NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20320

THIRD DIVISION Docket Number SG-17698

Gene T. Ritter, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Atchison, Topeka and Santa Fe Railway Company
(- Coast Lines -.

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka and Santa Fe Railway Company that:

(a) It was a violation of the Signalmen's Agreement for Carrier to assign a portion of the signal work of installing switch heaters at Canyon Diablo to employes who are not classified or covered by the Signalmen's Agreement.

(b) Signalmen A. T. Shilling, R. R. Porter, and D. H. Cockerham be paid eight (8) hours each at their pro rata rates for January 3, 1966, account three Shop Extension employes assigned to perform the wiring on two switch heaters.

(c) Signalmen A. T. Shilling, R. R. Porter, D. H. Cockerham, and D. E. Roy be paid twenty-four (24) hours each at their pro rata rates for January 4, 5 and 6, 1966, account four Shop Extension employes assigned to perform the wiring on two switch heaters.

(d) Signalmen A. T. Shilling and R. R. Porter be paid four (4) hours each at their pro rata rates for January 7, 1966, account two Shop Extension employee assigned to perform the wiring on two switch heaters.

(Carrier's File: 132-118-18)

OPINION OF BOARD: On claim dates, Signal Employes installed six switch heaters or thawers for the Signal Department's Signal System at Canyon Diablo, Arizona, on the Albuquerque Division. Carrier assigned Shop Extension employes of the Electricians' Organization to the wiring from the Signal Department's power line wires to two of the switch heaters, and the wiring of the two switch heaters. The Signal employes performed the wiring and installation of the other four switch heaters. The record reflects that notice was given to the Electricians' Organization and a response was filed by said Electricians' Organization to the effect that Carrier properly assigned the work in this instance. Carrier contends that during the months of February and March, 1962, similar work was assigned entirely to Signalmen and that the Electricians filed a claim for this work before the Second Division, NRAB, which resulted in Award

4613 sustaining the claim of the Electricians' Organization. Carrier further contends that although notified, the Signalmen's Organization did not respond, and, therefore, waived their right to complain. Carrier has since that time (Award 4613, Second Division) distributed the work in accordance with said Award. Carrier further maintains that the electrical work in question was handled in accordance with the findings-of said Second Division Award No. 4613 and that by failing to appear before the Second Division, petitioner acquiesced to having the Board establish Electrical workers' right to the work which it did in Award 4613; that the Signalmen's Agreement is void of any Agreement Rule that would support petitioner's position; and that the matter before this Board is res judicata. The Signalmen's Organization denies that Second Division Award No. 4613 is binding on this Board (Third Division) and alleges that the contractual Agreement with Electricians can not affect the contractual Agreement Carrier has with the Signalmen's Organization.

The Organization also relies upon Award No. 6426 (Bergman), which involves Sheet Metal Workers and the Carrier involved in this dispute. Award No. 6426 had the effect of awarding switch heater work to the employes covered by the Signalmen's Organization.

Therefore, this Board is confronted with questions concerning conflicting Awards (Award 4613 - Second Division and Award 6426 - Second Division; res judicata; and stare decisis). Carrier has cited the case of Transportation-Communication Employes Union vs. Union Pacific Railway Company, 385 U.S. 158, and contends that this Board is bound by the Federal case which holds in Syllabus No. 1 of said case that the Railroad Adjustment Board exercises exclusive jurisdiction to settle disputes with relation to conflicting claims of Unions under their respective contracts to have jobs assigned to their members in a single proceeding with all disputant Unions present and may not make determination as to one union only even though second Union notifies Board that it declines to participate except in subsequent and separate proceedings initiated by it in event Board's decision adversely affects its members' jobs. Railway Labor Act, Section III, subdivision 1 (p). Carrier also asserts that it makes no difference if Award 4613, supra, was in palpable error. 'This Board can not agree with this allegation. It is true that reviewing tribunals should be slow to resort to judicial surgery in upsetting precedents, but should not knowingly follow precedents which are palpably bad. To hold otherwise would be to state that this Board must always follow a prior decision, no matter how far afield or how much in error such decision or Award might be. It is common knowledge, even among laymen, that the Supreme Court of the United States has on many, many occasions overturned precedent of their own making and has also in many instances rendered decisions striking at the very heart of the doctrine of res judicata. The above cited Federal case clearly states that the' Railroad Adjustment Board has exclusive jurisdiction to settle disputes with relation to conflicting claims of Unions under their respective contracts; it does not purport to

order this Board to follow any Award found to be in palpable error. The involved Scope Rule was interpreted by this Board in Awards 12697 and 12698 in connection with the supplying of electric power to a Signal Department facility.. These two Awards conferred the right of supplying such electric power to employes covered by the Signalmen's Agreement. Even Award 4613, supra, cited by Carrier holds that the installation, maintenance and repair of infrared ray switch heaters is unquestionably encompassed within the Scope of the Current Agreement between this Carrier and the Brotherhood of Railroad Signalmen.

The function of the switch heater keeps the snow and ice out of the switch. In this instance, Electricians installed a direct line from a pole line installed by Signalmen to switch heaters installed by Signalmen. The Scope Rule involved in this dispute includes * * * * who construct, install, maintain and/or repair signals, interlocking plants, wayside automatic train control equipment, centralized traffic control, automatic highway crossing protective devices, including all their appurtenances and appliances * * * *.

It must be concluded by this Board that Award 4613 - Second Division is in palpable error; that rea judicata does not stand in face of palpable error; that switch heaters are au integral part of the Signal System; and that the work in dispute herein rightfully belongs to employes of the Signalmen's Organization. The rules supported by the American Law Institute Restatement, Judgments, Section 70 is thet where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction: and in any event. it is not conclusive if injustice would result. This Board finds that au injustice would result to allow Award 4613 - Second Division to stand.

However, it is the further opinion of this Board that Carrier was acting in good faith in this instance in the face of Award No. 4613 - Second Division and should not be penalized for following au Award which had not been stricken down. Therefore, parts C and D of this Claim will be denied. Parts A and B of this Claim will be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as apprwed June 21, 1934;

That this Division of the Adjustment Board has jurisdiction wet the dispute involved herein; and

That the Agreement was violated.

A W A R D

Parts A and B of claim sustained - Parts C and D of claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July 1974.

CARRIER MEMBERS' DISSENT TO AWARD 20320, DOCKET SG-17698 (Referee Ritter)

We respectfully submit that this Award is void on its face because it purports to readjudicate the subject matter that was adjudicated by this Board in Second Division Award 4613.

The subject matter of this dispute is a particular phase of the work involved in the installation of a particular type of switch heater. It is undenied that this identical subject matter was the subject matter involved in Second Division Award 4613 where Carrier had assigned the work to Signalmen. The Electricians there claimed that the work belonged exclusively to Electricians, and after giving due notice to the Signalmen and opportunity to be heard, the Board ruled that this work belongs exclusively to the Electricians. Although the decision went against it, the Carrier recognized the decision as final and binding and has subsequently assigned this work to Electricians.

In prosecuting the instant claim the Signalmen have not denied that the work or subject matter involved here is the identical work or subject matter involved in Second Division Award 4613. To the contrary, they have frankly argued that Award 4613 is erroneous and should be overthrown. They contend that said Award is not binding upon Signalmen because "the Second Division has no jurisdiction over this Brotherhood or over its agreement"; but see Seaboard ALR Co. v. Castle, et al, U. S. District Court for the Northern District of Illinois, Eastern Division, Civil No. 57C 1448.

Contrary to this contention of the Signalmen, the Supreme Court of the United States has ruled that in such jurisdictional disputes the duly rendered decision of this Board shall constitute a final adjustment of the issues and shall be enforceable by the courts. Transportation-Communication Employees Union v. Union Pacific Railroad Company, 87 S.Ct. 369 (1966), 385 U.S. 157. We do not find anything in this decision of the Supreme Court which makes allowance for "palpable error". Insofar as the subject matter of the proceedings in Second Division Award 4613 is concerned, the time and place to deal with any error was in those specific proceedings. The Signalmen were afforded an opportunity to appear and present their case. They had a remedy in the courts for any abuses, to the extent provided in the Railway Labor Act. Once the decision in that case became final, such decision became a conclusive adjudication of the subject matter, and the Signalmen are barred from relitigating the same subject matter in this "merry-go-round" type of proceeding.

While we believe Award 4613 is controlling here regardless of its correctness, it is worthy of note that the author of the instant Award has significantly failed to establish any obvious error in Award 4613. Instead of coming to grips with the specific issue and citing authorities dealing with the specific subject matter here involved, the author of this Award has resorted to a generalization which is too broad to be relevant. It is generalized: "It must be concluded . . . . that switch heaters are an integral part of the Signal System"; and from this he goes on to conclude that switch heater work is the exclusive work of Signalmen. There is great variety in the different types of switch heaters; and while the Signalmen have brought a multitude of cases to this Board in which they have claimed exclusive rights to switch heater work on the theory that the switch heater is an integral art of a signal system, they have Lost most of these cases. See our recent Awards

13651, 14284, 18919, 19185, 19376, 19506 through 19513, 19779, all of which denied Signalmen's claims to the work and held that the carriers were entitled to assign such work to others.

Furthermore, the mere fact that something is an "integral part" of a signal system is no sure indication that the installation and maintenance thereof belongs exclusively to Signalmen. The rails themselves carry signal circuits and are thus an integral part of the signal system in a Literal sense of the term; yet Track Department Employees have traditionally installed and maintained the rails. The Supreme Court wisely considered all of this when it ruled that the conflicting claims of different crafts to particular work must be resolved in a single proceeding in which the agreements with all affected crafts and past practices must be considered.

G. L. Naylor

H. F. M. Braidwood

D. M. Youhn

P. C. Carter

W. B. Jones

Answer to Carrier Members' Dissent
to Award 20320, Docket SC-17698

It seems apparent to us that the Minority is reading much more into the Supreme Court's findings and order in T-CU v. UP than can be found in the printed words. We find no prohibition to our rendering an award reversing an earlier decision, and we have often done so.

In T-CU v. UP the Supreme Court said that it "*** granted certiorari in order to settle doubts about whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a singlc proceeding with all disputant unions present ***. We hold that it must." This was the only question there disposed of by the Court.

Insofar as the interest of the third party is concerned, the Court in T-CU v. UP found the Board's handling to be that:

> "*** Notice of the referral was given to the clerks' union, which, pursuant to an understanding with the other Labor unions, declined to participate in this proceeding on the ground that it had no interest in the matter but stated its readiness to file a like proceeding before the Board to protect its members should any of their jobs be threatened. The Board then heard and decided the case without considering the railroad's liability to the clerks under its contract with them, concluded that the telegraphers were entitled to the jobs under their contract, and ordered that the railroad pay the telegraphers who had been idle because of the assignment of the jobs to the clerks. ***"

The Court held in part that:

> "*** The clerks' union was given notice here as it should have been under § 3 First (j). Certainly it is 'involved' in this dispute. Without its presence, unless it chooses to default and surrender its claims for its members, neither the Board nor the courts below could determine this whole dispute. ***"

It ordered that:

> "*** The Board should be directed to give once again the clerks' union an opportunity to be heard, and, whether or not the clerks' union accepts this opportunity, to resolve this entire dispute upon consideration not only of the contract between the railroad and the telegraphers, but 'in light of . . . /contracts/ between the railroad' and any other union 'involved' in the overall dispute, and upon consideration of 'evidence as to usage, practice and custom' pertinent to all these agreements. Order of Railway Conductors v. Pitney, supra, at 567. The Board's order, based upon such thorough consideration after giving the clerks' union a chance to be heard, will then be enforceable by the courts.
>
> It is so ordered"

When one compares the record of the Second Division's handling of the dispute disposed of by its Award No. 4613, it will be noted that that handling and the response by Signalmen was the same as the Third Division's handling and Clerks' response in our Award No. 9988. Hence, the Court's holding of non-enforceability in T-CU v. UP is equally applicable to the Second Division's Award No. 4613.

It follows that the Dissenters' position is without merit.

The Minority's comments concerning the reservation of switch heater work are in error and the awards cited in an attempt to support that position are dispositive of disputes involving other parties and agreements.

W. W. Altus, Jr.
Labor Member