

Award No. 7652
Docket No. SG-4426

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James P. Carey, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: Claim of the Brotherhood that the Carrier be required by appropriate award and order of the National Railroad Adjustment Board, Third Division, to pay to the individuals named below the amounts shown in consequence of the agreement violation established in Third Division Award No. 4713.

Austin, W. R.	\$734.375
Baker, C. E.	305.73
Bartholomew, L. G.	508.995
Coffman, L. D.	176.58
Craft, M. E.	437.40
Davis, R. O.	718.005
Dawson, R. W.	721.305
Denny, T. G.	39.585
Didier, J. E.	202.98
Franklin, R. R.	430.755
Gates, W. R.	440.07
Graham, B. F.	737.94
Hatfield, W. W.	713.955
Higbee, B. L.	131.34
Hinde, M. C.	524.67
Hovey, H. W.	289.80
Jackson, J. R.	681.60
Jordan, J. F.	393.30
Jordan, R. V.	730.89
Keeton, C. B.	740.145
Lawyer, H. B.	352.755
Lawyer, S. J. Jr.	282.90
Lewis, R. R.	252.72
Little, C. E.	704.715
Lynn, C. H.	727.215

Newberry, L. D.	742.913
Nye, A. G.	77.625
Parsons, J. B.	349.83
Plummer, F. P.	269.10
Pinon, W. E.	726.75
Scruggs, F. S.	324.30
Spencer, A. M.	720.84
Stull, C. S.	378.27
Taylor, R. E.	336.60
Tyson, R. T.	499.77
Woodworth, J. C.	48.72
Wooldridge, W. W.	319.44
Zehe, A. J.	740.145

EMPLOYEES' STATEMENT OF FACTS: On February 13, 1950, the National Railroad Adjustment Board, Third Division, in Award No. 4713 found that the Carrier violated the Signalmen's Agreement when it contracted with the Union Switch and Signal Company for nineteen steel relay houses and sixty-one steel relay cases completely fitted and wired ready for connecting into the C.T.C. System being installed between Newton and Mulvane, Kansas.

With respect to the penalty, the Board held that it was not possible to determine from the record which signal employees, if any, were affected by the violation and that only the parties through analysis and negotiation are likely to be able to do this. Therefore, the money portion of the claim was remanded for such adjustment as is warranted by the facts the parties develop.

The award was accompanied by an order directing the Carrier to comply therewith on or before May 16, 1950.

On May 16, 1950, the Carrier filed with the Third Division a document dated May 15, 1950, entitled:

**"PETITION FOR REHEARING AND MOTION TO SET ASIDE
AWARD 4713 AND ORDER DATED FEBRUARY 13, 1950."**

On June 29 and 30, 1950, the Third Division with Referee Carmody sitting with the Division as a member thereof, after full consideration denied the Carrier's request and the Carrier was so informed under date of June 30, 1950.

On July 19, 1950, General Chairman Lewis wrote Carrier's Assistant to Vice President, Mr. S. C. Kirkpatrick, as follows:

"Please refer to Award 4713, Docket SG-4426, of the Third Division, National Railroad Adjustment Board, wherein Brotherhood's claims were sustained in accordance with the Opinion and Findings.

Will you please advise place and date when we can meet for the purpose of negotiating an understanding as to the proper application of this award?

I anticipate visiting Chicago on or about August 14th and will give you a call at your office with the hope that we will be able to get together at that time, if it is not possible to do so before that date.

Will you kindly acknowledge receipt and advise?"

dated March 25, 1953, attached as Brotherhood's Exhibit "C", Judge Philip L. Sullivan said, in part, as follows:

"The Board sustained claim (a), but refused to make the money award, requested, and remanded the matter to the parties."

POSITION OF EMPLOYES: It is the position of the Brotherhood that the evidence taken from the records and set forth in the foregoing Statement of Facts discloses beyond reasonable doubt that an earnest and sincere effort was made by the Brotherhood to carry out the intent of the Board with respect to part (b) of the claim in Award No. 4713. This effort developed that the claimants are due the amount of money indicated in our Statement of Claim. Notwithstanding the fact, however, that the Carrier cooperated with the Brotherhood in developing these facts, it has declined to make the money payment as directed, hence this further handling of the matter with your Board.

As pointed out by the Brotherhood in its Statement of Facts, defenses were interposed by the Carrier before the case was tried. The Brotherhood is at a loss to understand how a carrier can consistently, in good conscience, contend that a matter should be subjected to Court review, and when the matter reaches the Court beg that tribunal to deny jurisdiction.

The Brotherhood firmly believes that the Board felt a payment of money was required because of the Carrier having violated the agreement, otherwise the Board would not, as we understand it, have remanded that portion of the claim to the parties.

Pursuant to the remand, the parties have negotiated and analyzed the records. See Brotherhood's Exhibits "A" and "B".

Both the claimants and the amounts claimed are predicated on the information contained in Brotherhood's Exhibits "A" and "B". Complete explanation and justification of the amounts are contained in Brotherhood's Exhibit "D".

The Brotherhood respectfully requests that the claim be sustained.

(Exhibits not reproduced.)

OPINION OF BOARD: This ex parte claim by the Brotherhood is that the Carrier be required to pay 38 named individuals the amounts specified, in consequence of the violation of its Agreement with the Brotherhood as determined on our Award 4713. The claim is accompanied by a letter from the President of the Brotherhood dated July 21, 1954, in which it is stated:

"Pursuant to the provisions of Award No. 4713, Docket SG-4426, issued by the Third Division of the National Railroad Adjustment Board on February 13, 1950, and accompanying Order the parties have developed the facts which the Award and Order directed be developed on remand, but the Carrier has failed and refused to make the adjustments required as a result of the facts so developed. The attached claim is herewith submitted to the Board based on grievance arising from such failure and refusal.

Mr. F. G. Gurley, President of the carrier, has been advised of our action.

Will you please place this matter in line for formal handling by the Board?"

Before proceeding to a discussion of the questions raised by this submission it is necessary to review relevant aspects of Award No. 4713 and the accompanying Order of February 13, 1950.

The Order reads:

"The Atchison, Topeka and Santa Fe Railway Company is hereby ordered to make effective Award No. 4713 made by the Third Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employe (or employes) the sum to which he is (or they are) entitled under the Award on or before May 16, 1950."

The Statement of Claim dealt with in Award 4713 was in two parts. Claim (a) charged that the Carrier violated the Scope Rule of the Agreement by contracting out work which belonged to members of the Brotherhood of Railroad Signalmen. Claim (b) sought compensation at overtime rates for the senior qualified employes of the carrier's signal department, by classes, who were alleged to have been deprived of the opportunity to perform the work so contracted out. Claim (a) was sustained. Claim (b) was "remanded to the parties as indicated in the opinion."

The opinion disposed of Claim (b) as follows:

"With respect to penalty, it is not possible to determine from the record before us which signal employes, if any, were affected by the violation, or to what extent. Only the parties, through analysis and negotiation, are likely to be able to do this. We shall therefore, remand that phase of the case to them for such adjustment as is warranted by the facts they develop."

On May 16, 1950, the Carrier filed with the Board a petition for re-hearing and motion to set aside Award 4713 and Order dated February 13, 1950. Carrier's petition for re-hearing was denied June 30, 1950.

The instant claim shows that at a conference between the parties on January 4, 1951 "it was agreed that, without prejudice to either party's position as to the meaning or ultimate disposition of the Award" representatives of both parties would meet at Newton, Kansas for a joint inspection of the carrier's records relating to the questions involved in the Brotherhood's claim to penalty payment. It appears that this joint inspection was made and a statement of the data thus obtained was prepared, but the parties were thereafter unable to come to any agreement.

In 1952 the Brotherhood filed suit in the U.S. District Court at Chicago under Section 3, First (P) of the Railway Labor Act to enforce Award 4713. Its complaint asked a court order requiring the carrier to make an accounting to the plaintiff of all monies due under the Award and order of this Division and to pay the employes the sums due them. (Brotherhood of Railroad Signalmen of America vs. A. T. & S. F. Ry. Co. U.S. District Ct. N. D. Illinois, E. D. No. 52 C 320). In a memorandum opinion of March 23, 1953 dismissing the complaint, District Judge Philip L. Sullivan held as follows:

". . . The Brotherhood had failed to show that anyone in the union was entitled to be paid for the work performed by others, because it had never found it possible to identify any railroad employes who were competent, and then available to do that work. The Board refused to sustain the Brotherhood's claim, stating as follows:

'With respect to penalty, it is not possible to determine from the record before us which signal employes, if any were affected by the violation, or to what extent. Only the parties through analysis and negotiation, are likely to be able to do this. We shall, therefore, remand that phase of the case to them for such adjustment as is warranted by the facts they develop.'

"The Board, consistent with this refusal to approve the Brotherhood's claim for money payments, then made formal findings that the Board had jurisdiction over the dispute, and that 'the agreement was violated', without making any findings at all regarding the claim for money payments except to declare that it had not been proved that any signal employees had been affected, and therefore, that 'if any' employees were affected 'only the parties' could deal with this feature of the claim.

"The Board issued an order in its standard form which did not purport to order the money payments which the Board's opinion, Findings and Award had declined to Sustain. * * *

"In this proceeding the order for money payments which the plaintiff here seeks from the Court was expressly withheld from the plaintiff by the Board. The Board made no order which the Santa Fe has not complied with and the complaint is therefore fatally defective under the statute. Such a negative determination by the Board cannot be made the basis of an enforcement action and complaints asking relief in court which has not been granted by the Board itself must be dismissed.

* * *

"In this case the Brotherhood asks the Court to sustain its claim for money payments which the Board expressly declined to sustain; however, 'the court cannot shape a new order' (Kirby case, supra.) * * * The Railway Labor Act * * * permits enforcement suits to be maintained only where 'a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order.' (45 U.S.C.A. Sec. 153, first (p)). The award and order upon which this complaint is based fail to fix a time limit for compliance thereby rendering them void and unenforceable. If the Board had decided that certain employees had been affected by the alleged violation of the agreement and had required the defendant to make payments to them, then the order would, as to those payments, have met this time limit requirement. But the time limit was applicable only if the award required the payment of money. No payments were required, therefore the time limit was not applicable. The absence of an applicable time limit renders the order invalid." No appeal was taken from the judgment of the District Court.

The theory of the instant claim is stated to be as follows:

"That the evidence taken from the records and set forth in the foregoing Statement of Facts discloses beyond reasonable doubt that an earnest and sincere effort was made by the Brotherhood to carry out the intent of the Board with respect to part (b) of the claim in Award No. 4713. This effort developed that the claimants are due the amount of money indicated in our Statement of Claim. Notwithstanding the fact, however, that the Carrier co-operated with the Brotherhood in developing these facts, it has declined to make the money payment as directed, hence this further handling of the matter with your Board.

* * * The Brotherhood firmly believes that the Board felt a payment of money was required because of the Carrier having violated the agreement, otherwise the Board would not, as we understand it, have remanded that portion of the claim to the parties."

The carrier has made no submission nor was it notified by the Board that the claim was presented.

After a motion of the labor members to adopt an affirming award on the instant claims failed for lack of a majority, this docket was deadlocked

and included in a list of deadlocked cases submitted to the National Mediation Board on behalf of the labor members with request for appointment of a referee. Inclusion of this docket in the list of deadlocked cases was protested to the National Mediation Board by the Carrier members on the following grounds: (a) That Award 4713 was final and binding and the docket closed; (b) that suit in the District Court to enforce the Award constituted an election of remedies by the Brotherhood which bars this claim; (c) that the claim cannot be considered as a new case because it is barred under time limitations of the controlling Agreement; (d) that the claim was not handled on the property as a new case in conformity with Section 3, First (i) of the Railway Labor Act, and no notice of intention to file was given in conformity with the Division's Rules of Procedure; (e) that the Division has not given Carrier notice of hearing in conformity with Section 3, First (i) of the Railway Labor Act and carrier has had no opportunity to be heard.

The National Mediation Board appointed the Referee to sit with the Division in disposing of this claim "without passing on the question of whether Docket SG-4426 is properly included in the list of cases for which the appointment of this referee is requested."

The primary question is whether these penalty claims may properly be considered at this time in view of the District Court's dismissal of the Brotherhood's suit to enforce Award 4713. We think the answer must be in the negative.

The Brotherhood's suit to enforce Award 4713 was essentially predicated on the proposition that the Award contemplated and intended penalty payments by the carrier for violating the Agreement. That issue has been finally determined by the judgment of the District Court and therefore the Organization is not entitled to re-try it before this Board. The judgment of the District Court is conclusive and binding on the parties and the Board. Consequently we are precluded from considering this claim and it must be dismissed.

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

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

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

That for reasons stated this claim will be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 15th day of February, 1957.