Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11562
SECOND DIVISION Docket No. 11410
88-2-87-2-51

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

1. That the Baltimore and Ohio Railroad Company violated the contractual rights of the carmen claimants herein listed. These carmen claimants had their contractual rights violated whenever the carrier assigned carmens' work to employes of Trailer Train Corporation on January 2, 1986. The claimants have been monetarily and contractually deprived and the organization has been deprived of its contractual rights under the provisions of Rules 138 and 29 of the Agreement between the Baltimore and Ohio Railroad Company and the Brotherhood Railway Carmen of the United States and Canada, as amended and effective January 1, 1980.

2. That accordingly, Carman Claimants R. E. Cade, R. H. Pierce, and W. J. Mitchell be awarded eight (8) hours at the carmens' straight time rate of pay account carrier consciously assigning work which has historically and contractually accrued to Claimants. This arbitrary assignment by the carrier, in violation of Rules 138 and 29 of the controlling Agreement occurred on January 2, 1986.

FINDINGS:

The Second 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.

On January 2, 1986, TTX Corporation repaired its own cars on track it leased on B&O property. There is no dispute that the work performed was historically performed by Carmen. The dispute centers on whether the Carrier had control of the work by virtue of the nature of the routine repairs and its location on Carrier's leased property.

The record includes both procedural and substantive issues. On procedural grounds the Organization asserts that the Carrier's letter of March 31, 1987 comes too late for consideration, as the Notice of Intention to File an Ex Parte Submission was already at the Board. It further argues before this Board that if the Carrier's letter is allowed then the Organization's response must also be allowed.

On the merits, the Organization argues that the Carrier violated Rules 138 and 29 of the Agreement when it permitted work reserved to Carmen to be performed by outside contractors in an effort to avoid the intent of the Agreement. It maintains that the leasing arrangement "stripped" employees of their Agreement rights.

The Carrier denies that its letter of March 31, 1987, comes too late for consideration. It argues however, that the Organization's response may not be considered. On the merits, the Carrier disputes the Organization's Claim of any Agreement violation. It argues instead that it has the right to lease its track and that it leased it to TTX Corporation. It further maintains that TTX has the right to make repairs to its own cars on leased property. As such, no violation of the Agreement occurred.

Preliminary to a decision on the merits, this Board must resolve the issue of what evidence it has before it. This includes the issue of the Carrier's letter of March 31, 1987, the Organization's letter of response dated April 20, 1987, and the numerous exhibits in the record.

The Board notes that both the Notice of Intent and the Carrier's letter were dated March 31, 1987. The Board is obligated to consider everything that was submitted on the property prior to the Notice of Intent to this Board. Here the evidence is clear that the Carrier responded to a March 20, 1987 Organization letter which stated in part that:

> "In an effort to avoid burdening the Board with a dispute that clearly should be resolved on the property, I again request that the claim be paid in its' entirety."

There is no probative evidence that the Carrier had notification from the Board that the Organization had filed the Notice as it responded to the March 20, 1987 letter. However, if evidence on the property was submitted by the parties shortly before or simultaneously with the notification of intent, there is no reasonable possibility of a response. The weight of such evidence is therefore suspect and this Board recognizes that it lacks the full power of matters raised and considered on the property. Under the instant circumstances the Board must accept the Carrier's letter.

The Organization's response of April 20, 1987 is untimely and may not be considered. It was written after all parties were aware that the dispute had advanced to the National Railroad Adjustment Board.

As for the exhibits, the Organization's letter of May 8, 1986 includes a document signed by the Chief Mechanical Officer. The Carrier's exhibits lack the document, but notes in written form that there was "nothing ever submitted on property." Both records include a note about the document stating in pertinent part:

> "ATTN: MR. BELL:
> We have written documentation that the Chief Mechanical Officer, Mr. E. F. Lind, purposely instituted a plan to strip the work from the Carmen employees, at E. St. Louis Illinois. This document will be used in our claim..."

The Board rejects the document. There is no evidence that the letter from the Chief Mechanical Officer was a part of the on-property effort to resolve this dispute. It is not listed as a copy attached, nor is there any evidence that it was exchanged and considered on the property. It is a firmly established principle that this Board cannot consider materials which were not handled on the property. This document is not properly before this Board.

Both sides present different records as to what occurred on the property. The Board does not find evidence in the form of any notations or statements in the record that the TTX Lease Agreement or Carrier Exhibits M and O through Q were exchanged on the property. Carrier's statement that "additional examples may be furnished with any Board case submission" does not establish that they were exchanged and considered on the property. They are likewise excluded.

On the merits, the burden of proof lies with the Organization. The record establishes that the work was routine work which the Claimants would normally have done under Rules 138 and 29 of the Agreement. There is, however, clear evidence of a lease. By letter of May 8, 1986, the Organization stated that said leasing "was entirely devised to injure the Claimants" and further that "the Chief Mechanical Officer Mr. E. F. Lind, purposely instituted a plan to strip the work from the Carmen employees...." Here, the Organization asserted that the Carrier entirely devised the leasing plan with TTX. It is clearly incumbent upon the Carrier to deny the assertion made many times by the Organization. The Carrier did not do so. Nowhere does the Carrier deny that it "instituted" or "devised" the plan. By long accepted principles, unrefuted assertions are fact.

Carrier took the position instead that prior Awards and leasing Agreements support Carrier's right to lease its property. Once that property is leased, Carrier no longer has "control." The Carrier points strongly to Second Division Award 6839 in support of its position. As the Carrier lacked control over the work, the Agreement protection of Rules 138 and 29 did not apply.

Our opinion is limited to the review of the facts which were raised and considered on the property. Central to our decision is the action of the Carrier in securing the lease. We have previously noted Awards (Third Division Awards 23034, 23036 and Public Law Board No. 2203, Award No. 21) that have held the Carrier liable when:

> "... the Carrier involved itself as principal or agent in the securing of an Agreement with a third party under which the Carrier circumvented its known existing contractual arrangements in relinquishing control to the third party for contracting." (Third Division Award 26103)."

In the circumstances of this case and based upon the evidence of record the Board holds that the Carrier has violated the Agreement.

Ordinarily, the lease Agreement would free the Carrier of liability as it would lack "control." Second Division Award 6839 reasoned correctly in our opinion, based on the fact that the request to remove the work came from the foreign Carrier. There is nothing in the record at bar to indicate that TTX requested, initialed, required or demanded that it perform its own repairs. There is no denial by the Carrier that it instituted the plan using a third party to circumvent its existing Agreement. The Carrier therefore had initial control and violated the Agreement with the employees in seeking out a lease which evaded its collective bargaining commitments.

Carrier argued on the property that the Claim was excessive. The Board sustains the Claim to the degree that a joint check of TTX records possessed by the Carrier establishes the actual time worked. If not, the Claim is sustained as presented.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1988.