

Award No. 6227
Docket No. 6036
2-D&RGW-TCD-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

1. (a) Carrier violated the Agreement on August 6, 1969, when it allowed, required or permitted Mr. E. H. Musgrove and Mr. L. E. Trump, supervisory employes not covered by the Agreement to perform the work of a Radio Maintainer, at Oak Creek, Colorado.
- (b) Carrier shall now compensate Maintainers R. A. Meyers and F. W. Theis each one day's pay at the daily rate of a Radio Communications Equipment Maintainer, on account of the above violations.
2. (a) Carrier violated the Agreement on July 16, 17 and 18, 1969, when it allowed, required or permitted Mr. L. E. Trump, a supervisory employe not covered by the Agreement to perform the duties of a Telephone and Telegraph Maintainer at Craig and Phippsburg, Colorado or the vicinity thereof.
- (b) Carrier shall now compensate Telephone and Telegraph Maintainer H. H. Phillips, one day's pay for each date shown in (a) above, account the above violations.

EMPLOYEES' STATEMENT OF FACTS: The instant dispute arose because Carrier used Supervisory Employees, who are not covered by the Agreement between the Parties, to perform work reserved to the Employees on four different occasions. The Employees contend that the performance of work set out in the record by these Supervisory Employees was violative of the Agreement, and that the Claimants are entitled to the compensation requested.

rule of the agreement. Clear and unambiguous contract provisions should be found before an inherent right of management is taken away.

The general chairman well knows that the claimants designated in this claim are all monthly rated employes who suffered no monetary damage by the use of the communication engineers to locate trouble the claimants had been unable to find. It appears that the organization is actually attempting to obtain a reward for the claimants for their failure to locate the trouble.

No pecuniary loss or damage to claimants has been shown, and the agreement does not provide for any arbitrary or penalty for this type of claim.

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.

The Organization is contending in this dispute that supervisory employes performed work on the dates in question which, by virtue of the Scope Rule of the Agreement, belongs to claimants, Telephone and Telegrapher Maintainers.

The Organization's position is that there is no provision in the Agreement which would permit supervisory employes to correct trouble in the event contract employes are unable to correct it; that the only exception which permits other than covered employes to perform work reserved to claimants is in an emergency, and such emergency line telegraph and telephone work may be performed by Signalmen; that neither an emergency existed nor were the supervisory employes used in this instance, Signalmen; that Carrier's defense that said Supervisory employes were merely testing the equipment is untenable, since the removal of equipment from its proper place, testing, adjusting, attempted repair and reinstallation of said equipment in question cannot be defined as testing; that not only by practice, but by the clear wording of Rules 1 and 2 of the Agreement the work in question is reserved exclusively to claimants to the exclusion of all others.

The Organization cites the specific work it claims was performed by supervisory employes on July 16, 17 and 18, 1969, to be as follows:

- (1) Removed 25A Teletype Carrier from office at Craig, Colorado.
- (2) Installed 25A Teletype Carrier from Craig in the office at Phippsburg, Colorado after removing 25A carrier equipment located there.
- (3) Performed tests and troubleshooting in this way to determine that the Craig 25A carrier was malfunctioning.

- (4) Removed the Craig 25A carrier from Phippsburg office and reinstalled Phippsburg's 25A carrier equipment.
- (5) Returned to Craig and reinstalled Craig's 25A teletype carrier and attempted to make repairs, but was unable to do so because parts were not available.

The Organization sets forth the work it claims to have been performed by supervisory employes on August 6, 1969 as follows:

- (1) On August 6, 1969, Mr. E. H. Musgrove and Mr. L. E. Trump made repairs to the No. 1 radio, frequency 160.92 MHZ at Oak Creek, Colorado, by installing tubes in said radio and tuning and adjusting same.
- (2) Removal of Radio No. 3, frequency 160.335 MHZ at Oak Creek, Colorado VHF Repeater.
- (3) Installing and adjusting to frequency at 161.49 transmit crystal in Radio No. 2 at Oak Creek VHF Repeater.

At the outset, Carrier raises a jurisdictional question alleging that this Division of the National Railroad Adjustment Board does not have jurisdiction to hear disputes involving Communication Maintenance employes under Section 3, First (h) of the Railway Labor Act, because Communication Maintenance employes are not listed as being under the jurisdiction of this Division and, therefore, this claim should be dismissed.

In reply to the Carrier's said contention that this Division is without jurisdiction to decide the instant dispute, the Organization points out that prior to Third Division Award No. 16665, it always progressed disputes involving telephone and telegraph maintenance and construction employes to the Third Division. The Organization's position is that although, in spite of said Award No. 16665, the Third Division is the proper Division to hear claims such as is presented here, and because of Award No. 16665 finding that the Second Division has jurisdiction over disputes involving this class of employes, it has brought this claim to the Second Division for adjudication.

Section 3, First (h) of the Railway Labor Act provides as follows:

"Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of the foregoing, coach cleaners, powerhouse employes, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the Carriers and five by the national labor organizations of the employes.

Third Division: To have jurisdiction over disputes involving station, tower and telegraph employes, train dispatchers, maintenance-of-way men, clerical employes, freight handlers, express, station and store employes, signalmen, sleeping-car porters, and maids and dining-car employes. This division shall consist of ten members, five of whom shall be selected by the Carriers and five by the national labor organizations of employes."

In Third Division Award No. 16665, the Board concluded that the telephone and telegraph maintenance and construction employes are not within any class of employes over which the Third Division of the Adjustment Board has jurisdiction for the purpose of resolving disputes. The Board in said Award No. 16665 decided that said employes are "electrical workers", and, therefore, this Division has sole jurisdiction to determine disputes involving said class of employes. With this conclusion we do not agree.

The Railway Labor Act expressly gives exclusive jurisdiction to the Third Division over disputes involving "telegraph" employes. In this dispute, we are dealing with "telephone and telegrapher maintainers." Therefore, we are obligated to reach a decision finding that the Third Division of the National Railroad Adjustment Board has exclusive jurisdiction over disputes involving the class of employes involved in this dispute. We find that Section 3, First (h) of the Railway Labor Act is unambiguous, and the plain meaning of said Section gives exclusive jurisdiction over a dispute involving the class of employes involved herein to the Third Division of the National Railroad Adjustment Board.

As was said by the Court in the case of "In Order of Railway Conductors of America v. Swan, et al", 152 F. 2d 325, at page 329:

"Administrative interpretation is resorted to only when the statute is ambiguous. * * * An administrative interpretation contrary to the plain meaning of the statute, though of long standing, is never accepted by the Courts."

We cannot, therefore, give said Section of the Railway Labor Act a strained or narrowed interpretation contrary to the clear meaning of its terms.

We appreciate the dilemma the Organization is placed in as a result of these conflicting rulings. We, therefore, will dismiss this claim without prejudice to the Organization filing said claim in another Division of the National Railroad Adjustment Board or Special Board of Adjustment.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1971.

DISSENT OF LABOR MEMBERS TO AWARD NO. 6227

By its decision in this case, the majority of the Division has attempted to usurp the authority and repudiate decisions of two Divisions. It has decided that "telephone and telegraph maintainers" are not "electrical workers" and, thus, are not subject to the jurisdiction of the Second Division. It reaches the conclusion despite of the findings of the Second Division in Award No. 784 which reads, in part:

"The contention of the carrier that the Second Division, National Railroad Adjustment Board, does not have jurisdiction over parties to this dispute is without foundation, as the Second Division's jurisdiction includes electrical workers, and telegraph and telephone linemen are classified as electrical workers."

and Third Division Award No. 16665 which reads, in part:

"OPINION OF BOARD: The Carrier has objected to the jurisdiction of this Board to render a decision on the case at bar. The ground for the jurisdictional objection is that under Section 3, First (h) of the Railway Labor Act the telephone and telegraph maintenance and construction employes are not within any class of employes over which the Third Division of the Adjustment Board has jurisdiction for the purpose of resolving disputes. The Carrier contends that the employes who are the Claimants herein are electrical workers whose disputes are properly before the Second Division.

The fact that the Transportation-Communication Employees Union (telegraphers) represents these workers does not change their character as a class of employes.

The Organization cites in support of its argument that the Third Division has jurisdiction over these workers awards wherein this Division assumed jurisdiction over telephone and telegraph maintenance and construction employes, Awards 16514, 15688 and 16518. These jurisdictional findings were no more than perfunctory, and are of little value as precedents.

Section 3, First (h) of the Act gives the Third Division jurisdiction as follows:

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employes, train dispatchers, maintenance-of-way men, clerical employes, freight handlers, express, station, and store employes, signalmen, sleeping-car conductors, sleeping-car porters, and maids and dining-car employes. This Division shall consist of ten members, five of whom shall be selected by the Carriers and five by the national labor organizations of employes.

The Second Division has jurisdiction as follows:

Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employes, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the Carriers, and five by the national labor organizations of the employes.' (Emphasis ours.)

We are of the opinion that the employes here involved do not belong to any class over which the Third Division has jurisdiction and, therefore, not properly before this Board.

This claim is dismissed without prejudice."

The decision of the majority is contrary to the above two decisions, as it has been, over a period of many years, the policy of this Board that the Second Division has jurisdiction over employes engaged as telephone and telegraph maintainers. The claimant was entitled to rely on this long-established recognition by the Division of its jurisdiction over these electrical workers. To deny the claimant of his rights to have his claim heard on the merits is improper, and completely unfair and unequitable.

Both from a legal and equitable standpoint, this dispute should have been determined on its merits.

Daniel S. Anderson

E. J. Haesaert

O. L. Wertz

E. J. McDermott

R. E. Stenzinger