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LABOR LAW—NRAB Awards in Work Assignment Disputes Are Unenforceable Unless the Board Has Considered the Interest of the Competing Union—*Order of R.R. Telegraphers v. Union Pac. R.R.**

The Order of Railroad Telegraphers filed a complaint with the National Railroad Adjustment Board (NRAB), alleging that the Union Pacific Railroad had violated its collective bargaining agreement with the union by assigning work covered by that agreement to members of the Brotherhood of Railway and Steamship Clerks.[1] The Telegraphers sought damages in the form of back pay, but did not demand job reinstatement. Notice of the Telegrapher's claim was served on the Clerks who declined to appear before the Board since they viewed the dispute as one which involved only an interpretation of the contract between the Telegraphers and the carrier. In addition, the Clerks stated that they would bring a separate action to the Board in the event that the proceedings resulted in the work being reassigned, thus indicating that they too claimed contractual rights to the disputed work. The Board sustained the Telegraphers' claim and awarded damages for breach of contract as prayed.[2] The Telegraphers then brought an enforcement action in a federal district court, which action was dismissed by the court on the ground that the Telegraphers had failed to join in the enforcement action an indispensable party—the Clerks.[3] On appeal, *held*, affirmed. Although the Court of Appeals rejected the indispensable party rationale, it concluded that the Board's award was unenforceable since the record of the NRAB proceeding was incomplete insofar as it did not indicate that the Board, in arriving at its award, had considered arguments relating to the Clerk's claim to the contested work. The court also held in an opinion later withdrawn that the Clerks would have been bound by proceedings in which a complete record was compiled, provided they had been given due notice of the proceedings.[4]

The principal case illustrates the conflict that has existed be-

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* 349 F.2d 408 (10th Cir. 1965), *cert. granted sub nom.* Transportation-Communications Employees Union v. Union Pac. R.R., 383 U.S. 905 (1966) [hereinafter cited as principal case].

1. The dispute arose out of the carrier's installation, in 1952, of new equipment which performs both clerical and communications functions. The carrier assigned the job of operating the new machinery to members of the Clerks. For a detailed history of the origins of this dispute, see Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869 (E.D. Mo. 1945), *vacated and remanded*, 156 F.2d 1 (8th Cir.), *cert. denied*, 329 U.S. 758 (1946).

2. Order of R.R. Telegraphers v. Union Pac. R.R., 96 N.R.A.B. 286 (3d div. 1961).

3. Order of R.R. Telegraphers v. Union Pac. R.R., 231 F. Supp. 33 (D. Colo. 1964).

4. Order of R.R. Telegraphers v. Union Pac. R.R., 59 L.R.R.M. 2993 (1965) [hereinafter cited as first opinion].

tween the NRAB and the courts over the proper treatment of work assignment ("scope rule"[5]) disputes under the Railway Labor Act (RLA).[6] A work assignment dispute arises when work claimed by Union A (the Telegraphers in the principal case) is assigned to Union B (the Clerks). Union A brings its claim to the NRAB which has primary original jurisdiction over disputes arising out of the application or interpretation of collective bargaining agreements governed by the RLA.[7] The NRAB treats such claims simply as contract disputes between Union A and the carrier, and it will award either damages or reinstatement to Union A if it determines that A's contract does in fact cover the disputed work. Since NRAB awards are not self-executing, Union A must then seek enforcement of the order in a federal district court.[8] The courts, however, have rejected the NRAB's purely contractual analysis and have viewed the problem essentially as an inter-union dispute between A and B over which union will ultimately receive the contested work.[9] The courts have consequently been reluctant to give effect to an award which does not reflect a consideration of the positions of both of the unions and have found various reasons for refusing to enforce such awards.[10] Analysis of the contrasting positions of the NRAB and the courts indicates that work assignment disputes arising under the RLA cannot be properly treated either as purely contractual dis-

5. In a "scope rule" claim, a union simply asserts that work which is covered by its collective bargaining agreement has not been assigned to it.

6. See Whitehouse v. Illinois Cent. R.R., 349 U.S. 366 (1955); Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950); Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946); Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir. 1956); Brotherhood of R.R. Trainmen v. Templeton, 181 F.2d 527 (8th Cir. 1950); Hunter v. Atchison, T. & S.F. Ry., 171 F.2d 594 (7th Cir. 1948); Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869 (E.D. Mo. 1945), *vacated and remanded*, 156 F.2d 1 (8th Cir.), *cert. denied*, 329 U.S. 758 (1946); Kroner, *Minor Disputes Under the Railway Labor Act: A Critical Appraisal*, 37 N.Y.U.L. REV. 41, 54-57 (1962); Note, 9 STAN. L. REV. 820 (1957).

7. See Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950).

8. Railway Labor Act § 3 First (p), as amended, 48 Stat. 1192 (1934), 45 U.S.C. § 153 First (p) (1964).

9. See, *e.g.*, principal case at 410: "These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad." Because it viewed the dispute as primarily inter-union, the court in the principal case had some doubts about the jurisdiction of the NRAB to hear these cases at all. However, it thought the matter too well established, see cases cited note 6 *supra*, to question at this time. Compare Kroner, *supra* note 6, at 55.

10. See Illinois Cent. R.R. v. Whitehouse, 212 F.2d 22 (7th Cir. 1954), *rev'd*, 349 U.S. 366 (1955) (NRAB proceedings between Union A and the carrier, without notice to Union B, deprive the carrier of due process); Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir. 1956) (NRAB award unenforceable without notice to Union B, which notice is required for parties "involved in any disputes" by Railway Labor Act § 3 First (j), as amended, 48 Stat. 1191 (1934), 45 U.S.C. § 153 First (j) (1964)); Order of R.R. Telegraphers v. Union Pac. R.R., 231 F. Supp. 33 (D. Colo. 1964) (NRAB award is unenforceable for want of an indispensable party in the enforcement action).

putes or as purely inter-union disputes, and that an awareness of both of these dimensions to the problem is essential to a proper disposition of these cases.

The deficiency of the NRAB's approach to work assignment disputes is that it can lead to a multiplicity of actions and conflicting awards. In traditional bilateral arbitration between the carrier and Union A, an award which reinstates A will not bind Union B. Thus, the carrier who complies with the award exposes himself to a subsequent claim by B. Moreover, there is no reason why B's claim should not be successful, since the only question before the Board would be whether the contract under consideration covers the disputed work, and it is possible that the two agreements would overlap so that B's contract as well as A's would cover the work in question. Indeed, in at least one instance, the Board has in fact ordered assignment of the work to A and, in a later claim, ordered the same carrier to assign the same work to B.[11] Theoretically, there is no end to this process if both A and B were to continue to press their claims.

Given this background, the reluctance of the courts to enforce awards which might expose the carrier to the possibility of a subsequent, successful claim by the non-submitting union is understandable. However, the solution generally offered by the courts—a trilateral proceeding wherein both unions present their claims and are bound by the arbitrator's decision—is even less satisfactory and, thus far, ineffectual as well. At first the courts attempted to have both unions and the carrier before the Board by requiring that Union B be notified of the hearing initiated by A.[12] However, the notice requirement accomplished nothing, since non-submitting unions have generally declined to appear before the Board,[13] and the Board has not attempted to render an award that would bind the absent union. Moreover, the Supreme Court has acknowledged

11. *Compare* Brotherhood of Ry. Clerks v. Gulf Coast Lines, 20 N.R.A.B. 307 (3d div. 1943), *with* Order of R.R. Telegraphers v. Missouri Pac. Lines, 45 N.R.A.B. 368 (3d div. 1950). For a more detailed history of this litigation, see 9 STAN. L. REV. 820, 821-22 n.5 (1957). It should be pointed out that the carrier does not have a right to be free from multiple actions. He has contracted with two parties and both have independent claims against him. See Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 372 (1955).

12. See, *e.g.*, Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir. 1956).

13. Since Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869 (E.D. Mo. 1945), *vacated and remanded*, 156 F.2d 1 (8th Cir.), *cert. denied*, 329 U.S. 758 (1946), which denied Union B the right to intervene in NRAB proceedings initiated by A, the unions have consistently declined to appear in proceedings initiated by putative rivals. Apparently this course of conduct has been pursuant to agreements between the unions which have strongly opposed any trilateral determination of their claims. See Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 372 (1955).

Union B's right to refuse to participate without being bound.[14] As a result of the courts' failure to achieve trilateral proceedings before the NRAB, they subsequently attempted to bring Union B into the *enforcement* action on the theory that it is an indispensable party.[15] This approach has been equally unsuccessful in binding B because Union A has refused to join Union B as a party defendant, with the result that the enforcement action is dismissed with prejudice.[16]

Not only is the achievement of "trilateral arbitration"[17] unlikely because of union opposition, but it is not a satisfactory method of resolving work assignment disputes under the RLA.[18] First of all, it is at least arguable that the NRAB does not have the statutory authority to make a determination through trilateral arbitration, even if both of the unions were to submit voluntarily to its jurisdiction.[19] Second, and more important, the composition of the NRAB is such that it would clearly be inappropriate for it to conduct such proceedings. The Board consists of three divisions, each of which has jurisdiction over a different group of crafts.[20] In an inter-divisional dispute, it is thus possible that one division would not have jurisdiction over both unions.[21] Furthermore, the members of each

14. "One thing is unquestioned. Were notice given to Clerks [Union B] they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding." Whitehouse v. Illinois Cent. R.R., *supra* note 13, at 372.

15. See Order of R.R. Telegraphers v. Union Pac. R.R., 231 F. Supp. 33 (D. Colo. 1964); Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir.), *cert. denied*, 350 U.S. 997 (1956) (alternative ground).

16. Compare note 13 *supra*. Union A's refusal to join Union B is further evidence of union opposition to any form of trilateral proceedings.

17. The term "trilateral arbitration" was coined by Professor Edgar Jones as part of his plan for non-RLA arbitration of jurisdictional disputes. See Jones, *Autobiography of a Decision—The Function of Innovation in Labor Arbitration and, the National Steel Orders of Joinder and Interpleader*, 10 U.C.L.A.L. REV. 987 (1963). Within the framework of consensual arbitration, the Jones plan attempts to accomplish the same objectives sought by the courts in their handling of work assignment disputes under the RLA. For a criticism of the plan, see Bernstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel*, 78 HARV. L. REV. 784 (1965).

18. The position of the unions has been that the contract dispute between Union A and the carrier is arbitrable without regard to B's claim, Brotherhood of Ry. Clerks v. Gulf Coast Lines, 20 N.R.A.B. 307 (3d div. 1943), and that the inter-union controversy is simply not justiciable. See Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59, 67 (8th Cir. 1956).

19. Railway Labor Act § 3 First (m), as amended, 48 Stat. 1191 (1934), 45 U.S.C. § 153 First (m) (1964), provides for awards "final and binding on *both* parties to the controversy . . . ." (Emphasis added.) "Both parties" would seem to encompass the parties to the agreement being applied by the Board. See Note, 9 STAN. L. REV. 820, 823 & n.11 (1957). See also Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 372 (1955), where the Supreme Court explicitly left open this issue.

20. Railway Labor Act § 3 First (h), as amended, 48 Stat. 1190 (1934), 45 U.S.C. § 153 First (h) (1964). A fourth division has jurisdiction over non-rail carriers.

21. See Kroner, *supra* note 6, at 54.

division are divided equally between union and carrier representatives,[22] with the union members selected from the crafts over which the particular division has jurisdiction.[23] Consequently, even if A's division could legally exercise jurisdiction over Union B, such exercise would be inequitable, since B would not be represented on the panel.[24] If, on the other hand, both A and B are in the same division, and, as is likely, both have representatives on the panel, it is probable that the votes of their representatives would nullify each other, and the carrier representatives would be able to determine unilaterally which union prevails.[25] This would obviously contravene the policy, underlying the reason of the NRAB, of obtaining settlements of contract disputes by a panel on which the adverse parties are equally represented.

The course of action that has been urged by the carriers[26]—that is, bringing all three parties by means of the indispensable party rationale before the district court in the enforcement action so as to determine the right to the jobs as between the two unions—would also be improper. In such an adjudication, the court would be required to interpret B 's contract which, as was pointed out in the principal case,[27] the court could not do because of the NRAB's "primary exclusive jurisdiction" over the interpretation of agreements.[28] Thus, nothing would be resolved by making Union B a party to the enforcement proceeding, even if joinder could be effected. Furthermore, however valid the indispensable party rationale may be in the case in which the Board has awarded reinstatement, thereby necessarily displacing B's members, this rationale seems particularly inapplicable when, as in the principal case, the Board has awarded only damages. Since the job status of B's members is not directly effected by the damage award, it is difficult to see how Union B's presence could be "indispensable" in an action to enforce the award.[29]

In the principal case, the Court of Appeals properly rejected the indispensable party device. However, the ground upon which the court ultimately rested its affirmance of the dismissal of the

22. Railway Labor Act § 3 First (h), as amended, 48 Stat. 1190 (1934), 45 U.S.C. § 153 First (h) (1964).

23. See Kroner, *supra* note 6, at 55.

24. *Ibid.*

25. *Ibid.*

26. See Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59, 67 (8th Cir. 1956).

27. Principal case at 412.

28. See note 7 *supra* and accompanying text.

29. In the principal case, the district court did not face the problem of the inapplicability of the indispensable party rationale when only damages are claimed. Apparently, the district court accepted the carrier's argument that "in ultimate effect" the damage award "gives to the Telegraphers jobs now held by the Clerks." Order of R.R. Telegraphers v. Union Pac. R.R., 231 F. Supp. 33, 35 (D. Colo. 1964).

Telegraphers' action suggests that the court is attempting to establish compulsory trilateral arbitration of work assignment disputes before the NRAB. The court's statement in its first opinion that the Clerks (Union B) would have been bound by the Board's findings and award had they had notice of the proceedings[30] ignores explicit dictum to the contrary in the Supreme Court's decision in *Whitehouse v. Illinois Central R.R.*[31] Although this statement was subsequently withdrawn, the court's final opinion is susceptible to an interpretation which leads to the same result. Both opinions stated that once Union B had received notice, it was "for all practical purposes" a party to the NRAB proceeding.[32] In light of this language, the court's additional requirement that the Board consider B's position as well as A's seems to be merely a device which will make it more equitable to bind B when B has not taken part in the proceedings to which it has been made a party. Indeed, the court's failure to explain how an examination of B's position will shed light on A's rights or interests indicates that the court was less concerned with fairly determining A's individual claim than it was with establishing a proceeding wherein the Board (and on review, the courts) could decide which union has the *better* claim, interpret the contracts accordingly, and thus avoid the possibility of finding that the work is covered by both contracts.[33] Such a proceeding would not only be contrary to the *Whitehouse* dictum and open to the objections set out above, but it would also contravene the whole thrust of *Carey v. Westinghouse Elec. Corp.*,[34] a recent Supreme Court decision which indicates that the widest possible scope should be allowed for the operation of bilateral arbitration in work assignment disputes.[35] Consequently, if this interpretation of the

30. First opinion at 2996.

31. See note 14 *supra*.

32. Principal case at 412; first opinion at 2996.

33. This seems to have been the motivation underlying the courts' efforts to bring all three parties together in one proceeding. See, *e.g.*, Missouri-K-T Ry. v. Brotherhood of Ry. & S.S. Clerks, 188 F.2d 302, 306 (7th Cir. 1951):

> Obviously it is desirable to settle controversies such as these involving *so-called* "overlapping agreements" on the basis of the existing contracts . . . . Of course this may not always be possible, *but it is certainly much more likely to result if both* parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other. [Emphasis added.]

Compare Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371-72 (1955).

34. 375 U.S. 261 (1964).

35. In *Carey*, a non-RLA case, the Supreme Court reversed the New York court's refusal to compel arbitration of Union A's claim that the employer had assigned work which should have been assigned to A's members to members of another bargaining unit. The court held that the jurisdictional dispute provisions of the Labor Management Relations Act (Taft-Hartley Act) §§ 8(b)(4)(D), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(D) (1964); 10(k), as amended, 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1964); 10(l), as amended, 61 Stat. 149 (1947), 29 U.S.C. § 160(l) (1964), did not preempt the issue for the NLRB to the exclusion of arbitration. Citing *Whitehouse*, the court expressly noted that Union B would not be bound by the arbitrator's award and, nonetheless, adopted a "hands-off" policy. 375 U.S. at 265-66.

court's opinion in the principal case is correct, it should be modified or reversed by the Supreme Court which has granted certiorari. Since the principal case involves only a claim for damages, the Supreme Court could conceivably dispose of it without considering the more difficult questions raised by a reinstatement award.[36] However, neither the district court nor the court of appeals has attributed any significance to this distinction,[37] and, regardless of the scope of the Supreme Court's inquiry, the underlying problem—bilateral determination of a dispute which has trilateral aspects—will remain, unless the NRAB itself adopts a more constructive approach to work assignment dispute arbitration.[38]

One such approach would be for the Board to base its award on a consideration of both contracts. The requirement that both contracts be considered is advanced by the court of appeals in the principal case.[39] However, while the court of appeals viewed this requirement as part of a plan for trilateral arbitration, binding on both unions,[40] the solution to be suggested would not require that Union B be bound. Consideration of Union B's position would not be dependent upon B's appearance, since the carrier is fully capable of presenting arguments relevant to B's claim; indeed, it is in the carrier's best interest to do so in order to defend properly its original allocation of the contested work.[41] Moreover, such a proceeding would avoid the legal and practical objections to trilateral arbitration by the Board, and at the same time it would be responsive to the courts' objections to the Board's present approach.

The relevance of Union B's contract in a bilateral proceeding between Union A and the carrier would be two-fold. First, many courts, including the Supreme Court,[42] have indicated that A's contract should be construed in light of B's. When A claims only damages (and not reinstatement), then B's contract would function

36. When, as in the case of a damage award, reinstatement is not ordered, there is no possibility of a later claim by Union B which could result in a conflicting award. (This would not be true if the carrier were to reassign the contested work to Union A voluntarily. However, such action would be taken at the carrier's risk.)

37. For the district court's attitude, see note 29 *supra* and accompanying text. The court of appeals' attitude is demonstrated by its statement that the Clerks (Union B) would be bound by Board proceedings in which they did not participate. See note 4 *supra* and accompanying text. Obviously this holding makes no sense in a damage claim since the Clerks would not be affected by a damage award.

38. If the Supreme Court rejects trilateral arbitration, then the remaining question is under what circumstances will NRAB awards be enforceable. Regardless what criteria the Court devises in answer to this question, no solution will be achieved unless the Board complies.

39. Principal case at 411-12.

40. The court of appeals' authority for the requirement that one contract be read in light of the other is Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946). However, *Pitney* clearly contemplates the use of Union B's contract only as an interpretive aid. *Id.* at 567.

41. *Cf.* Bernstein, *supra* note 17, at 788.

42. See Order of Ry. Conductors v. Pitney, 326 U.S. 561, 567 (1946).

only as an aid to the interpretation of A's contract, and if the Board, after having considered all relevant evidence, awards damages to A, there would be no technical ground upon which a court could refuse to enforce the award.[43] Second, if, as has usually been the case, Union A claims reinstatement, then consideration of B's contract would also be relevant insofar as it would demonstrate the other contractual obligations of the carrier.

The suggested solution would provide a workable procedure for the Board, regardless of its findings as to the scope of the respective contracts. If the Board finds that Union A's contract, interpreted in light of B's, does not cover the work, then A's claim would be dismissed and the controversy would be at an end.[44] If, on the other hand, the Board finds that the work is covered by A's contract, but not by B's, the Board should award reinstatement to Union A's members; Union B, which would not be bound by the first proceeding, could then bring a subsequent claim to the NRAB, and while this would again raise the problem of conflicting awards, the likelihood of such a conflict will have been minimized by the fact that in the first proceeding B's position was considered.[45] The most difficult situation is presented when the Board finds that both contracts cover the disputed work. When both unions have an equal right to the work there is no equitable way of choosing between them, and the RLA does not contain any provisions comparable to the jurisdictional dispute procedures of the Taft-Hartley Act.[46] Moreover, although it might be argued that the ultimate right to the work could be determined on the basis of a contract theory of priorities—first in time, first in right[47]—the Board could not make

43. See note 29 *supra* and accompanying text.

44. This obvious result has been optimistically noted in both *Whitehouse*, 349 U.S. at 373, and *Carey*, 375 U.S. at 265.

45. A second reason why the possibility of conflicting awards is minimized is that when B brings its separate claim, the Board should limit its award to damages if the union presently holding the jobs has a valid contractual claim to them. See note 48 *infra* and accompanying text. Thus in order to have conflicting awards, the Board must reverse its interpretation of *both* contracts.

46. Labor Management Relations Act §§ 8(b)(4)(D), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(D) (1964); 10(k), as amended, 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1964); 10(l), as amended, 61 Stat. 149 (1947), 29 U.S.C. § 160(l) (1964).

47. Presumably, the union with the prior contract right would be entitled to specific performance. See 5A CORBIN, CONTRACTS § 1169 (1964 ed.). However, such a determination would involve concepts of title, notice, and good faith which would be difficult to apply in the collective bargaining situation. Moreover, the determination of which union was first in time would very often be the result of a completely arbitrary choice. For example, if Union A's contract began in 1964 and B's began in 1965, A would be prior in time and thus entitled to the work. However, if in 1964 when A's contract was signed, B had in force an agreement containing exactly the same language ("scope rule") on which its present claim is based, at the time the carrier promised the work to A it was already promised to B. Assuming that a satisfactory determination of priority could be made, the union second in time would be entitled to damages. *Id.* § 1170.

such a determination without exceeding its authority.[48] However, while the NRAB is limited to telling the parties what they have already agreed upon, there would not seem to be any objection to allowing the Board to fashion its award so as to avoid the pitfalls of conflicting awards and multiple proceedings.[49] In the overlapping contracts situation, the Board should confine Union A's relief to an award for damages. Admittedly this would have the effect of upholding, at least temporarily, the carrier's assignment of the work to B.[50] However, such an award would not prejudice A's right to seek an assignment of the contested work in future negotiations or, failing in that effort, to obtain the contested work on a contractual priority theory in court.[51] In any case, the suggested approach would seem to be the most equitable result which is possible under the machinery of the RLA, and it would obviate the difficulties inherent in a purely bilateral treatment of the dispute, without denying A its right to an independent vindication of its claim.

Finally, the adoption of this procedure should promote the private settlement of work assignment disputes—a solution which has been urged, at various times, by both unions and carriers.[52] Since the aggrieved union would now have an enforceable remedy, the carrier would be encouraged to employ greater precision in the drafting of "scope rules" so as to avoid completely the problem of overlapping agreements.[53] Even when overlapping exists, the employer would be stimulated to seek a settlement with the two unions prior to the assignment of the work, rather than risk having to pay

48. "The [NRAB's] only authority, under the Act, is to determine what [the parties] have agreed upon previously . . . ." Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 748 n.44 (1945).

49. The statute is general in its authorization to the Board as to the nature of its awards and orders. In view of the infinite variety of "grievances" that might arise it is natural that the statute "makes no attempt to catalogue the infinite forms and variations which such orders might take!"
Odom v. Thompson 85 F. Supp. 477, 481 (N.D. Ala. 1949) (Citation omitted.)

50. Since, in non-RLA jurisdictional disputes decided by the NLRB, management's assignment of the contested work is upheld in over 90% of the cases, see Cox & Bok, Labor Law 781 (6th ed. 1965), this result would not be unusual. Moreover, if Union A obtains an award of damages, the carrier would have nothing to gain by assigning the work to the union with the lower pay scale.

51. The rail unions have not sought this type of adjudication in the courts. Indeed, they have argued that the inter-union controversy is not justiciable. See Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59, 67 (1956). There are apparently no reported cases which decide the question on a contract theory.

52. The unions' position has always been that the inter-union dispute should be settled by negotiation. See Order of R.R. Telegraphers v. Union Pac. R.R., 231 F. Supp. 33, 35 (D. Colo. 1964). For the carriers' present position, see Order of R.R. Telegraphers v. Union Pac. R.R., 96 N.R.A.B. 286, 343-45 (3d div. 1961).

53. Although the unions might resist precise "scope rules," it would seem to be easier to reach a compromise at the bargaining stage, rather than to attempt to change the terms of an existing contract.

twice for the same work.[54] Moreover, negotiations at this stage, before either union has acquired a vested interest in the status quo, would appear to improve the prospects for voluntary inter-union arbitration as a means of resolving work assignment disputes.

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54. When, as in the principal case, the contested assignment is brought about by the installation of a technological improvement, the job which is created—operating the new machinery—may be so different from either of the former jobs that it is best described as a new job. If this is so, then the contest for the job which is created might not be a work assignment dispute, and, hence, not resolvable by an interpretation of the individual contracts. In this situation, pre-assignment negotiations, rather than post-assignment arbitration, might well be the proper approach. See Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960). Compare Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).