CARRIER MEMBERS' DISSENT TO AWARD NO. 7926 -
DOCKET NO. 7818 - REFEREE LARNEY

The decision reached by the majority in Award No. 7926 is palpably erroneous and cannot be accepted as a precedential Award.

Regardless of the fancy rhetorical footwork displayed by the author of the Award and adopted by the majority of the Division, the fact remains that there is no wrecking crew - as such - at Washington, Indiana, and there has not been a wrecking crew at that location since the removal of the wreck derrick and attendant equipment in 1972.

The majority has apparently accepted the fact and premise that:

> "(1) A derrick of the 150 ton steam variety is the central piece of equipment comprising a 'wreck outfit' and without a derrick there can be no 'wreck outfit'; and
>
> "(2) A 'wreck outfit' presupposes a 'wreck crew' and the two are so inextricably bound together, that where no wreck outfit exists there can be no wreck crew;"

However, they go on to say:

> "nevertheless, there still remains the fact that wreck crew assignments are bulletined positions and as such are subject to the abolishment procedures set forth in Article III, Rule 24(h) of the June 5, 1962 National Agreement. The Board notes that such wrecking crew positions apparently were never formally abolished at Washington, Indiana in accordance with Article III, Rule 24(h) either at the time the derrick was reassigned in 1972 nor any time subsequent to the removal of the derrick.
> * * *
>
> "The Board finds that the mere removal of the derrick from Washington, Indiana in the instant case, did not simultaneously automatically cause the elimination of the wrecking crew positions. Abolition of said assignments could have been accomplished by complying with Article III, Rule 24(h) of the June 5, 1962 National Agreement. In so finding, the Board is in agreement with the Organization's position that a wrecking crew does exist at Washington, Indiana. * * *."

Yet, nowhere in the handling of this case on the property is there any reference to be found relative to either Rule 24 or Article III of the June 5, 1962 National Agreement. These two items appeared for the first time during the panel discussion of this case when the labor member of the panel made reference to them.

The "usual manner" of handling claims and grievances as mandated by both Section 3, First (i) of the Railway Labor Act and Circular No. 1 of this Board requires - no, demands - that the applicable Rules of the Agreement which are allegedly violated be clearly and specifically identified during the handling of the claim or grievance on the property. This Board cannot properly consider any citation of Rules which were allegedly violated which citation is advanced for the first time before the Board.

A few of the plethora of Awards in this regard:

"Second Division Award No. 6303 (Cole):

"Since the Employes are the moving party, they are charged with citing what rule or rules of the Agreement were violated. See Second Division Awards 1845, 4166, 5526 and Third Division Awards 15835, 16663, 17212, 18864. * * *."
(Underscore ours)

Second Division Award No. 6321 (Harr):

"The claim is premised on the assertion that 'the applicable rules of our controlling Agreement have been violated'. However, during the handling of the case on the property, the Employes did not cite a single rule the Carrier allegedly violated. In their submission to this Board, the Employes for the first time refer to Rule 90 as being violated. This should have been raised on the property, not before this Board.

"This Board has held that the Organization must prove every element of its claim and failure to identify a specific rule is fatal to its claim. * * *."

Second Division Award No. 7153 (Sickles):

"The notification of intention to file ex parte submission in this case asserted a violation of Rule 36 and 26. It did not claim a violation of Rule 35, and accordingly that assertion is not properly before us."

Third Division Award No. 21441 (McBrearty):

"* * * The Employes have the responsibility and burden to cite the rules and agreement language relied upon during handling on the property. This, of course, is a fundamental due process right of the other party, and where the rules are not cited, discussed, or in some way stated on the property, the omitted rules cannot be supplied for the first time in the submission of claim to this Board. It is the intent of the Railway Labor Act that issues in a dispute before this Board, shall have been framed by the parties in conference on the property.

"This fundamental principle cannot be evaded by Petitioner using the scatter-gun approach on the property 'or any other applicable rules of the October 1, 1973 Agreement.' The 'applicable rules' must be clearly identified."
(Underscore ours)

Third Division Award No. 21331 (Zumas):

"During the handling on the property the Organization contended that two specific provisions of the agreement were violated when Carrier failed to call Claimant to perform the work involved.

"* * * * *

"In its submissions before this Board, the Organization asserted additionally that Article 5, Rule 6(1) was also violated. Whether or not Article 5, Rule 6(1) has merit cannot be determined by this Board. There are numerous awards of this Board that have consistently held that failure to cite specific rules violations during the handling on the property precludes consideration at the Board level."

Third Division Award No. 20255 (Blackwell):

"The Carrier objects to Board consideration of Rules 34 and 48 (a) on the ground that they were not raised on the property. Rule 33, standing alone, does not support the claim and Carrier's objection to consideration of Rules 34 and 48 (a) is well taken. The Employes were expressly challenged on the property to cite any additional rules that would support the claim. The Employes

"failed to do so and the injection of additional rules for the first time before this Board comes too late. Award 18246. We shall deny the claim, on the ground that it is not supported by Rule 33."

Third Division Award No. 20166 (Sickles):

"* * * On the property, Claimant originally asserted a violation of the Scope Rule, and stressed Rule 47. In one document, Claimant asserted that Carrier's action violated Rules 1, 2, 39(b), 47 and 49(b). However, during the handling on the property the Carrier was not advised on the nature of the alleged Rule 49(b) violation. * * *

"In the documents presented to this Board, the Organization relies heavily upon the Scope Rule and 49(b). * * * While Rule 49(b) was mentioned, during the handling on the property, the alleged facts of position abolition and resultant theories of violation were not. While the Board might, in individual cases, be pursuaded to focus its attention solely upon the alleged violation of the Scope Rule (which was urged on the property) under this record we are precluded from doing so. In its Reply to Carrier's Submission, the Organization states:

> "'Furthermore, the Organization only relied on the Scope Rule to identify the positions of Time Desk Clerk as coming under the scope of the Clerk's Agreement, for the purpose of applying the governing Rule 49(b)...' (Double underscoring supplied)"

(Emphasis supplied in original)

Third Division Award No. 20064 (Blackwell):

"The foregoing shows that the rules mentioned on the property were Rules 12 and 22 (f). However, in the claim presented to the Board, Rules 12 and 22 (f) are not mentioned and instead the claim is now predicated on Carrier's violation of Rules 2(a), (f), 3 (a), 6 (a) and 57. On these facts there can be no doubt that the claim as presented to the Board is not the same claim that was handled on the property and, consequently, there is no proper claim before the Board for its consideration. The employees have the responsibility and burden to cite the rules and agreement language relied upon during handling on the property. This, of course,

"is a fundamental due process right of the other party, and where the rules are not cited, discussed, or in some way stated on the property, the omitted rules cannot be supplied for the first time in the submission of claim to this Board. We conclude therefore that the claim as stated is not properly before the Board and, accordingly, we shall issue a dismissal Award. * * *."

Third Division Award No. 20043 (Sickles):

"During the handling of the matter on the property, the employees alleged a violation of 'seniority and related rules.' Although Carrier advised the Organization that it had not cited any rule or agreement, the Organization failed to further identify the 'violation.'

"The same basic issue, concerning the same parties, was recently decided by this Referee. A failure to assert a specific rule violation while the matter is handled on the property is fatal to the employees' case, and citation of a specific rule in the Submission to this Board does not cure the earlier procedural defect. * * *."

Third Division Award No. 19970 (Roadley):

"A thorough review of the record before us shows that, during the handling of this dipuste on the property, the Organization did not identify which Rules in the Agreement had allegedly been violated but merely asserted '...a violation of the provisions of the seniority and other related rules.' It is a long established principle of this Board that failure to assert the specific Rule, or Rules, allegedly violated while the matter is being handled on the property is fatal to the claim when presented to this Board. See Awards 14754, 13282, 13741, 14118, 14772 and many others. We will accordingly dismiss the claim on the basis of the procedural defect."

Third Division Award No. 19969 (Roadley):

"In its submission to the Board Petitioner cited Rules 1, Scope; 2, Seniority; 15 (k), Work on Unassigned Days; 17 (c), Overtime; and 18 (a), Calls; and 26 (a) and (b), Classification of Work. However, a careful review of the

"record of handling on the property, as shown by the correspondence between the parties, indicates that the only rule violations advanced in behalf of Claimants were Rules 1, 17, and 26, (per General Chairman's appeal letter of May 22, 1971 and Superintendent's reply thereto, dated June 18, 1971). We will therefore limit our consideration to the partisan positions as argued on the property for it is a well established principle of this Board that the parties are barred from raising issues for the first time before the Board. * * *."

Third Division Award No. 19831 (Roadley):

"The Petitioner, in handling this claim on the property, cited 'particularly Rule 1 and others' in support of its position. Rule 1 is the Scope Rule of the Agreement. * * *.

"* * * * *

"In its submission to this Board, Petitioner relied on the language of Rule 42(f), re Work on Unassigned Days, as also supportive of their position. However, a thorough review of the record before us, including the exchange of correspondence between the parties prior to their respective submissions to this Board, shows that this Rule was not cited by Petitioner during the handling on the property.

"* * * * *

"We * * * find that Petitioner's introduction of Rule 42(f) in its submission to this Board was an effort 'to mend its hold' and is, therefore, not properly before us."

Third Division Award No. 19773 (Ritter):

"* * * The awards are abundant to the effect that the Organization can not prevail before the Board on the basis of rules that were not cited or discussed during usual handling on the property. * * *."

Third Division Award No. 18964 (Dugan):

"This Board, in a long continuous line of Awards, has repeatedly held that it is too late to supply the specifics for the first time in the submission to this Board because (1) it in effect raises new issues not the subject of conference on the property; and (2) it is the intent of the Railway Labor Act that issues in a dispute before this Board shall have been framed by the parties in conference on the property. * * *."
(Underscore ours)

Third Division Award No. 17329 (Devine):

"In its submission to this Board the Petitioner also cites and relies upon Rule 30--Absorbing Overtime. Carrier contends that the application of Rule 30 was not raised during the handling of the dispute on the property. A review of the correspondence covering the handling on the property bears out the contention of the Carrier in this respect. It is well settled that issues and contentions not raised in the handling of disputes on the property may not be raised for the first time before the Board."

"Third Division Award No. 15700 (Dorsey):

"The issue is whether Petitioner to perfect its case had the burden of specifying the rule(s) allegedly violated. When confronted with the same issue, we have held that Petitioner had the burden. For reasons stated in Award Nos. 13741, 14081 and 14772, we will dismiss the instant Claim."

"Third Division Award No. 13741 (Dorsey):

"We are of the opinion that when, on the property, a claim is made stating that an agreement has been violated without specifying the rule(s) allegedly violated and Carrier responds that it is not aware of any rule prohibiting the action complained of the burden shifts to the Organization to particularize the rule(s).

"It is axiomatic that: (1) the parties to an agreement are conclusively presumed to have knowledge of its terms, and (2) a party claiming a violation has the burden of proof.

"When a respondent denies a general allegation that the agreement has been violated for the given reason that it is not aware of any rule which supports the alleged violation, the movant, in the perfection of its case on the property, is put to supplying specifics. It is too late to supply the specifics, for the first time, in the Submission to this Board--this because (1) it in effect raises new issues not the subject of conference on the property; and (2) it is the intent of the Act that issues in a dispute, before this Board, shall have been framed by the parties in conference on the property."

Third Division Award No. 12178 (Stack):

"It is true the Claimant contended Carrier violated 'the Agreement . . . particularly Rule 3-C-2'. Thus technically a violation of each and every rule of the Agreement was claimed. But these sections referred to above were never specifically identified on the property. On the property, the entire discussion related to 3-C-2 and it was not until the filing of the Ex Parte Submission that the subject of these other Rules were raised. We do not believe that a claim can be one thing on the property and something different before this Board."
(Underscore ours)

There are many more Awards from other learned Referees which have made similar rulings. These are sufficient to make the point that the Petitioner must cite the specific rule or rules on the property which have allegedly been violated. That was not done in this case. Only Article VII of the December 4, 1975 Agreement was cited on the property. Only Article VII of the December 4, 1975 Agreement was properly before this Board for consideration.

Even if the majority in this Award chose to ignore the case law of our Board as cited above, they are - at the very least - required to consdier the correct rule. In this case the labor member of the panel cited Rule 24(h). The Referee in his Award makes four (4) separate references to Rule 24(h).

Rule 24(h) of the applicable Rules Agreement reads as follows:

"(h) When positions are abolished, the employes affected will have the privilege of exercising their rights to any job that may be preferable to them according to their seniority."

It was paragraph (b) of Rule 24 that was amended by Article III of the June 5, 1962 National Agreement. That Article III of the National Agreement merely changed the "4 working days' notice" which was in Rule 24(b) to "five (5) working days" - nothing more. Apparently the majority in making their deliberations on this case did not read the Rules which were belatedly mentioned.

While it is true that the wreck assignments at this location prior to 1972 - when there was a bona fide wreck crew assigned at Washington, Indiana - were bulletined, the "wreck crew assignment" was secondary or ancillary to the concurrently bulletined "carman" assignment. The employes so assigned were carmen first and on a full time basis. They were members of the wreck crew only when the wreck force was needed. When there ceased to be a need for a wreck crew in 1972 it would have been totally illogical to "abolish" the assignments because the primary carman portion of the assignments continued to exist. That is exactly why, as carmen who had been assigned to the wreck crew attrited, their "carman" positions were filled by bulletin, but - as Carrier pointed out in their submission - "The former members have not been replaced and no wrecking crew positions have been assigned, advertised or awarded." It is impossible to believe that the organization representatives at this location would have permitted bona fide unbulletined "vacancies" to exist without complaint.

When the correct language of Rule 24(h) as quoted above is examined, the absence of logic in abolishing the ancillary wreck crew assignments becomes more apparent. That language presupposes that the affected employe will have a right to exercise his seniority to some other position. If there were only "carman" jobs in the first place - some with added responsibility of being a wreck crew member - and only the "wreck crew" portion is removed, that leaves only the "carman" portion of the assignment. There was no logical reason or agreement requirement to abolish the "carman" positions when the wreck train equipment was removed from Washington, Indiana in 1972 and only full time car- "carman" positions remained.

For all of the above reasons, we dissent.

J. E. Mason

J. W. Gohmann

B. K. Tucker

P. V. Varga

G. H. Vernon

6-12-79

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7819
Docket No. 7771-I
2-SOU-I-'79

Parties to Dispute: (Wayne McKinney, et al., Petitioners
(Southern Railway Company

Dispute: Claim of Employes:

Whether or not Respondent breached their agreement with the Petitioners regarding employment and advancement.

Statement:

The above question was submitted to the Second Division of the National Railroad Adjustment Board by the above referred to organization in ex parte form, hearing thereon was waived, and the Division is now in receipt of a request from the employes that the case be withdrawn.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 24th day of January, 1979.