Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27282
THIRD DIVISION Docket No. SG-27236
88-3-86-3-327

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Chesapeake and Ohio Railway Co. (C&O):

On behalf of D. J. Clayton, Jr., that

(a) Carrier violated and continues to violate the parties' Schedule Agreement, as amended, particularly Rule 43 1/2-Signal Maintenance Units, when Claimant D. J. Clayton, Jr. was assigned work on AFE 30716 in excess of 400 man hours without allowing him the monthly rate of Signal Gang Foreman of $2,824.38 pursuant to paragraph (c) of Rule 43 1/2.

(b) Carrier should now be required to compensate D. J. Clayton, Jr., C&O ID No. 2621002, the difference between his hourly rate of Leading Signal Maintainer of $13.55 and monthly rate for Signal Gang Foreman of $2,824.38 for all hours he was assigned and/or required to perform work on C&O AFE 30716. General Chairman File 84-30-CD. Carrier File SG-750."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Agreement between the parties effective March 1, 1981 provides:

"RULE 43 1/2 - SIGNAL MAINTENANCE UNITS

(a) Signal Maintenance units will be established. These units will be comprised of a Leading Signal Maintainer and such Signal Maintainers, Assistant Signal Maintainers and Helpers as necessary in the judgment of the proper Carrier Officer.

* * *

(c) Signal Maintenance Units will be used primarily for maintenance work. However, notwithstanding other rules to the contrary, such Maintenance Units may be used to perform construction work, if desired by Carrier, under the following conditions:

1. Signal Maintenance Units may be used to perform construction work which is estimated by the Carrier to require four hundred (400) man-hours or less to perform.

2. When a Signal Maintenance Unit is used to perform construction work which the Carrier estimates to require more than four hundred (400) man-hours, the Leading Signal Maintainer position assigned to such Unit will be classed as Gang Foreman and will be paid the applicable rate of pay of Gang Foreman. Position of Gang Foreman will not be advertised for bid in this circumstance, neither will the incumbent of the Leading Signal Maintainer position establish seniority as Gang Foreman."

Section 5 of a Memorandum of Agreement signed by the parties on March 24, 1984 concerning the Coordination of the Greater Cincinnati Terminal area states:

"Section 5. All employees shall be subject to the B&O collective bargaining agreements covering Signal employees except as might otherwise be provided herein and except that C&O and SBD employees will be subject to the B&O Agreement only to the extent that such agreement differs from their home Carrier Agreement covering Signal employees. Where there is a conflict between the home Carrier and B&O Agreement rules, the C&O and SBD employees will be covered by the B&O Agreement. They will, however, be represented by their home Carrier General Chairman and/or other designated Union representatives in the handling of any claims or grievances including discipline matters which shall be filed with the B&O Carrier officer designated. Any settlement of a claim or grievance with the C&O or SBD General

> Chairman involving a B&O Agreement rule will not constitute an interpretation of the B&O Agreement binding on the B&O General Chairman. Furthermore, any settlement reached between the C&O or SBD General Chairman and the B&O Carrier Officer designated will not constitute a precedent binding on the C&O or SBD. C&O and SBD employees will not establish seniority on B&O rosters. All employees will retain their seniority on their home Carrier and time devoted to work within the coordinated terminal area will be credited on the home carrier."

By letter of September 25, 1984, the Organization alleged Claimant had participated in construction work estimated to require more than 400 man-hours and was entitled to be classed and paid as Gang Foreman. The Manager-Engineering responded:

> "Mr. Clayton and his maintenance unit are part of the Consolidated Cincinnati Terminal and as agreed to in Section 5 of the Memorandum of Agreement, which states, 'All employees shall be subject to the B&O collective bargaining agreements covering signal employees except as might otherwise be provided herein and except that C&O and SBD employees will be subject to the B&O agreement only to the extent that such agreement differs from their home carrier agreement covering signal employees. Where there is a conflict between the home carrier and B&O agreement rules, the C&O and SBD employees will be governed by the B&O agreement.'
>
> Your claim is clearly in conflict with the B&O Signal Agreement as there are no rules in the B&O Signal Agreement that require the Carrier to pay leading signal maintainers Gang Foreman's rate if used to perform construction work requiring more than four hundred (400) man hours."

After the Organization appealed, the Senior Manager Labor Relations wrote on February 1, 1985:

> "Contrary to your contention, the intent of the parties involved in the negotiation of Section 5 was that all employees in the coordinated signal operation would work under the B&O Signal Agreement. If either the SBD or C&O employees Agreement

contained a provision that was not found in the B&O Agreement the B&O would apply. If a similar but not identical provision was contained in the SBD or C&O Agreement, the B&O would apply. To have done otherwise would have resulted in total confusion." (Emphasis in Original)

The General Chairman responded, relying on the bargaining history, that the intent and meaning of Section 5 was to resolve conflicting rules. That was the framework of the dispute as handled on the property.

Carrier now contends that factually the claim would have no basis even if C&O Rules are found applicable. That is new argument, never advanced on the property, and it cannot now be considered by this Board. Accordingly we will limit our consideration to Section 5 of the Memorandum of Agreement.

There is appeal to Carrier's position that inasmuch as the B&O agreement contains nothing comparable to Rule 43 1/2 the Agreements differ and therefore the B&O agreement applies. If the first sentence of Section 5 stood alone we would agree with Carrier, but it does not stand alone. Rather it goes on to explain that the B&O agreement will apply "Where there is a conflict between the home Carrier and B&O Agreement rules." This language has meaning and it must be considered. Under Carrier's view this language would be superfluous because in all respects the B&O Agreement would apply and there would be no need for the explanatory language. It seems clear that language means that when Rules are in conflict, the B&O Agreement Rule prevails. We believe this contemplates conflict in Rules and not situations where one agreement is silent upon a matter covered by a specific Rule found in another.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 27282, DOCKET SG-27236
(Referee Cloney)

The Majority in Award 27282 sustained a claim for unspecified dates (dates were not specified in the Statement of Claim or elsewhere in the Award) based solely on their interpretation of Section 5 of the March 24, 1984 Implementing Agreement:

> "There is appeal to Carrier's position that inasmuch as the B&O agreement contains nothing comparable to Rule 43 1/2 the Agreements differ and therefore the B&O agreement applies. If the first sentence of Section 5 stood alone we would agree with Carrier, but it does not stand alone. Rather it goes on to explain that the B&O agreement will apply 'Where there is a conflict between the home Carrier and B&O Agreement rules.' This language has meaning and it must be considered. Under Carrier's view this language would be superfluous because in all respects the B&O Agreement would apply and there would be no need for the explanatory language. It seems clear that language means that when Rules are in conflict, the B&O Agreement Rule prevails. We believe this contemplates conflict in Rules and not situations where one agreement is silent upon a matter covered by a specific Rule found in another."

The Majority's difficulty with the second sentence of Section 5 is understandable since the negotiators of the rule were credited with more language skills than justified.

It is true that skilled negotiators usually write clear agreement rules without superfluous language, but all negotiators are not skilled and some do not have that goal. It is true that the first sentence does not stand alone and the second sentence has meaning, but the second sentence does not stand alone and the balance of the rule has meaning. Having recognized that a "part" must be interpreted in conjunction with the "whole", the Majority ignored that basic principle of contract interpretation and others in their erroneous conclusion that the second sentence had some significant hidden meaning contrary to the first sentence.

Under the guise of interpretation, the Majority attempted to supply language to make the second sentence state what they believe was intended but not reduced to writing - and thereby circumvented what the parties did agree to. While the language of Section 5 may not be that of skilled negotiators, the parties agreed to it and they are bound by what they reduced to writing.

The first sentence of Section 5 states:

> "All employees shall be subject to the B&O collective bargaining agreements covering Signal employees except as might otherwise be provided herein and except that C&O and SBD employees will be subject to the B&O Agreement only to the extent such agreement differs from their home Carrier Agreement covering Signal employees.

The second sentence of Section 5 states:

> "Where there is a conflict between the home Carrier and B&O Agreement rules, the C&O and SBD employees will be covered by the B&O Agreement."

The balance of Section 5 states:

> "They will however, be represented by their home Carrier General Chairman and/or other designated Union representatives in the handling of any claims or grievances including discipline matters which shall be filed with the B&O Carrier officer designated.
>
> "Any settlement of a claim or grievance with the C&O or SBD General Chairman involving a B&O Agreement rule will not constitute an interpretation of the B&O Agreement binding on the B&O General Chairman.
>
> "Furthermore, any settlement reached between the C&O or SBD General Chairman and the B&O Carrier Officer designated will not constitute a precedent binding on the C&O or SBD.
>
> "C&O and SBD employees will not establish seniority on B&O rosters. All employees will retain their seniority on their home Carrier and time devoted to work within the coordinated terminal area will be credited on the home carrier."

Section 5 covers the collective bargaining agreement rules under which all employees will work (B&O collective bargaining agreements), their seniority (home property), who will represent them (home property General Chairman), and who has authority to make binding interpretations of the B&O Agreement (only the B&O and the B&O General Chairman).

Nothing in Section 5 changes the fact that all employees (B&O, C&O and SBD) are subject to B&O collective bargaining agreements except as otherwise provided in the implementing agreement (first sentence). However, C&O and SBD employees are subject to the B&O Agreement only to the extent that agreement differs from home Carrier agreements (second exception to the first sentence) and they are covered by the B&O Agreement where there is a conflict between home Carrier agreement rules and B&O agreement rules (second sentence).

The first two sentences do not differ or conflict. The first states when C&O and SBD employees are subject to the B&O Agreement and the second states when they are covered by the B&O Agreement. C&O and SBD employees are subject to home Carrier agreements only when they are not subject to the B&O Agreement - when home Carrier agreements provide nothing different from what is provided by the B&O Agreement; where there is a difference (conflict) between home Carrier and B&O Agreement rules, they are covered by the B&O Agreement.

It is true that the B&O Agreement rules do not provide what C&O Rule 43 1/2 provides; however, an agreement with a specific penalty rule not found in another agreement differs to that extent; and there is a conflict between the two agreements when one contains a specific penalty rule not found in rules of the other agreement. To the extent the B&O Agreement differs from the C&O Agreement, C&O employees are subject to the B&O Agreement (first

sentence); and where C&O Agreement rules conflict with B&O Agreement rules, C&O employees are covered by the B&O Agreement (second sentence).

The faulty reasoning behind the Majority's interpretation of Section 5 is best illustrated by the reverse situation:

If the B&O Agreement contained a rule absent in the C&O Agreement, under the Majority's misguided theory in Award 27282 that "absence of a rule vs. presence of a rule" is not a conflict between agreement rules, C&O employees in Cincinnati Terminal would be covered by rules of the C&O Agreement (second sentence) and therefore not subject to the B&O Agreement even though the B&O Agreement differs from the C&O Agreement to the extent of the penalty rule.

In that event, however, the Brotherhood would no doubt contend that "absence of a rule vs. presence of a rule" is a conflict between agreements rules, that the two agreements differ to that extent, and thus the B&O Agreement prevails under both the first and second sentences of Section 5 - and no doubt the same Majority Members of the Board who rendered the decision in Award 27282 would agree, and correctly so since no reasonable mind could disagree.

For reasons given, the Majority's interpretation of Section 5 on which the claim was sustained is obviously erroneous, as is sustaining a claim for unspecified dates. The Award is palpably erroneous and we vigorously dissent.

James E. Yost

M. W. Fingerhut

C. V. Vaga

Robert L. Hicks

Michael C. Lesnik