Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7368
SECOND DIVISION Docket No. 7196-T
2-BNI-MA-'77

The Second Division consisted of the regular members and in addition Referee Abraham Weiss when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Burlington Northern Inc.

Dispute: Claim of Employes:

Claim of the International Association of Machinists and Aerospace Workers that the Carrier:

1. Violated Rules 27, 50 and 51 of the Shop Crafts' Agreement effective April 1, 1970 when it assigned Carmen to install and test an Allis Chalmers diesel engine on Passenger Car 1415 on August 8, 1975 in King Street Coach Yard.

2. Compensate Machinist E. Clementz and Advanced Apprentice D. Hawkins four (4) hours each computed at staight-time rate on August 8, 1975 in consequence thereof.

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 employe 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.

Claimants in this case are two machinists who assert that the Carrier violated the Agreement effective April 1, 1970, specifically Rules 27, 50 and 51, by assigning Carmen to install and test a diesel engine on a specified passenger car at the King Street Passenger Station, Seattle, Washington, on August 8, 1975.

This dispute involves a jurisdictional question and the Brotherhood of Railway Carmen and the International Brotherhood of Electrical Workers are parties in interest which have elected to file a submission.

The positions of the three Organizations--Machinists, Carmen, and Electrical Workers--are summarized below.

The petitioner, International Association of Machinists, maintains that under the agreement, machinists have the right to install and test internal combustion engines on passenger cars by virtue of the Machinists Classification of Work Rule (Rule 51) and Decision 34 (an agreement between the Machinists and the Carmen dated April 27, 1966).

Rule 51 provides that "Machinists' work shall consist of ... assembling, maintaining, dismantling and installing locomotives and engines (operated by steam and other power)...."

Rule 51, Petitioner asserts, by assigning work to Machinists, precludes any jurisdictional dispute, since the work in dispute is assigned to the Machinists' craft. Consequently, a practice, claimed by the Carrier, inconsistent with the Rule, does not determine application of the Rule.

Decision 34, designed by agreement reached in 1966 between the Machinists and Carmen to settle questions concerning the scope of their respective Classification of Work Rules on the former Great Northern Railway, one of the three major carriers involved in the merger that resulted in the present Burlington Northern, Inc., specified that "the installation, ... testing ... of internal combustion engines used in connection with generators for light and power on passenger cars is Machinists' work." Decision 34 also provided that: (1) an employee on "full time assignment" on such work "shall remain on such assignment and continue to perform said work until he may vacate the assignment...."; and (2) "this understanding is to apply only on this railroad and not to be considered or used as a precedent affecting any other railroad."

The Machinists' Organization also cites a letter dated December 6, 1972, in which the Carrier, Burlington Northern, implemented three other jurisdictional settlements between the Machinists and Carmen, reached on the same date as Decision 34. These jurisdictional agreements were applicable on the former C. B. and Q. Railroad, which was later merged into the Burlington Northern. The Carrier's letter of December 6, 1972 states, however, that "acceptance of these three settlements ... is with the understanding that the provisions thereof are applicable only at the actual points specified, or on the former CB&Q territory for which the agreements were actually prepared."

The Machinists contend that the Carrier's actions with respect to these three other jurisdictional settlements, subsequent to the merger of the three prior carriers, "established a precedent for the application of an agreement on a segment of the Carrier."

When the Machinists reopened the jurisdictional issue on June 2, 1975 (Carrier's Exhibit No. 19), the General Chairman of the Carmen responded that the jurisdictional settlement could not be applied on the merged Burlington Northern and that the Machinists' Organization would have to submit a dispute applicable to the Burlington Northern "in order that such

Awards would be uniformly applied over the entire Carrier." He added: "Any other action on the part of the Machinists and the Carrier would be violation of Rule 98(c) of the Agreement." (Carrier Exhibit No. 20)

Rule 98(c) is the outgrowth of negotiations between the parties prior to and in anticipation of the merger of the former carriers now comprising the Burlington Northern, so as to arrive at a consolidated agreement covering all of the Shop Craft Organizations. Rule 98(c) provides:

> "It is the intent of this Agreement to preserve pre-existing rights accruing to employees covered by the Agreement as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging Carriers which were in effect prior to the date of merger."

In a subsequent letter to the Machinists, dated February 26, 1976, the Carmen advised the Machinists' General Chairman that "jurisdictional settlements on the Great Northern cannot be properly applied at this late date on the Burlington Northern, unless all parties to such settlement are in agreement." (Employees' Exhibit C-3).

In brief, the Railway Carmen maintain that the Decision 34 jurisdictional settlement between it and the Machinists is not valid, since it was never accepted nor implemented.

The Electrical Workers assert that their rights and jurisdiction are affected by the Machinists-Carmen agreement, referring specifically to Rules 76 (Electricians' Classification of Work) and 93 (Jurisdiction) of the current Agreement. The claim is made that the Machinists' Classification of Work Rule makes no reference to engines on passenger cars (but rather to engines in locomotives); that the Machinists made no attempt to resolve the jurisdictional issue with the Electrical Workers; that the work in question is currently performed by the Electrical Workers or by the Carmen; and that the Machinists' claim to installation and testing of internal combustion engines on passenger cars is not substantiated.

The Machinists deny the Electrical Workers' assertions and, in addition, state that as an affiliate of the System Federation in 1966 when Decision 34 was reached, the Electrical Workers actively participated in negotiations with the Carrier without asserting any right to do the work specified in Decision 34.

The Carrier requests dismissal or denial of the claim on the following grounds:

1. Petitioner must show that the work in dispute must be performed by machinists on an exclusive basis system-wide on one of the railroads which now comprise the Burlington Northern, or that the work is reserved to the machinists' craft by a clear and unambiguous rule "that is in no way limited by the interaction of the balance of that Agreement."

2. Machinists do not have the exclusive right to work at the situs or system wide on the former Great Northern. Carrier records reflect that carmen have always installed such motors at the King Street Station on the former Great Northern. (Carrier Exhibit 2). Such work, the Carrier maintains, has been done almost daily by carmen at King Street Station before and after 1966 (the date of Decision 34) and subsequent to the effective date of the current Agreement (April 1, 1970). Petitioner did not deny that carmen are doing the work at King Street Station.

3. The Petitioner has to meet the criterion that the work it seeks to perform must have been performed system wide, and no such evidence has been presented.

4. The Carrier is not bound by jurisdictional settlement reached between two Organizations unless and until it accepts such settlement. The Carrier has never accepted the jurisdictional agreement between the Machinists and Carmen embodied in Decision 34.

5. Decision 34 was not raised on the property during the handling of the claim. Therefore, this Board has no authority to consider it.

6. The principle of equitable estoppel applies, in view of Petitioner's long-standing failure to contest the assignment of the work in dispute.

7. The Machinists have not exhausted their remedy in Rule 93 dealing with jurisdictional disputes and hence this Board should dismiss this claim for lack of jurisdiction.

The outcome of this case turns on whether the work in question falls within the clear and unambiguous language of the Agreement.

To sustain their contention, petitioning Organization must show either that the express terms of the Agreement grant them exclusive right to the work at issue, or that absent such express grant, they have as a matter of custom and practice always, and exclusively, performed this work.

1. The jurisdictional dispute settlement of July 6, 1966, between the Machinists and the Carmen concerning the work of installing and testing internal combustion engines on passenger cars on the

former Great Northern Railway (referred to as Decision 34) was arrived at pursuant to Rule 94, Jurisdiction of the Great Northern Agreement. Rule 94 of that Agreement is identical to Rule 93 of the current Burlington Northern Agreement effective April 1, 1970. Rule 93 provides that "existing practices shall be continued without penalty until and when the Carrier has been properly notified and has had reasonable opportunity to reach an understanding with the organizations involved."

It is clear that no understanding has been arrived at, pursuant to this rule, between the Carrier and the Organizations so as to effectuate the jurisdictional dispute settlement. It is equally clear that absent such understanding, existing practices as to jurisdiction and work assignment "shall be continued without penalty."

This Board has often ruled that it may not assume jurisdiction of a dispute between two or more Organizations as to who is entitled to perform certain work unless and until the Organizations have exhausted the procedures under existing rules governing jurisdictional disputes. Rule 93 of the current Agreement (Rule 94 of the prior agreement with Great Northern) prescribes such procedures, which have not been complied with.

Rule 93 calls for a two-step procedure to resolve disputes over jurisdiction. The Organizations claiming the work must first settle the issue between themselves. Then, they must negotiate with the Carrier to secure management's acceptance of the proposed jurisdictional settlement. All of the parties involved--Organizations and Carrier--must be in agreement. Only then can work be assigned or transferred from one craft to another.

The record is also clear that the jurisdictional settlement between the two Organizations (Decision 34) was not accepted by the Carrier. although the Machinists tried in 1966, 1967 and 1968 to gain its acceptance by the former Great Northern Railway Company. (Carrier's Exhibit No. 13) The last conference between the Petitioner and the Carrier prior to the merger on March 3, 1970 was on September 30, 1968. As of the date of the merger the present Carrier (Burlington Northern) had not indicated acceptance of the jurisdictional settlement between the two organizations on the former Great Northern. Petitioner reopened the issue on June 2, 1975.

2. Rule 93 discussed above must be read in conjunction with Rule 98(c) of the April 1, 1970 Agreement. The record clearly indicates that the Machinists have not performed the work in dispute at the King Street Station. Indeed, the basis of their claim is that machinists were not assigned such work at that location. Under

Rule 98(c), therefore, "pre-existing rights" are preserved to members of these crafts other than Machinists who performed the work prior to merger, and who are currently performing the work, to continue to perform such work. Rule 93, as previously noted, provides for "existing practices" to be continued absent settlement of craft jurisdiction disputes between contesting organizations and "Carrier ... understanding with the organizations involved." This very case, and the submissions of the Carmen and Electrical Workers, indicate that the craft organizations involved have not as of this date resolved the question of the work jurisdiction at issue.

The purpose of Rule 98(c) is to preserve pre-existing rights accruing to the employees covered by the current agreement as they existed in effect on the Great Northern prior to the date of the merger into the Burlington Northern.

3. Petitioner relies heavily on Rule 51, the Machinists' Work Classification Rule, as assigning the work in question to members of the Machinists' craft. For work to fall within the exclusive jurisdiction of a craft, the grant of jurisdiction must be provided through language that is clear, definite, and unambiguous. In the case before us, the Work Classification Rule on both the former Great Northern and on the merged Burlington Northern make no explicit reference to installing and testing engines on passenger cars--the crux of the instant dispute. Rule 51 does not unequivocally cover the work involved as exclusively machinists' work. Hence, Rule 51 must be read in conjunction with Rule 98(c), which preserves the "pre-existing rights" of other employees on the carriers which were merged into the present Burlington Northern.

Since there is no clear and unambiguous rule which allocates the disputed work to the Petitioner Organization, it must proffer proof that members of the Machinists' craft have historically and exclusively performed the work of installing and testing engines on passenger cars on the former Great Northern, which was later merged with other carriers into the Burlington Northern. The Petitioner has failed to meet the burden of proof with respect to exclusivity and system wide application. In fact, Petitioner's request to the Carrier (Great Northern) on October 9, 1967, to adopt and accept the proposed jurisdictional settlement between the Petitioner and the Carmen and to apply the settlement "on the entire system," constitutes clear evidence that the Petitioner did not have the exclusive right system wide, to the work in question, and specifically at the King Street Station. The Machinists' submission in the case before us states that members of the Machinists' craft do not perform the work in question at the King Street Station.

Since, as noted above, the Machinists' Classification of Work Rule is silent as to craft jurisdiction over installing and testing engines on passenger cars, we must look to past practice as to the Rule's meaning and application. The record shows that other than machinists have been used to perform such work, at the site to which the claim refers, over an extended period of time.

The Petitioner's claims regarding its jurisdictional right to the work in question have been denied by the Carrier and the two other Organizations involved in this dispute.

Petitioner therefore bears the burden of sustaining its claim, by a showing of clear convincing evidence, that it has exclusively performed the work at issue on a system wide basis. Petitioner has not met the burden of proof.

Members of the Machinists' craft have undoubtedly performed work substantially identical with or similar to that here in dispute, at various times and at various locations, for the predecessor carriers and for the current carrier--but not, according to the record, on an exclusive or system wide basis. The performance of this work under such circumstances does not confer on such employees, the exclusive right to perform all such work nor does it constitute proof of such exclusive right.

The fact that both Carmen and Electricians have filed ex parte submissions maintaining that they have performed the disputed work in the past, that they are currently performing the work (Carmen, supported by the Carrier, emphasizes that it has been doing the work at the location of the claim), and that their Classification of Work Rules reserve such work to their respective crafts constitutes clear evidence that a jurisdictional dispute exists.

The fact that in 1966, the Machinists and the Carmen met to resolve their jurisdictional dispute shows that the Carmen were doing the disputed work at that time; otherwise, there would be no need to agree on jurisdiction. That jurisdictional settlement on the Great Northern was not accepted by the Carrier, whereas those applicable to the former CB&Q, also merged into the present BN, were accepted and made operative.

Failure or inability to meet, discuss, and attempt to reach agreement with the Carrier (and, as the record indicates, with other Organizations on the merged Carrier) stands as a bar to our consideration of the merits of Petitioner's claim. We consider that this Board has no jurisdiction to hear and decide the merits, since the requirements of Rule 93 have not been complied with before bringing this action.

We therefore hold that this case is prematurely presented to this Board, not only because Rule 93 has not been followed fully, but also under the provisions of Section 3, First (i) of the Railway Labor Act, as amended, and Circular No. 1 of the National Railroad Adjustment Board.

We will decline to accept jurisdiction over this dispute. It will be dismissed without prejudice.

A W A R D

Claim dismissed for lack of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of October, 1977.