NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21602

THIRD DIVISION Docket Number SG-21388

Robert J. Ables, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Robert W. Blanchette, Richard C. Bond, and
( John H. McArthur, Trustees of the Property
( of Penn Central Transportation Company,
( Debtor

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the former New York Central Railroad Company (Lines West of Buffalo):

System Docket W-56

Northern Region - Canadian Division
Welland Canal Project

(a) Claim that the Penn Central Transportation Company, by some joint plan, method or device, entered into an agreement with the Canadian National Railroad, St. Lawrence Seaway Authority or both, whereby certain work relating to the installation and maintenance of signal apparatus at the Welland Canal project, such work accruing to employees represented by this organization and defined under Rule 1 (Scope) of the agreement dated March 1, 1951, as amended, was assigned to signal department employees of the Canadian National Railroad, who have no right or equity to this work.

(b) Claim that the Carrier acted in an arbitrary and capricious manner, made no effort to reach agreement with this organization and without consent or approval, took this action, which is in violation of the existing agreement, and contractual rights of the employees involved.

(c) Claim that present Canadian National signal forces installed and are now maintaining signal apparatus and equipment located wholly on Penn Central tracks.

(d) Claim that since three (3) Canadian National signal employees are now maintaining signal equipment on CN track, joint facilities track and Penn Central track, that three (3) signal employees of the Penn Central be assigned to cover that portion relating to Penn Central signal equipment.

(e) Claim that since E. C. Eldridge, Maintainer Test, W. C. Winkworth, Maintainer, and B. E. Elliott, Leading Maintainer, have been arbitrarily deprived of these additional duties and responsibilities to which they are rightfully entitled, that beginning with March 18, 1974 and continuing for each and every reglar work day thereafter, each claimant be compensated eight (8) additional hours at the pro rata rate of pay of their respective positions, until violation is corrected and agreement is reached with this organization concerning this project.

OPINION OF BOARD: The essence of the claim is that the Carrier allowed signalmen of the Canadian National Railroad to perform certain installation work on signal apparatus at a new Welland Canal project in Canada which was required because of construction by authorities of the St. Lawrence Seaway Corporation of a new ship canal by-pass, and that certain maintenance work on the equipment so installed was improperly assigned to employes of the CN instead of to employes of the Penn Central Railroad, thereby violating the Scope Rule (Rule 1) of the Agreement.

The principal area of dispute is a tunnel under the new ship canal. Of the three tracks in the tunnel, the northerly track was owned by Penn Central, the southerly track was owned by the Canadian National and the center track was jointly owned track.

As to the jointly owned track, the Organization concludes that the work should have been assigned by agreement between the CN and PC, as was the case with respect to other work in the overall project. Also, because the work in dispute in the railroad tunnel "does not clearly accrue wholly to one or the other", the equipment which is jointly owned

> "should be maintained by Penn Central signal forces at least on an equitable basis." (emphasis added).

There is merit in the argument that Scope Rule was violated.

The Carrier and the Organization did make new agreements with respect to maintenance work which was required by reason of the construction of the new ship by-pass canal. There is, therefore, no good reason to conclude that the work in the tunnel should have been handled any differently. On the merits of the dispute, the Carrier seems to conclude the same as the employes that there was an equal right between employes of the CN and the PC to perform the work in issue because the Carrier, in its final rebuttal submission states:

"Therefore PC signal men have no more right to the maintenance on the signal plant than the CN signal men. Accordingly, there is no logical basis for the contention that the PC employes have the right to work to the exclusion of the CN employes which is what the employes' claim amounts to."

Thus, it may be concluded that both parties agree that there should have been an agreement with respect to the work in issue and that some part of the work in issue rightfully belonged to the Organization under the Scope Rule.

On this reasoning there was at least a technical violation of the Scope Rule by the Carrier. But the real question presented by the parties is how to correct this wrong. The employes ask, effectively, for damages for three signalmen, from the time of the claim.

The Carrier opposes the claim not only on the merits but on the basis that this Board does not have jurisdiction of the dispute. Further, the Carrier argues that the Board has no power to make a money award even if it were to find that the Carrier violated the Agreement because the claimants were all employed at the time of the claim and this Board cannot award damages for violation of contract where there has been no demonstrable injury to claimants.

The question raised by the Carrier with respect to whether or not the Board may assign damages for violation of a contract need not be answered here in any depth, in view of the conclusion that equitable considerations preclude award of damages. The Carrier specifically advised the employes in writing almost three years before the claim what it intended to do and with what workforces, but the employes took no action to bring the matter to a head. The Organization claims that the disputed work is theirs based on equitable considerations. Total equity in the case however, including the fact that the employes could have prevented this claim from developing by timely objection, justifies denial of damages. A party should not profit in an equitable situation by failing to do something which could have obviated the dispute in the first place.

The decision not to award damages could dispose of the issue for this case but some general comment on the point does seem to be warranted in view of the strength of the argument by each side.

The Organization cited 57 awards of this Board. Also it presented a legal brief on damages, which has been finely honed through the years, containing extensive references to court opinions and supporting legal authorities.

The Carrier cited 112 awards of this Board. It also presented a considered brief on damages. Further, the Carrier presented a brief on jurisdiction. Each brief contained its own extensive list of legal authority and supporting argument.

With these impressive submissions one might expect that a decisive and far-reaching decision is in the offing. This is not the case. It would be a waste of time. It has been thirteen years since this neutral referee last served before this Board. The intervening years have been occupied with considerable experience in arbitrations in other industries, but still maintaining an active law practice in the broad field of transportation. If memory serves, these same arguments and these same lengthy submissions were submitted on these same issues thirteen years ago.

The statutory object of this Board is to expeditiously pass on the merits of disputes under the agreements of the parties. One must question whether those purposes can be served if this well trod ground must be covered again and again each time one of these issues comes up. Certainly, there must be a way to achieve final answers rather than treat each case seriatim and de novo. Every lawyer knows that the vitality and creativity of the common law exists in its adherence to precedent and the doctrine of stare decisis. The very fact these questions keep coming up indicates this approach must be unacceptable. It would seem appropriate to seek other ways of resolving the question. Obviously, the collectively bargained agreements provide the best opportunity for such decisions but it seems, for some reason, this has not happened. The existing problem is complicated by new law. In 1966 the United States Congress amended the law making decisions of this Board final and binding, including money awards; thus, opportunities for judicial review other than questions of fraud, etc. are minimal. It follows that there is less likelihood that basic questions on damages and jurisdiction will be resolved by an ultimate decision by the U. S. Supreme Court.

Clearly, there is no easy and simple solution or the members of this Board as men of ability and good will would have uncovered it. Nevertheless, to this neutral, it is far better to direct our energies and our time to the search for that elusive method for final resolution. The alternative seems to involve waste, duplication and leads to a chaotic array of decisions, one cancelling the other.

It would be tragic if the railroad industry surrendered to all other industries (excepting the airlines which are also under the Railway Labor Act) the leadership it demonstrated in supporting the National Railroad Adjustment Act in 1934 to settle grievances of the parties under their agreement.

Today, in arbitration of disputes in other industries, it is not uncommon for the parties to ask the neutral for his decision on the meaning of a provision of the contract and for the parties to be bound by that decision without the question of damages arising at all. Good faith of the parties makes this work.

In a situation where a grievance as to lost opportunity for work is not decided until several years later (as is frequently the case before this Board), on what theory under which this Board is authorized to act may the Board decide only that the agreement has been violated, without damages or reparations or penalty or compensation to the aggrieved parties? What is going to deter the Carrier from proceeding in like fashion in similar circumstances knowing it would take a number of years for the Board to reach a decision and, knowing further, that new referees (which are frequently changing in this industry) may be persuaded to view the matter differently? Or, what is the equity on the Carrier's side in a system where there is little discipline in filing a claim because the cost of settling the dispute is borne by the public, unlike other industries where typically the parties share the cost of arbitrating the dispute (which has the good effect of inducing the parties to settle their dispute in the grievance step procedure or at the least to send meritorious claims to binding arbitration).

As we must deal with matters as they stand as well as how we think they should be, it may be helpful to provide the parties with the thinking of this Board, as constituted, as to the grounds on which it will determine whether damages should be assessed and, if so, how much. The remedy for any decided violation of the agreement would be determined by the total circumstances (not to exceed the claim)

including the motive and intent of the parties and the consequences of their acts, with special emphasis on the alternatives available to the Carrier considering jurisdictional disputes between unions and other problems such as those imposed by public law.

On the general question of the jurisdiction of this Board, particularly as disputes involve through rail service, only small segments of which touch Canada as in this case, it would take a much more concrete case by the carriers to deny jurisdiction of this Board to adjust or settle grievances under an existing agreement of the parties. The airline cases relied on by the carriers dealt with the attempt to apply collective bargaining rights under the Railway Labor Act in foreign lands involving foreign nationals. Here, the property involved is on the border; for years, Canadian and U.S. employes have done work on opposite railway properties; this Carrier, with respect to this Organization, with respect to other work in Canada related to this dispute, made new agreements reserving work to the employes of this Organization.

Under these circumstances, this Board has jurisdiction of a dispute under the agreement of the parties.

On the record therefore, this Board does have jurisdiction of this dispute; damages could have been awarded if there had not been strong equitable reasons against doing so because the employes waited too long to assert a claim and thus in effect let a dispute develop which could have been prevented.

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 has jurisdiction over the dispute involved herein; and

that the Scope Rule of the Agreement was violated.

A W A R D

Claim sustained only to the extent that the Carrier violated the Scope Rule.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1977.