NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20591
THIRD DIVISION Docket Number TD-20473

David P. Twomey, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(George P. Raker, Richard C. Bond, and
(Jervis Langdon, Jr., Trustees of the
(Property of Penn Central Transportation
(Company, Debtor

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Penn Central Transportation Company (hereinafter referred to as "the Carrier"), violated the currently effective Agreement between the Carrier end the American Train Dispatchers Association, the Scope ad Definition in Part II thereof in particular, when on January 18, 1972 lt permitted and/or required en employe not within the Scope of said Agreement to perform work covered thereby.

(b) Because of said violation, the Carrier shall now be required to compensate Claimant Movement Director K. A. Peak one (1) day's pay at Movement Director's rate for raid violation.

OPINION OF BOARD: On January 19, 1972, the Elkhart enginehouse foreman, upon request of Mr. Royer, a supervisory employee not covered by the Scope of the Agreement, added an additional locomotive unit to the power consist of train NY-4. The addition of the extra engine unit was necessitated by the fact that tvo of the train's four engine consist were not operating.

The Organization contends that Mr. Royer's action in issuing instructions on power distribution, without the advance knowledge, authority and/or concurrence of the Movement Director on duty in that jurisdiction la a clear violation of the Agreement. Specifically, the Organization contends that the order should have been transmitted through the Movement Director.

The pertinent portions of Part II of the Agreement of the parties Is quoted below:

"PROVISIONS GOVERNING MOVEMENT DIRECTORS, EMPLOYES OF THE PENNSYLVANIA RAILROAD COMPANY.

SCOPE

The provisions set forth in Part II of this Agreement shall constitute an Agreement between the Pennsylvania Railroad Company and Its Movement Directors represented by the American TrainDispatchers Association, and shall govern the hours of service, work-lug conditions and rate8 of pay of the respective positions and employes classified herein.

The tens 'Movement Director' as used in Part II of this Agreement applies to trick, relief and extra Movement Directors and trick, relief aud extra Assistant Movement Director8 and shall include only positions and duties of Movement Directors and Assistant Movement Directors, and employes occupying positions as relief or extra Movement Directors aud Assistant Movement Directors, performing service on positions classified in the Rate Schedule applicable to Part II of this Agreement.

DEFINITIONS

MOVEMENT DIRECTOR: This class shall Include positions listed in the Scope of this Agreement in which the preponderance of the dutlea consist of:

Supervision of the handling of trains, distribution of motive power, equipment, and crews, and performing work lucldent thereto."

The Scope Rule by itself doe8 hot define specific Items of work exclusively to specific employees. It is thus by Itself a General Scope Rule and the employee8 then have the burden of proving that the work in question has been performed by them exclusively, by custom, practice and tradition system-wide. Nor doe8 the Definition of Movement

Director as It relate8 to the Scope Rule reserve the work in question exclusively to the Employees. Award 6312(Elkouri) interpreted this very Same contractual language involving the Same parties to this dispute and found a8 follows:

> "Use of the word 'preponderance' in the definition strongly implies that the parties contemplated that some employer other than Movement Director8 might properly perform some of the enumerated duties; in other words, that the type of duties performed by Movement Directors should not belong exclusively to the Movement Director classification. Even the Employer seem to *recognize* that such work doer not belong exclusively to *Movement* Director8 *under* the rules, for they say they do not contend that Movement Directors have the same exclusive right at outlying terminal8 that the Employes claim for them where a Movement Director position has been maintained and abolished. This seems to imply recognition, though indirectly, that under the roles persona holding Movement Director seniority do not have exclusive right to the type of work involved in their classification."

See also Award 11285.

The Organization then has the burden of proving that the work in question has been performed by them exclusively, by showing this exclusivity by custom, practice and tradition system-wide. We find that the Organization ha8 not carried this burden of proof and therefore we must deny the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

That this Division of the Adjustment Board ha8 jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.

Carrier Members' Answer to Labor Member's
Dissent to Award 20591, Docket TD-20473
(Referee Twomey)

The Dissenter asserts Award 20591 is palpably erroneous because it relied upon earlier Award 6312 from this same property. The Dissenter makes no mention of Award 11285 also involving the same parties which reached the same conclusion. The Dissenter concludes his discussion of Award 6312 with the following ob-sex-ration:

> "* * * Awards of this and every other tribunal charged with interpreting and/or applying Agreements have been consistent in holding that the Agreement cannot be changed by virtue of being interpreted and if changes are to be made in an Agreement, such changes must be accomplished by the parties at the bargaining table under the procedures detailed in the Railway Labor Act."

If, as Dissenter points out, changes must be made by negotiation, the question occurs why the Organization did not do so when the agreement was subsequently negotiated in 1960, some seven years later. In Award 4388 (Carter), the Board said:

> "It is argued, however, that a new Agreement has been entered into since Decision 209 was rendered'and that this has the effect of nullifying the interpretation made in that decision. The rule of contract interpretation is that the readoption of language from a former agreement into a new one carries with it the meaning given to the language of the former, unless by clear expression an intent to change the meaning is shown. No such intention is shown by the adoption of the new agreement."

Award 11285 was adopted in 1963, some three years after the agreement was re-negotiated. There the Board said:

"We can find no express rule in the Agreement, which specifies certain work is reserved to Movement Directors. We can find no provision in the Scope Rule or other provisions, which prohibits Carrier from making changes in the number and use of crews, as appears in the record before us. There is no proof here that the employes here have an exclusive right to the work, required here either by past custom or practice or by provision of the Scope Rule, relied on by the Organization. There is no evidence here before us that the work of Movement Directors, was affected in any manner by changes made by Carrier."

The Labor Member's Dissent to that award contained the following illuminating statement:

"Carrier's own quoted excerpts from Awards 4827 and 6032 admit that past practice governs the work which is to be included within the terms of the agreement.

"Either a Scope Rule, general in nature, does or does not cover work which has previously been performed through years of past practice by a certain craft of employes. If such general Scope Rule does not cover work of this nature and Carrier is permitted to have absolute right to add to, take away or eliminate and 'transfer work from one craft to another arbitrarily and unilaterally then the effectiveness of the general Scope Rule is completely nullified."

Any reasonable construction of the foregoing statement would concede the Dissenter to Award 11285 also construed the present Scope Rule to be "general in nature."

On page 4, the Dissenter asserts as follows:

"* * * The Carrier might assign other duties to the Movement Directors which another craft or class might feel was their work under their individual craft Agreement and cause the Carrier to be faced with claims made by those other Organizations but the Movement Directors themselves would not have cause for action under their Agreement as long as those other duties did not become the preponderance of the duties of the Movement Director."

We do agree that Carrier could assign other duties to Movement Directors and such Movement Directors would have "no cause for action", but this fact would not change a general scope rule into a specific scope rule. If anything, it supports the conclusion that the scope rule is general and work only becomes reserved thereunder by system-wide custom, practice and tradition.

Finally the Dissenter's argument dealing with Carrier's right to assess discipline for failure to perform work properly is perfectly consistent with the theory, which even the Dissenter accepts, that other work, not belonging exclusively to the craft, may be assigned to a Movement Director which he can be held responsible for performing. In short, he has the same responsibility for performing work, whether exclusively or non-exclusively assigned, hence it is a non-sequitur to conclude that because it is assigned by Carrier, and he is held responsible for it, it becomes his exclusive work thereafter.

In Award 7031 (Carter), followed by a score of awards, it was held:

> "* * • Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement. * * *"

Thus, it was incumbent upon the Organization to prove by substantial evidence that the work claimed not only has been assigned to the craft, but belongs exclusively to their craft by custom, practice and tradition on the system. The Majority's decision in support of this principle is free of error.

W. F. Euker

W. F. Euker

H. F. M. Braidwood

P. C. Carter

G. L. Naylor

G. M. Youhn

Labor Member's Dissent to Award 20591, Docket TD-20473

Award 20591 is not merely palpably erroneous but is so illogical that it does violence to the statute that created the National Railroad Adjustment Board by defeating the purpose for which the Railway Labor Act established the National Railroad Adjustment Board and by thwarting basic purposes of the Railway Labor Act itself.

Award 20591 quotes from the SCOPE and DEFINITIONS following the statement that "the pertinent portions of Part II of the Agreement of the parties is quoted below". Following the SCOPE and DEFINITIONS quotation, Award 20591 states:

> "The Scope Rule by itself does not define specific items of work exclusively to specific employees. It is thus by itself a General Scope Rule and the employees then have the burden of proving that the work in question has been performed by them exclusively, by custom, practice and trodition system-wide. Nor does the Definition of Movement Director as it relates to the Scope Rule reserve the work in question exclusively to the Employees. ***"

The Agreement book wherein the instant Agreement is found is the Agreement entered into by and between the Pennsylvania Railroad Company and certain employes represented by the American Train Dispatchers Association with the regulations effective June 1, 1960, except as. otherwise specified, and rates of pay effective May 1, 1962. The Agreement book is in three parts to cover different employes, i.e. Part I contains provisions governing train dispatchers, Part II contains provisions governing movement directors and Part III contains provision governing power directors, assistant power directors and load dispatchers. Each of these parts is a separate Agreement in itself and is so identified in the opening part of the SCOPE by so stating as in Part II reading "The provisions set forth in Part IS of this Agreement shall constitute an Agreement between the Pennsylvania Railroad Company and its Movement Directors represented by the American Train Dispatchers Association, and shall govern the hours of service, working conditions and rates of pay of the respective positions and employes classified herein"....'

The Agreement continues by detailing just what employes the term "Movement Director" applies to in Part II of the Agreement. The words "Movement Director" are set out with quotation marks and just below the paragraph detailing to what employes the term "Movement Director" applies there are two DEFINITIONS shown to define the work of a Movement Director or Assistant Movement Director.

Award 20591 separates the two paragraphs under the word SCOPE from the three following paragraphs under the word DEFINITIONS to make the statement the Scope Rule "does not define specific items of work exclusively to specific employees. It is thus by itself a General Scope Rule and the employees then have the burden of proving that the work in question has been performed by them exclusively, by custom, practice and tradition system-wide." seem feasible but it can only be considered to be specious reasoning at the very best. As hereinbefore mentioned, the term "Movement Director" is set out with quotation marks as that is a technical term and a DEFINITION of Movement Director follows to explain what that technical term means. The portions of Part II which governs movement director employes captioned SCOPE and DEFINITION are directly related to and/or are dependant on one another. In addition, in Part II you find that the SCOPC and DEFINITIONS sections are both included in the preamble of the Agreement and are followed by nine regulations which are the provisions being set forth in Part II to govern the hours of service, corking conditions and rates of pay. The SCOPE and DEFINITIONS sections do not individually stand clone as Award 20591 implies but are part and parcel of the same preamble.

In any case the Agreement is not a "general scope rule" Agreement as Award 20591 rules. A general scope rule Agreement names the positions without describing the work reserved to each class of employes. The scope rule along with the definition of the term "Movement Director" in the instant Agreement not only names the positions to which the term "Movement Director" applies but the work which a Movement Director performs.

To create support for fragmentizing of the preamble to the Agreement (Part II) to enable equating or reducing the positions named and the duties defined into a general scope rule Agreement dispute, Award 20531 cites from Award 631.2 (Elkouri) involving the same parties, i.e. the American Train Dispatchers Association and the Pennsylvania Railroad Company. Award 6312 is factually different from the instant dispute in many respects. In Award 6312 the issue was work being performed by persons not covered by the Movement Director's Agreement following abolishment of Movement Directors' positions. While Award 631.2 did include the language which is quoted in Award 20591, and which is palpably wrong, this was not the basis for denial of the claim in Award 6312. Following the language in Award 6312 quoted in Award 20591, Award 631.2 counters its own language by stating:

> "*** In this regard, if a substantial amount of such work is spread to other employes after a Movement Director position has been abolished, and this fact is satisfactorily established, then the Employes have good cause to complain, for the Carrier cannot properly do indirectly what it cannot properly do directly."

Award 6312 then concludes, stating:

> "*** Indeed, the Employes themselves have admitted at other places in the record that numerous of the items included in their list were handled by Movement Directors. The Employes have simply failed to satisfactorily establish that a substantial. amount of work previously performed by Movement Directors at Toledo has been performed by other employes since the Movement Director positions were abolished.
>
> "In view of the above considerations it must be concluded that the Employes have not established any violation of the Agreement by the Carrier."

Award 20591 endorses a serious *error* committed in Award 6312 though Award 6312 did not attempt to convert the SCOPE and DEFINITIONS of the preamble to the Agreement, Part II, into a general scope rule as Award 20591 does. The definitions in the Agreement under consideration in Award 6312 and Award 20591 are not exactly identical for the Agreement was revised after Award 6312 was rendered. However, the definitions are similar enough to show the error in both Awards by considering the language as contained in the *now* effective Agreement. In the effective Agreement the definition of MOVEMENT DIRECTOR reads "This class shall include positions listed in the Scope of this Agreement in which the preponderance of the duties consist of:" and following that describes the duties as "Supervision of the handling of trains, distribution of motive power, equipment, and crews, and performing work incident thereto".

Award 6312 and Award 20591 both commit serious error when the word preponderance is not considered in the Agreement exactly where it appears in the Agreement. The Agreement says the preponderance of the duties it does not say the preponderance of the supervision of the handling of trains, the preponderanc of the distribution of motive power, etc. Awards of this and every other tribun charged with interpreting and/or applying Agreements have been consistent in holding that the Agreement cannot be changed by virtue of being interpreted and if changes are to be made in an Agreement, such changes must be accomplished by the parties at the bargaining table under the procedures detailed in the Railway Labor Act.

The use of the word preponderance in the Agreement can hardly be considered to be accidental. or misplaced in the Agreement. The parties clearly intended that the preponderance of tine duties of the Movement Director would be the duties then described or detailed in the Agreement. This provision can only be interpreted as written and means exactly what it says. The preponderance of a Movement Director's duties must be those specifically reserved to them in the Agreement such as supervision of the handling of trains, distribution of motive power, equipment, crews, and performing work incident thereto. Taking

the language as it is contained in the Agreement you find that it was permissiv to the Carrier. The Carrier was to be permitted to require the Movement Direct to perform duties other than tiiose specifically reserved to Movement Directors in the Agreement and the only restriction being that the preponderance of the Movement Directors' duties must be those specifically reserved under the Agreement. The Carrier might assign other duties to the Movement Directors which another craft or class might feel was their work under their individual craft Agreement and cause the Carrier to be faced with claims made by those other Organizations but the Movement Directors themselves would not have cause for action under their Agreement as long as those other duties did not become the preponderance of the duties of the Movement Director.

There have been numerous awards by the various Divisions of the National Railroad Adjustment Board holding that where language in an Agreement is subject to two interpretations, the interpretation lending itself to the most reasonabl result must govern. While the words "preponderance of the duties" can hardly be considered to be subject to more than one interpretation when considered as placed in the Agreement, there can be no question that use of the word "preponderance" does not destroy the work or duties which are being reserved to Movement Directors in the Agreement. Findingas Award 20591 does that the word "preponderance" appearing before detailing the duties makes eaoh of thc. individual duties subject to the burden of proof by history, custom snd tradit. can only be constrccd to be an unreasonable result or an illogical conclusion. If the intent of the parties draftingthe Agreement had been to make this a "general scope rule" Agreement, they would have simply listed the names of the positions without specifying certain duties which were to comprise the largest part, i.e. the preponderance of the duties of Movement Directors. However, the Agreement must be considered as written snd the parties did not merely list the names of the positions to be covered by the terms of the Agreement. The Agreement cannot be rewritten by a tribunal specifically charged with the interpretation and/or application of the Agreement as written. It is apparent that Award 20591 has exceeded the jurisdiction granted the National Railroad Adjustment Board when the duties prescribed or reserved are, in effect, removed from the Agreement.

Award 20591 concludes by stating:

> "The Organization then has the burden of proving that the work in question has been performed by them exclusively, by showing this exclusivity by custom, practice and tradition system-wide. We find that the Organization has not carried this burden of proof and therefore we must deny the claim."

The exclusivity theory, i.e. proof of exclusive performance of the work by showing this exclusivity by custom, practice and tradition system-wide, has absolutely no application where there are duties described or reserved within the Agreement. The exclusivity theory can only have application when you have a general scope rule which does not list the work to be Performed and if the duties are detailed in the Agreement regardless of how they are placed in the Agreement, they are there and must be considered to be a part of the Agreement, Award 20591 seriously errs when it discounts the prescribed duties reserved in the Agreement as being meaningless language.

The National Railroad Adjustment Board is a forum to provide for the settling of disputes growing out of the interpretation or application of Agree. ments. The National Railroad Adjustment Board is not a place to engage in legalistic legerdemain or linguistic manipulation to permit sidestepping the settlement of the dispute which is the Board's duty to perform. Labor Agreements for the most part are written by laymen to govern the terms and working conditions of laymen and, therefore, written in laymen's terms so the laymen covered by the Agreement will understand the provisions detailed in the Agreement. To forget this end destroy the Agreement is wrong.

The exclusivity theory has not been confined to Agreements wherein the names of the positions are listed end no duties or work are defined or describe 'This erroneous application of the exclusivity theory has progressed to the point where it has become a prime factor to bc used to malign contract terms and the results run from the ridiculous to the sublime. The result has been that some work or duties have been placed in a limbo, i.e. not being reserved to any class or craft, though the work remains to be performed. It has reached the point that an Agreement which names the position of truck driver must also state that a truck driver drives a truck and a coal heaver heaves coal.. It was recently contended when work which is performed by the employe during the regular work week of the employe is, performed on a rest day by another person, the employe must prove that he has the exclusive right to perform that work on the rest day by conclusively proving that no one else has ever performed that type of work on the Claimant employe's rest day to prove a claim for unassigned day compensation. In short, almost every kind of claim whether related to the scope rule or not is now being subjected to an exclusive right theory determination. In the instant case it becomes apparent how ridiculous this can be. Under a history, custom and practice burden of proof a showing is required that you have exclusively done this work from the genesis of the work to the exclusion of all others. The very fact that a person outside of the Agreement performed such work, as in the instant claim, would serve to show that you have not performed this work to the complete exclusion of all others as the claim being presented is, in itself, prima facie evidence that another person has performed such work.

The Carrier and the Carrier Members of the Third Division, acting as obedient jackals in the Carrier's behalf, have played the exclusivity theory to the hilt giving little if any thought to what must be the ultimate consequence of such an abuse of a theory which can have only limited application. In the instant case the Carrier has claimed that the Movement Directors do not have the exclusive right to perform any work whether defined in the Agreement or not and Award 20591 appears to endorse this contention. However, Award 7350 contains language which should be considered. While Award 7350 must be read in its entirety to grasp the entire meaning, certain excerpts applicable to the instant dispute follow:

> "*** It is argued, with more than a little justification, that, this Board, while a creature of law, is not a court of record and Congress never intended it as such; that if the rules of evidence, pleadings, and other legal precepts were to govern in these disputes, the courts provide a proper forum and no need for this agency existed. Further, it is persuasively argued that Congress would have given us the plenary power to marshal evidence and take testimony, if it were intended we should do more than interpret and apply Agreements according to the clear purpose and intent of language used by the contracting parties."
>
> "The Agreements are made in a setting unlike anything known to usual contract making. Collective bargaining is closely akin to the process of legislating and out of that process comes rules that govern employer and employe alike, such rules being commonly known end referred to as Rules of Agreement. Nevertheless, these Rules of Agreement take on many of the attributes of contract rind always have been held to be enforceable as such.
>
> "The subject matter of the contract is work. The contracting parties are Carrier's Management Representatives on tine one hand and the duly designated Representative of its employes on the other. The authority of both is recognized by law and they make their agreements within scope of the law. Mutual covenants, responsibilities, and obligations serve as consideration.

"Neither contracting party is required by law to give up any prerogative that is inherent to the position each occupies, but, if through the powers of persuasion, or such economic forces as may be effectively and legitimately employed, a share is given by one to the other of its formerly unquestioned authority, it should not thereafter complain when it finds that authority thus fettered.

"The subject matter of the contract being work the first determination to be made in making the contract is the class of work that is to be let to a given craft of employes and next the conditions under which it is to be let and is to be performed. The Carrier has need for staffing its operations with positions, variable in number and subject to change in accordance with work load and requirements of the service. Those positions are to be worked by employes who hire out in the Carrier's service, pursuant to the terms of a collective agreement, not by individual contracts of hire. The employes next must be assigned duties in accordance with classified positions and thus the work is organized and assigned along craft lines.

"The Employe Representative always seeks the right to perform the Carrier's work that traditionally falls in the class of service that its craft has, by usage, custom and practice, performed for those who have found need for such services, and, thereupon, it lays claim to such work in negotiations with Management Representatives. Out of the Carrier's needs, end the demands of its employes who are banded together in crafts, comes what usually is one of the first rules incorporated in the Agreement and commonly referred to as the 'scope rule' stated simply, the 'scope rule' has the effect of reserving to enumerated positions the customary work of the craft."

"For a well reasoned&d judicious opinion as to the more important undertakings of these Agreements, what they mean, end how they operate, see Award No. 351 (First Div.), by the late Judge Swacker, who, at the time the Award was rendered, was assisting the Board as Referee. In that docket the dispute concerned, in part, the workers' right to perform all service embraced by the Agreement. In that regard, Judge Swacker said in part:

> "'*** To hold that the contract contemplated less than all of such services would leave it quite indefinite as to what, if any, portion of the service of the kind involved was subject to it. ***'
>
> "In connection with a contention that the Carrier should have the right to place work within the scope of the Agreement and to take it out at will, Judge Swacker makes this pertinent observation:
>
> 'Such aconstruction of the contract would make it a mere "will, wish or want" contract or, that is, no contract at all.'"

Awards such as Award 20591, which in effect hold that there are no duties or work reserved to the employes covered by the Agreement, serve to nullify and/or break the Agreement and you have no contract. All Carriers as well as the Employes under Section 2 First of the Railway Labor Act are required to make and maintain agreements concerning rates of pay, rules and working conditions. If there is no work it follows that there is no contract and this is the situation that Awards such as Award 20531 are fast creating. The Railway Labor Act serves the basic purpose of insuring that there will not be interruptions to commerce by providing for the making and maintaining of Agreements. If there is no Agreement there is no way of keeping industrial peace, i.e. insuring that there will not be an interruption to commerce.

Award 20591 fails to confine itself to the single Agreement to be interpreted when it talks about "exclusivity by custom, practice and tradition system wide". This dispute involves the Penn Central Transportation Company and it would appear that "system-wide" would encompass the entire Penn Central Transportation system. There are many individual railroad properties which are included within the Penn Central Transportation System such as the Pennsylvania Railroad, the New York Central Railroad, the New York, New Haven and Hartford, the Michigan Central, etc. On these properties the American Train Dispatchers Association is a party to individual Agreements with the respective individual Carriers which were made prior to and continued in effect after the merger. In fact one of the conditions agreed to prior to being allowed by the Government body having jurisdiction to merge into the Penn Central Transportation System was that the Penn Central would honor these individual Agreements. When this fact is considered along with the fact that the instant Pennsylvania Agreement book covers or includes three separate Agreements, it is plain to see that the "system-wide" ruling in Award 20591 is clearly a case of the Third Division exceeding its jurisdiction by failing to confine itself to matters within the scope of the Division's jurisdiction, i.e. interpretation of the single Agreement before the Third Division for consideration.

While the Carrier and the Carrier Members at the National Railroad Adjustment Board are prone to interject the exclusivity theory argument into almost any dispute, there is one notable exception. Neither the Carriers nor the Carrier Members are inclined to give any consideration to or mention the exclusivity theory in discipline cases when the work which the Carriers claim is not contractually reserved is not properly performed by the employes that the Carriers claim do not have an Agreement right to perform in the first place. The instant case was a dispute resulting from a proven case of a supervisory employe not covered by the Scope of the Agreement adding an additional locomotive unit to the power consist of train NY-4 as Award 20591 recognizes. Tnis was unquestionably distribution of motive power, a duty defined in the Agreement. Two recent discipline cases involving the Pennsylvan Railroad Company and the American Train Dispatchers (the same parties as in tht instant dispute though the Pennsylvania Railroad is now part of the Penn Centr; also involve distribution of motive power. Award 15727 was a dispute wherein the Assistant Movement Director served seven days actual suspension end was disqualified (though the disqualification was removed on the property prior to the case being submitted to the Third Division) because he added too much motive power to a train and as a result the train was damaged by the excessive motive power on the helper engine and the Board upheld the discipline assessed. In Award 15828 a Movement Director was disqualified as a consequence of delays to trains caused by the Movement Director making a substitution of engines, i.e. distributing motive power, and the Board upheld the Movement Director's disquslifiication. It is incongrous for the Board to uphold discipline for non-performance or incorrect performance of work that the Board holds this employe does not have the contractual reservation or proven right to perform. Does the employe have the exclusive right to this work only when discipline is to be meted out?

The exclusivity theory should be scrapped entirely or at the very least interjected only into cases where there are no defined duties and collateral information would reasonably be required to permit adjudicating the dispute. While the exclusivity theory has been used successfully by the Carrier and/or Carrier Members to defeat individual compensation claims, the fact that the neutral person named to serve as a Referee can sometimes be swayed because of a lack of correct Labor Agreement interpretation knowledge and/or a desire to show an expertise in legalistic legerdemain or linguistic manipulation, does not serve to overcome the fact the Agreement is not being interpreted or applie nor is the dispute being settled. The overriding zeal to show such an expertis is apparent in Awards such as recent Award 20539 (see the Dissent) wherein the Referee manipulated the claim presented so that an exclusivity burden of proof could be required and then elected to ignore the 43 years of history, custom and tradition proof presented by the Employes and the proof of the Employes was the only evidence submitted to show history, custom and practice.

Award 20591 is not only palpably erroneous but is a disservice to the Third Division, the National Railroad Adjustment Board and to the Railway Labor Act itself. Therefore, I must dissent to Award 20591.

J. P. Erickson
Labor Member

Carrier Members' Answer to Labor Member's
Dissent to Award 20591, Docket TD-20473
(Referee Twomey)

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> "It is argued, however, that a new Agreement has been entered into since Decision 209 was rendered and that this has the effect of nullifying the interpretation made in that decision. The rule of contract interpretation is that the readoption of language from a former agreement into a new one carries with it the meaning given to the langunge of the former, unless by clear expression an intent to change the meaning is shown. No such intention] is shown by the adoption of the new agreement."

Award 11285 was adopted in 1963, some three years after the agreement was re-negotiated. There the Board said:

"We can find no express rule in the Agreement, which specifies certain work is reserved to Movement Directors. We can find no provision in the Scope Rule or other provisions, which prohibits Carrier from making changes in the number and use of crews, as appears in the record before us. There is no proof here that the employes here have an exclusive right to the work, required here either by past custom or practice or by provision of the Scope Rule, relied on by the Organization. There is no evidence here before us that the work of Movement Directors, was affected in any manner by changes made by Carrier."

The Labor Member's Dissent to that award contained the following illuminating statement:

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"Either a Scope Rule, general in nature, does or does not cover work which has previously been performed through years of past practice by a certain craft of employes. If such general Scope Rule does not cover work of this nature and Carrier is permitted to have absolute right to add to, take away or eliminate and 'transfer work from one craft to another arbitrarily and unilaterally then the effectiveness of the general Scope Rule is completely nullified."

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"* * * The Carrier might assign other duties to the Mwement Directors which another craft or class might feel was their work under their individual craft Agreement and cause the Carrier to be faced with claims made by those other Organizations but the Movement Directors themselves would not have cause for action under their Agreement as long as those other duties did not become the preponderance of the duties of the Movement Director. "

We do agree that Carrier could assign other duties to Movement Directors and such Movement Directors would have "no cause for action", but this fact would not change a general scope rule into a specific scope rule. If anything, it supports the conclusion that the scope rule is general and work only becomes reserved thereunder by system-wide custom, practice and tradition.

Finally the Dissenter's argument dealing with Carrier's right to assess discipline for failure to perform work properly is perfectly consistent with the theory, which even the Dissenter accepts, that other work, not belonging exclusively to the craft, may be assigned to a Movement Director which he can be held responsible for performing. In short, he has the same responsibility for performing work, whether exclusively or non-exclusively assigned, hence it is a non-sequitur to conclude that because it is assigned by Carrier, and he is held responsible for it, it becomes his exclusive work thereafter.

In Award 7031 (Carter), followed by a score of awards, it was held:

> "* * * Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement. * * *"

Thus, it was incumbent upon the Organization to prove by substantial evidence that the work claimed not only has been assigned to the craft, but belongs exclusively to their craft by custom, practice and tradition on the system. The Majority's decision in support of this principle is free of error.

W. F. Euker

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H. F. M. Braidwood

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G. M. Youhn