Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7951
SECOND DIVISION Docket No. 7607
2-ICG-CM-'79

The Second Division consisted of the regular members and in addition Referee Arthur T. Van Wart when award was rendered.

Parties to Dispute: (System Federation No. 99, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. That under the current Agreement the Illinois Central Gulf Railroad improperly assigned other than carmen (Contractor, Hulcher Emergency Railroad Service) to dismantle thirty-three (33) cars of a forty-four (44) car derailment at Diana, Illinois.

2. The Illinois Central Gulf Railroad violated Rules 32, 33 and 127 of the Carmen's Agreement by utilizing the outside contractor to dismantle the cars, and accordingly, the Illinois Central Gulf Railroad be ordered to make the carmen, including the provisional carmen whole by additionally compensating them in the amount as shown on Attachment A, pages 1 and 2, marked as Employes' Exhibit Q, pages 5 and 6.

3. The Illinois Central Gulf Railroad violated Rule 37 of the controlling Agreement when they failed to acknowledge the claim on the local level within the 60-day Time Limit Rule.

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.

A forty-four (44) car derailment occurred on November 29, 1975, near Diana, Illinois on Carrier's single track main line which ran through a cut of a hill with 35 foot slopes. The cars involved were 100 ton loaded grain hopper cars. Said cars were owned by the Cargill Grain Company. Carrier's wrecking outfit from Centralia, Illinois and Paducah, Kentucky were dispatched to the scene of the derailment to clear the main line. Said wrecking crews, with their derricks, were able to rerail eleven (11) of the derailed cars. The remaining 33 cars were in such a twisted and wrecked condition that the derricks were only capable of pushing the said twisted cars away from the right of way.

After the main line was cleared, supervision surveyed the area and examined the remaining 33 wrecked cars. It was determined that the cheapest, the safest, and most expeditious manner to remove such cars would be that such cars must be cut and scrapped at the location where the derailment occurred. The Carrier (determined that they lacked the capacity to do it themselves and) engaged Hulcher Emergency Railroad Service to do the entire scrapping and clean up operation. Hulcher was scheduled to begin on January 1, 1976. However, because of the snow and rain, the commencement of such operations were delayed for approximately two months. Hulcher commenced cutting up the cars on March 1, 1976. The twisted and wrecked cars were each pulled up to the top of the hill, cut up and then brought down the hill and loaded into railroad cars. Such scrap was sold and directly shipped to a scrap dealer. It took Hulcher eleven days to remove the thirty-three wrecked cars.

The Employees allege that Carrier violated Rules 32 (Seniority), 33 (Assignment of Work) and 127 (Classification of Work) of the Schedule of Rules when it "improperly assigned other than carmen to dismantle thirty-three (33) cars of a forty-four (44) car derailment at Diana, Illinois." Further, the Union alleged that Carrier's local supervision failed to timely decline the claim, thus making the claim valid under Schedule Rule 37.

Carrier contends that the claim is before the wrong forum, that the dispute properly belongs before Special Board of Adjustment No. 570, which Board was established under the provisions of the September 25, 1964 Agreement. Said Special Board has exclusive jurisdiction over disputes arising under that Agreement. The instant dispute arises under the September 25, 1964 National Agreement. Hence, this Division therefor has no jurisdiction to determine issues in respect to the merits of the dispute.

The issues formulated herein are (1) whether the claim was timely declined by local supervision (2) whether the Second Division has jurisdiction in cases stemming from alleged violations of the September 25, 1964 Agreement, (3) if (2) is in the affirmative, then whether the Union has assumed the burden of proving that "scrapping" or "dismantling", as the case might be, the 33 freight cars is work exclusively reserved to carmen.

Rule 37 in pertinent part reads:

> "all claims or grievances must be presented in writing by or on behalf of the employees involved, to the office of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claimant grievance is based. Should any such claim or grievance be disallowed, the Carrier shall within sixty days from date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or agreement shall be allowed as

"presented, but this shall not be considered as a precedence of a waiver of the contentions of the Carrier as to other similar claims or grievances." (Underscoring supplied)

The Local Chairman, under date of July 2, 1976, appealed the instant claim, which had been denied by the General Car Foreman, to the Master Mechanic. The Director of Labor Relations telephoned the General Chairman on September 7, 1976 and inquired what he contemplated doing about the claims of Hulcher Emergency Railroad Service dismantling the thirty-three (33) cars involved in the derailment at Diana, Illinois. The General Chairman advised that such claim had not yet left the local level and was not properly before him. The Director was alleged to have advised that the claim had been declined by the Master Mechanic on July 15, 1976. The General Chairman contacted the Local Chairman who advised that the claim had not yet been denied by the Master Mechanic and that in fact, he was that date, making demand on the Master Mechanic for payment under a time limit rule violation. Such demand was made of the Master Mechanic on September 7, 1976 and was personally delivered by the Local Chairman. The claim was then forwarded to the General Chairman, on September 7th along with a copy of such demand of payment.

The Master Mechanic, under date of September 7, 1976, sent a letter by Certified Mail, stating that he was attaching a copy of his letter of his declination, dated July 19, 1976.

The Director of Labor Relations, in answer to the appeal letter of the General Chairman, dated September 10, 1976, insofar as this issue is concerned, advised that the Master Mechanic had read and declined the appeal on July 19, 1976, which was well within the sixty day time limit. He attached thereto copies of statements from several employees attesting therein to their participation in the preparation and delivery of the July 19, 1976 letter in the customary manner. The General Chairman asserted that there had been other incidents wherein the Master Mechanic failed to comply with the sixty (60) day time limit rule and when such alleged failure was called to his attention, said Master Mechanic, allegedly would then forward a copy of the letter which he would allege that he previously had sent.

Thus, the Board, is left with weighing the certification, in lieu of oath or affirmation, of the three employees who stated that they had participated in preparing and delivering the July 19, 1976 letter of denial to the Local Chairman's desk, in the North Yard, Carmen's building, who incidentally was on vacation, against the single unsubstantiated employee assertion as to the Master Mechanic's alleged "modis operandi". We are impelled to conclude that the weight of proof offered, no matter how suspicious the circumstances may appear, tilts towards the position of the Carrier that the Local Chairman's appeal had been timely declined. There is a presumption, although rebuttable, that people are honest. Here one party (Carrier) made an offer of proof as to its contention. The other party (the Employes) failed to offer any.

We must conclude, as to the jurisdiction of this Board to handle this claim, that the record amply supports the position that this is a dispute involving a question concerning the "contracting out" of work. In fact, the General Chairman asserted that Carrier was not in compliance with Article II of the National Agreement dated September 25, 1964, when in his letter under date of January 2, 1976, he had this to say:

> "I do not agree that you have fulfilled the requirements of Article II of the September 25, 1964 Agreement."

Section 1 of Article VI of of the September 25, 1964 Agreement reads as follows:

> "In accordance with the provisions of the Railway Labor Act as amended, a Shop Craft Special Board of Adjustment here and after referred to as the Board is hereby established for the purpose of adjudicating or deciding disputes which may arise under Article I, Employee Protection, and Article II, Subcontracting of this Agreement. The Parties agree that such disputes are not subject to Section III, Second, of the Railway Labor Act, as amended." (Underscoring supplied)

Section 8 of Article VI reads:

> "The Board shall have exclusive jurisdiction over disputes between the parties growing out of grievances concerning the interpretation or application of Article I, Employee Protection, and Article II, Subcontracting." (Underscoring supplied)

Consequently, we agree with the findings in Award 5939 (Dugan), that:

> "In view of the fact that the issue before this Board for determination involves subcontracting out of work and inasmuch as Section 8 of Article II of the September 25, 1964 clearly gives 'exclusive' jurisdiction over such disputes as involved herein to a Shop Craft Special Board of Adjustment, namely Special Board of Adjustment No. 570 we are compelled to dismiss the claim without prejudice for want of jurisdiction."

This Claim will also be dismissed without prejudice for want of jurisdiction.

A W A R D

Claim dismissed as per findings without prejudice.

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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 13th day of June, 1979.