 'continuing claim,' the TWU claiming 'eight hours each day Machinists (I.A.M.) Are performing carmen's work at the new Brewster facility.'"

Although the IAM was invited to intervene in the dispute before SBA No. 935 as an interested third party, it declined to do so. The Board, with Referee Harold Weston serving as Chairman, on December 12, 1990, issued the following Award:

> "Paragraph 1 of the claim is sustained. Paragraph 2 of the claim is denied for the period ending on the effective day of this Award; however, carmen will be entitled to compensation for the number of hours machinist perform M.U. inspection and repair work at Brewster subsequent to the effective date of this Award.
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> "Carrier is hereby ordered to comply with the above Award within 30 days subsequent to the date a majority of the Board have signed the Award.
>
> "The Award shall be effective on the 30th day subsequent to the date a majority of the Board have signed this Award."

Contemporaneous with the handling of the dispute before SBA No. 935, the Carrier and the IAM agreed to present a related dispute to Public Law Board No. 4573. The claim before that Board, in Award No. 1, was:

> "Whether the work assignment at the new Brewster Shop as contained in the Metro-North bulletins of March 17, 1987 violates Section 2, Seventh of the Railway Labor Act."

In an Award issued December 20, 1990, PLB No. 4573, with Referee Richard R. Kasher serving as Chairman, answered the Statement of Issue before it in the affirmative. In reaching this conclusion, the Board wrote:

> "The Board is sympathetic to the Carrier's dilemma. Metro-North found itself, in 1987, with a new shop facility and with competing claims from the two involved Organizations for the repair and maintenance work at that shop. It is clear that the Carrier made a somewhat scientific effort to satisfy both labor organizations by 'dividing' the work on a sixty percent (60%) TWU and forty percent (40%) IAM basis.

"While this Board is not prepared to say that the Carrier's effort was not intended to achieve an equitable distribution of the work, this Board is prepared to say that the Carrier has not established, by fact or argument, that it had the right, by contract or law, to determine what would be an appropriate division of work where no percentage guidelines existed in the collective bargaining agreements or had been agreed to by the competing Organizations.

"Clearly, the Carrier's unilateral implementation of a percentage division of work, which Metro-North found to be appropriate, impacted and 'changed' the existing scope rules of both the TWU and the IAM. While the TWU may have been satisfied with the division, although it is not clear that the Organization has abandoned claims to the forty percent (40%) of the work assigned to the IAM, it is this Board's opinion that there is merit in the IAM's contention that the Carrier's arbitrary assignment of work was a violation of Section 2, Seventh of the RLA.

"The Carrier's division of work at the Brewster shop, while it may have been reasonable and equitable, was not a right which the Carrier obtained through negotiations with the IAM and/or the TWU. Accordingly, this Board must conclude that the Carrier's determination of what was an appropriate division of work cannot bind the two Labor Organizations, and must be viewed as a change in existing rules and working conditions."

Thereafter, the Carrier met with both Organizations in an effort to resolve this issue. Although the IAM and the Carrier agreed to submit the dispute to a tri-partite arbitration panel, the TWU did not agree. Carrier then decided to implement Award 175 of SBA No. 935, assigning all of the disputed work at Brewster to the TWU. In response, the IAM, in January 1991, filed a motion for injunctive relief against the Carrier with the U.S. District Court for the Southern District of New York, seeking, *inter alia*, the re-establishment of the *status quo* as it existed at Brewster prior to 1987. The IAM's motion was subsequently amended to include the TWU as an additional

defendant. The court, in September 1991, issued an Order which stated, in pertinent part, as follows:

> "On the basis of the various submissions in this case, the court concludes that the conflicting arbitration awards create a problem which is properly resolved by tri-partite arbitration - involving IAM, TWU and Metro-North - before the National Railroad Adjustment Board. In the interest of justice, this arbitration proceeding should be handled on an expedited basis."

The dispute was then presented before the Second Division of the National Railroad Adjustment Board in Docket No. 12438, with the following Statement of Claim:

> "In accordance with past practice and the collective bargaining agreements between Metro-North and IAM&AW and Metro-North and TWU, which employees should be assigned to the repair, maintenance and inspection of MU electric equipment at the Carrier's Brewster, New York, Shop facility?"

On July 22, 1992, the Division, consisting of the regular members and Referee Edward L. Suntrup, issued Award No. 12397. In its Award, the Board first dismissed the TWU's procedural argument that the two prior Awards were not in conflict. In doing so, the Board held:

> "There are a number of problems with the procedural argument raised by the TWU. First of all, while PLB No. 4573 clearly states that the Carrier has no right by 'contract or law' to scientifically divide the work up on 60/40 basis, this Board notes that the issue raised in that Award does not examine the intent and application of the IAM's Classification of Work Rule. And Award 175 of SBA No. 935 examines the TWU's Classification of Work Rule with incomplete information. The author of Award 175 expresses concern about evidentiary matters. This Board also notes that certain factual conclusion, crucial to an understanding

"of the work jurisdictional issue related to MUs at Brewster, which are arrived at in Award 175 of SBA No. 935, are in potential error. All parties to this dispute have danced around the jurisdictional issue long enough and have tried to win battles, no uningeniously, by using legal and procedural weapons. But what has been lacking, heretofore, is what is always needed as *sine qua non* to resolve jurisdictional disputes, and this is language from all contracts involved, and a complete record of evidence on past and current practices. It is difficult enough to come to reasonable conclusions on work jurisdictional issues with all pertinent contract language and facts in hand. It is impossible to do so without them.

"The Board will not deny, after a full study of the record before it and the parties' arguments in its Submissions, that both sides may have had good, strategic reasons for not participating in the evidentiary process, as third parties, in the two prior arbitrations dealing with MU work at Brewster. But it is not the Board's function to speculate on these matters and it will refrain, therefore, from doing so. On the other hand, the work jurisdictional issue before the two Organizations, and before the Carrier, has not yet had a full hearing prior to the docketing of this case before the Board. The procedural objection raised by the TWU is dismissed on those grounds."

The Board then made the following findings:

"From the record before it, the Board concludes as follows. Award 175 of SBA No. 935 factually erred when it concluded as follows:

'As we understand it, the term, "locomotive" and "self-propelled units," are specialized equipment that realistically and in normal

> "'railroad parlance do not refer to the type of MU cars worked upon at Brewster. . . .'

Thus the TWU argument that MUs are not self-propelled units ' . . . since they cannot move under their own power when simply placed on tracks, without the addition of electric power' is rejected Such conclusion is not only supported by the opinion of the ICC, FRA and the courts cited in the foregoing, but the Carrier itself, in its Submission to the Board, states the following:

> 'Inconsistent with . . .award (175 of SBA 935) a MU is considered by the FRA to be a type of locomotive within the scope of the (IAM's Classification of Work Rule) . . . .'

"Secondly, it is clear that there was a mixed tradition on the Carrier's property, due to past practices originating on operating railroad which were incorporated into its corporate structure over time, which puts to rest the claim of exclusivity by either the TWU or the IAM when it is question of repair and maintenance on MUs. Both Organizations admit that in their Submission to the Board and both have labor contracts which permit accommodations to this arrangement.

"Thirdly, the Board must agree with the conclusions of Award 1 of PLB No. 4573, despite the Carrier's continuing argument to the contrary on equity and other factual grounds which it finds to be pertinent, that there is no basis 'by contract or law' for the Second Division to conclude that the maintenance and repair work on MUs at Brewster should be divided up between the TWU and the IAM according to some formula. The work either belongs to the IAM or to the TWU and the Board must rule accordingly.

"Fourthly, there is insufficient evidence that members of the TWU craft did work of the type in question on locomotives or any other self-propelled units at Brewster itself prior to the establishment of the MU repair and maintenance work there by the Carrier. There is evidence that the IAM had exclusive purview at Brewster on repair and maintenance work of the type at bar in this case on self-propelled units and, as concluded in the foregoing, MUs are self-propelled units.

"Lastly, the language of the IAM contract, and not that of the TWU contract, more properly supports that the repair and maintenance work on MUs of the type here at bar, at Brewster, belongs to the IAM, and not to the TWU. Therefore, the Board rules that in accordance with past practice and the Collective Bargaining Agreements between the Carrier and the IAM&AW and the Carrier and TWU, the work of repair, maintenance and inspection of MU electric equipment at the Carrier's Brewster, New York, Shop facility shall be assigned to the Machinists' craft covered by the IAM&AW labor contract."

Following the issuance of Award No. 12397, the TWU returned to the U.S. District Court in a petition to set aside the Award, which was granted. The basis for the court's decision was that one of the Organization Members of the Second Division, Mark Filipovic, is an employee of the IAM and had signed the IAM's submission in the dispute before the Board. The TWU, on the other hand, does not have a member on the Board. Although the court found there was no showing of fraud or corruption in the usual sense, nor any showing of bribery or other malign actions to influence the Referee or the Division members who made the final decision, it determined that " Filipovic's role involved a conflict of interest of the kind that is completely unacceptable in adjudicative bodies." The court determined that "Filipovic was required to disqualify himself from participating in any way in the activities of the division in this matter." Accordingly, the court remanded the dispute "to the NRAB for a new proceeding with proper procedural safeguards." The court further directed that Carrier maintain the *status quo*, with IAM members in place, until and unless this Board rules otherwise.

The IAM appealed this decision to the U.S. Court of Appeals for the Second Circuit, and the TWU cross-appealed the court's order to maintain the *status quo*. In affirming the district court's decision to remand the dispute, the court of appeals held:

> "At least since the time of Lord Coke, (Nemo debet esse judex in propria causa - no one may be a judge in his own case), a fundamental precept of due process has been that an interested party in a dispute cannot also sit as a decision-make. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Wolkenstein v. Reville*, 694 F.2d 35, 38-39 (2d Cir. 1982). It may be true, as IAM asserts, that the award in this dispute was made by a neutral referee, not the Second Division on which Filipovic sits. It may also be a fact of life that the Second Division *always* refers railway labor disputes to a subpanel, the subpanel *always* deadlocks, and the dispute is *always* settled by a neutral referee. Nevertheless, Filipovic was both an IAM employee and a voting member of the NRAB division empowered to decide the Metro-North/IAM/TWU dispute. He signed IAM's brief to the Second Division. Moreover, he was one of the two members of the subpanel formed to make findings in the dispute, and he actually voted to deadlock the dispute and to send it to a referee. Thus, at crucial stages in this star-crossed proceeding, Filipovic sat as both interested party and decision-make, in violation of due process. It is no less important that justice appear to be done than that justice be done."

The court of appeals further rejected TWUs assertion that the PLB and SBA decisions were not in conflict and that the SBA Award should be enforced and all of the jobs should be awarded to TWU. On this point, the court held:

> "The RLA directs that adjustment board decisions be enforced when the parties have agreed to resolve their dispute in that manner. 45 U.S.C. § 153 Second. Here, IAM was not a party to the contract between Metro-North and

> "TWU pursuant to which the TWU board was established. IAM never appeared or participated in the proceeding before the TWU board. As a result, the TWU board never heard IAM's side of the dispute. Thus, there is no basis for holding IAM to the TWU board's decision. The district court, in its discretion, properly ordered Metro-North to leave the IAM members in place pending further order by the NRAB or the court."

Upon remand of this dispute to the Second Division, all of the partisan members of the Division, Carrier as well as Organization, recused themselves. The dispute, then, was heard and decided solely by the neutral Referee.

Findings

The Referee, upon extensive review of the submissions of the parties to this dispute, as well as oral argument, finds that the arguments advanced therein were given full consideration in Award No. 12397. There has been nothing presented by the parties upon remand to convince the Referee that the findings in Award No. 12397 are erroneous, patently or otherwise. While the court may have found the process to have been tainted in that case, the wisdom and rationale of the outcome may still be valid. Without further burdening the record in this dispute, the Referee adopts the findings of Award No. 12397 as if they were his own. Therefore, in accordance with past practice and the Collective Bargaining Agreements between the Carrier and the IAM&AW and the Carrier and TWU, the work of repair, maintenance and inspection of MU electric equipment at the Carrier's Brewster, New York, Shop facility shall be assigned to the Machinists' craft covered by the IAM&AW labor contract.

AWARD

The question in the Statement of Claim is disposed of in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 19th day of March 1997.