Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38350
Docket No. CL-38665
07-3-05-3-90

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(CSX Transportation, Inc (former Seaboard Coast
(Line Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Union (GL-13075) that:

1. Carrier violated the Clerical Agreement (Scope Rule) on the dates indicated in each claim, when it allowed, caused, or permitted someone other than those covered under the Scope of the TCU Agreement to perform duties historically assigned to and performed by the Clerical craft, namely checking the standing order of outbound cars in train at the Charlotte, North Carolina, facility.

2. As a result of this action, Carrier shall compensate the Senior Available Clerk, extra in preference, for eight (8) hours at the overtime rate of $157.77 per day."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

As an initial note, it is well settled by controlling authority that the Board has no power to impose principles of equity or justice. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute, for to do so would deprive them of the bargain struck. With this principle firmly in place, we now review the relevant facts and authority set forth in the record of this case.

Except in one determinative aspect, i.e., the location, the dispute before the Board is virtually identical to that reviewed in Third Division Award 38062 (Referee Marty E. Zusman). For the sake of brevity, the Findings in the Zusman Award are incorporated herein by reference. In that Award, which was rendered on January 25, 2007, the Organization contended that beginning in April 2003, Carmen, utilizing track lists provided by the Customer Operations Center, not only inspected inbound and outbound trains at Montgomery, Alabama, but also performed track checks in violation of the Clerks' Scope Rule.

In the instant case, the issue before the Board is whether the Carrier violated the Clerks' Scope Rule when, according to the Organization, Carmen were directed to and did make physical checks of the standing order of cars in trains departing from Charlotte, North Carolina, between July 1 and July 31, 2003. The 53 claims allege that the work in dispute is protected by the revised 1981 "positions or work" Scope Rule.

As alluded to above, the Board notes that with the exception of the location (Montgomery, Alabama, vs. Charlotte North Carolina) the facts in the Zusman Award are on all fours with the facts in this case. Specifically, the record evidence indicates that the lists were fully checked, well beyond a simple performance of ensuring that placards and hazardous material cars were properly placed, as required by the FRA. On the contrary, the lists were noted for extra cars and the order of cars and also for trains without any hazardous material cars. Sufficient record evidence proves that the disputed work was scope-protected. Its performance by Carmen was not incidental to the FRA requirement that Carmen report hazmat placement errors. Furthermore, the same arguments and Agreement provisions raised in this case were also raised and reviewed in that case.

When the Board has previously considered and disposed of a dispute involving the same parties, the same Rule and similar facts presenting the same issue, as is the situation now before the Board, the prior decision should control. Any other standard would lead to chaos.

Although the Supreme Court of the United States ruled that the precedents established by Section 3 Railway Labor Act Boards are "not necessarily binding" it also ruled that such precedents do "provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." [Slocum v. Delaware, L. & W. RR.Co., 339 U.S. 239, (1950) 70 S. Ct.577 94 L. ed 795.] In this vein, the Board has consistently reaffirmed the principle that the legalistic common-law doctrines of res judicata and stare decisis do not technically apply in arbitration, however, proper regard for the arbitration process and harmonious labor-management relations militate in favor of accepting the interpretation of a prior arbitration so long as the subsequent claim before the Board involves the same controlling facts and the same contractual provisions that were fully adjudicated in an earlier dispute, assuming it is on point and not palpably erroneous. It is unnecessary for the subsequent Section 3 tribunal to endorse all reasoning expressed in the earlier Award so long as the identity of the issue and the parties is established and the earlier Award is final, definitive and sets forth a holding that is not palpably erroneous. If the Board were to totally disregard the salient precedent on this property, we would be improperly encouraging the parties to go forum shopping whenever they received an unfavorable decision. Moreover, to subject the parties to the unsettling effects of conflicting and inconsistent interpretations of the same Agreement language under the same set of circumstances would be a disservice to the parties. The arbitral process must provide the parties with finality. Such is the case even if the second Award might have reached a contrary result had we heard the case in the first instance. The stated concept is geared to ensure predictability in the resolution of labor-management disputes. See Second Division Awards 12867, 12139, 11702, 11506, 11323, 6413; Third Division Awards 35633, 33438, 29230, 29108, 28557, 23031, 4569; Fourth Division Award 4884, et al.

That being said, we would not blindly follow a precedent where to do so would merely serve to compound an error. In other words, we would not hesitate to reach a different result if we were convinced that the prior Award was palpably erroneous. Award 38062, which is not palpably erroneous on its face, adequately addressed the germane issues of this case. Suffice to say, there is absolutely nothing

in the on-property record of the instant case that in any way suggests that the Board should violate the principle of stare decisis and start a whole new line of decisions. If a different result is desired by either party, it should be achieved through negotiation rather than through repeated arbitrations.

Therefore, due to the absence of any evidence in this case record that the Zusman Award is palpably erroneous, there is no basis to reverse its conclusion. Award 38062 is soundly reasoned. Because it involves the same parties, the same issues, the same contract provision, and the same factual underpinnings, it is controlling. As stated above, the concept of finality dictates that the instant claim be resolved in the same fashion. Accordingly, inasmuch as the Board desires to maintain a degree of consistency and predictability in its rulings, under the authority of that Award, we likewise find that a days' pay for each violation at the penalty rate is excessive and unsupported by the record. Therefore, the Board sustains the claim for a call for each violation as per SCL Rule 23.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of September 2007.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 38350
(Referee Dennis J. Campagna)

The Majority wrongfully applied the doctrine of stare decisis as the foundation for its findings and decision in this case. We understand the Board's responsibility to ensure uniformity of contract interpretation. We also agree with the Board's declaration that Third Division Award 38062 (TCU v. CSXT [L&N] Referee Zusman rendered January 25, 2007) - the decisional authority upon which the Majority solely ruled here - "is soundly reasoned." However, to support its reliance upon stare decisis in this case, the Majority apparently mistakenly declared, "Except in one determinative aspect, i.e., the location, the dispute before the Board is virtually identical to that reviewed in Third Division Award 38062 . . . ."

First, the Collective Bargaining Agreement between the Organization and the former Seaboard Coast Line Railroad (SCL) was controlling in this case. Third Division Award 38062 was governed by the Collective Bargaining Agreement between the Organization and the former Louisville and Nashville Railroad (L&N).

Second, the SCL Collective Bargaining Agreement and L&N Collective Bargaining Agreement both contain a "position and work" Scope Rule. As such, the petitioner's burden of proof threshold to demonstrate exclusive performance of work becomes location specific. In this same regard, the supporting evidence must reflect exclusive performance at the location on the date of transition from a general to a "position and work" Scope Rule, which, in the SCL Collective Bargaining Agreement, was May 16, 1981. [The time-tested standard was best articulated in on-property Public Law Board No. 6409, Award 4 (Referee Wallin) which appeared in the record as CSXT Exhibit Q.] The dispute decided by Award 38062 originated at Montgomery, Alabama. The dispute decided by Award 38350 arose at Charlotte, North Carolina. Likewise, Referee Zusman observed in Award 38062 that "Our review of the work performed by Carmen - the track lists - reveals that most often there were no hazmat cars in the track lists altered and checked" leading to a logical conclusion that it was clerical

work, not mechanical work that was performed. On the other hand, the evidence in the case decided by Award 38350 contained numerous hazmat cars on the many track lists produced as evidence. Hence, the same logic should not have been applied here.

Because the Majority failed to comprehensively review the evidence of record in light of the many Awards attached to the Carrier's Submission, Award 38350 cannot be considered as a sound contract interpretation. The most basic premise - that is, that location governs application of the "position and work" Scope Rule - was obviously inadvertently overlooked. Without this cornerstone, the Board's logic, upon which its decision was built, crumbles.

Michael C. Lesnik

Martin W. Fingerhut

John P. Lange