C O R R E C T E D

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8970
SECOND DIVISION Docket No. 8455
2-CRI&P-CM-'82

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago, Rock Island and Pacific Railroad Company (William M. Gibbons, Trustee)

Dispute: Claim of Employes:

(1) That under the current Agreement the Carrier improperly permitted the use of other than Carmen (Resco Corporation employes) to perform Carmen's work of inspecting, lubricating, and repairing D.F. (damage free) cars at Muscatine, Iowa.

(2) That accordingly the Carrier be ordered to compensate Carman L. Mullen for 2 and 2/3 hours at the time and one half rate each day for 42 days during the period from July 5, 1977 through August 31, 1977.

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 were given due notice of hearing thereon.

The Organization contends the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") violated Rules 28(a) and 110 of the applicable collective bargaining agreement in effect between the parties when the Rock Island purportedly permitted workers who were not Carmen to perform Carmen's work at Muscatine, Iowa on forty-two days during the period from July 5, 1977 through August 31, 1977. Specifically, the Organization charges the Rock Island with allowing employes of Rescar Corporation to perform the work of inspecting, lubricating and repairing Damage Free cars on a rail line going into the H. J. Heinz Company at Muscatine. The Organization presented the claim on the property on October 10, 1977 (revising a claim dated August 5, 1977) and pursued the claim through the various levels of appeal. On June 20, 1979, the Organization timely filed, with this Board, a Notice of Intent to File an Ex Parte Submission involving the Carrier's alleged violation of the controlling labor agreement.

I. JURISDICTION

At the onset, the Rock Island vigorously asserts that this Board lacks jurisdiction to adjudicate this claim. In essence, the Rock Island argues that we lack both personal and subject matter jurisdiction. According to the Rock Island, in January 1980 when the United States District Court issued the Order for the Trustee of the Rock Island to liquidate the Rock Island Estate, it was no longer a "carrier" subject to the terms of The Railway Labor Act ("Act"). 45 U.S.C. §151 et seq. The Rock Island reasons that if it is not now a "carrier", it is outside the scope of the Act and, consequently, this Board is prohibited from asserting jurisdiction over the Rock Island. In addition, the Rock Island characterizes the Organization as a potential but ordinary creditor of a bankrupt debtor and therefore subject matter jurisdiction is exclusively within the province of the Federal Court. The Rock Island acknowledges that it was a "carrier" at the time this claim arose but alleges any jurisdiction of this Board terminated when the Trustee was ordered to liquidate.

Though these jurisdictional questions were not advanced in the written record, the Rock Island did extensively argue the points at the hearing before this Board. Since the Rock Island's arguments challenge the fundamental authority and power of this Board, it may properly raise the lack of jurisdiction issue at any time.

After careful consideration, as set forth in our introductory findings (above), we rule that this Board has jurisdiction over the Rock Island. There are two independent bases for asserting jurisdiction under the Act.

First, our jurisdiction extends to all entities or persons falling within the definition of "carriers" contained in the Act. Section One, First of the Act states:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier' ..." 45 U.S.C. §151, First (Emphasis added).

This Board's authority emanates from Section Three, First of the Act and subsection (b) thereof provides the method for the carriers to select their representatives to this Board as follows:

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board..." 45 U.S.C. §153, First (b) (Emphasis added).

The clear and unequivocal language in Sections One, First and Three, First (b) of the Act conclusively manifests an express Congressional intent that the terms of the Act were to cover railroad entities under the control of a trustee. Even if the trustee is acting under the direction of the United States District Court, the Act applies to trustees, "judicial or otherwise..." 45 U.S.C. §151, First. Section One makes no distinction between operating and liquidating trustees. The appointment of a receiver to hold the assets of a bankrupt railroad pursuant to a creditor's bill in District Court does not render the Act inapplicable to the receiver. Burke v. Morphy, 109 F.2d 572 (2nd Cir. 1940); cert. den. 310 U.S. 635 (1940). In Burke, the Court rejected the receiver's arguments that financial distress excused violations of the Act, and even if unexcused, only the District Court could pass on such violations. The Court concluded that the Act expressly covered receivers. Id. The jurisdiction of this Board is compatible with the duties of the Rock Island Trustee to wind down the operations of the company and to liquidate the assets of a once great railroad empire. See also Grand International Brotherhood of Locomotive Engineers v. Morphy, 109 F.2nd 576 (2nd Cir. 1940)

The Rock Island additionally contends that the Act was intended to cover only carriers still subject to the Interstate Commerce Act. The record in this case is unclear concerning the Interstate Commerce Commission's continuing jurisdiction over the Rock Island. However, even if we assume arguendo, that the Commission no longer regulates the Rock Island, the express definitions of a "carrier" under the Act extend not merely to entities considered "carriers" pursuant to the Interstate Commerce Act but to any company, receiver or trustee in possession of a railroad business. 45 U.S.C. §151, First. The Fourth Circuit, consistent with the express terms of Section One, First of the Act, has ruled that Congress intended to give an expansive interpretation to the term "carrier". International Longshoremen's Association, AFL-CIO v. North Carolina Port Authority, 463 F.2d 1 (4th Cir. 1972); cert. den. 409 U.S. 982 (1972). In the Longshoremen's case, the Interstate Commerce Commission had never certified a state agency (which operated seaport facilities) as a "carrier". The District Court had found that only a small part of the agency's activities were devoted to operating a short rail line and since the agency was not a carrier subject to the Interstate Commerce Act, the agency was exempt from the Railway Labor Act. The Fourth Circuit reversed the decision and deferred to the National Mediation Board's determination that the state agency was a carrier within the scope of the Act. So our jurisdiction is not tied to the Interstate Commerce Commission's continuing jurisdiction, if any, over the Rock Island. The Rock Island is a "carrier" within the definition stated in the Act.

Our second basis for asserting both personal and subject matter jurisdiction over the Rock Island rests on the exclusive, primary jurisdiction of this Adjustment Board to resolve "... disputes between an employee or groups of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions..." 45 U.S.C. §153, First (i). In this case, the Organization charges the Rock Island with breaching Rules 28(a) and 110 of the applicable labor agreement. Congress established the Adjustment Board to function as the sole arbiter of disputes growing out of labor agreements and thus all controversies over the interpretation of agreements must be submitted to the Adjustment Board. Gunther v. San Diego and Arizona Eastern Railway Company, 382 U. S. 257 (1965). Since this Board has the authority and recognized expertise to decide disputes under railway collective bargaining agreements, the Organization is actually precluded from pursuing its claim in the United States District Court without first exhausting its available administrative remedies. Id. at 261-262; Pennsylvania Railroad Company v. Day, 360 U. S. 548 (1959); 45 U.S.C. §153, First (h), (i).

Contrary to the Rock Island's argument, our jurisdiction did not terminate when the Trustee began to liquidate and distribute the Rock Island Estate. The Rock Island concedes it was a carrier both at the time this claim arose (October 10, 1977) and at the time the Organization commenced proceedings before this Board (June 20, 1979). Nothing in the Act requires that the employment relationship exist throughout the entire duration of administrative adjudication. The exclusive, primary jurisdiction of this Board vests and the purposes of the Act are satisfied if the claim arose out of an employment relationship. Pennsylvania Railroad Company v. Day, supra at 552; 45 U.S.C. §152(5); See also Third Division Award No. 22849 (Roukis). Regardless of whether or not the Rock Island is presently a "carrier" within the definition of the Act (though we have found that it clearly is a carrier), we can independently assume jurisdiction over this claim since an employment relationship between the Rock Island and the Employe was present at the time this claim arose.

Therefore, we find two independent bases justifying this Board's assertion of jurisdiction over the Rock Island and the Organization's claim.

II. THE PROPER FORUM

The Carrier raises an ancillary argument concerning the specific jurisdiction of this particular Adjustment Board. According to the Rock Island, even if we conclude (as we have) that it is subject to the provisions of the Act, the instant claim involves the subcontracting of work. Resolution of disputes regarding the alleged contracting out of work is exclusively reserved to Special Board of Adjustment No. 570 pursuant to the September 25, 1964 National Agreement. Both the Rock Island and Carmen are parties to the national agreement creating Special Board of Adjustment No. 570. The Organization contends this Board is the appropriate forum for adjudicating this dispute since the claim is premised on Rules 28(a) and 110 which are incorporated into the working agreement between the Organization and this particular Carrier.

On the property, the Organization brought and appealed this claim as a violation of the Carmen's classification of work rules of the controlling agreement in effect between these parties. Claims involving the classification and assignment of work purportedly exclusively reserved to a shop craft are within the province of the Second Division. Second Division Awards No. 6529 (Shapiro); No. 6800 (O'Brien); No. 7653 (Williams); and No. 7660 (Williams). Though subcontracting may be an incidental issue in this claim, the primary thrust of the claim cuts to Rules 28(a) and 110 of the controlling agreement. Thus, this Board is the proper forum for resolving the instant claim.

III. THE MERITS

Rule 110 reserves to Carmen work consisting of the inspection and maintenance of freight cars and Rule 28(a) forbids any person other than regularly employed mechanics from performing work reserved to a particular craft. Claimant held seniority at Muscatine. The work performed by employes of Rescar on the dates in controversy involved the inspection and maintenance of Damage Free freight cars which was clearly work exclusively reserved to Carmen.

The Carrier's main defense is that it, the shipper and Rescar had previously entered into a maintenance pool arrangement whereby Rescar would inspect and maintain the cars delivered to the shipper. The maintenance pool agreement is dated July 1, 1977. The Carrier contends there is no provision in the applicable labor agreement prohibiting maintenance pools. Furthermore, the Carrier argues that in the past, it has established maintenance pool arrangements at other points along its line and the Organization, by protracted silence and inaction, has acquiesced in the practice.

We are precluded from considering whether or not the Carrier's maintenance pool arrangement is a valid defense to the Organization's claim since the Carrier inexplicably failed to timely raise the pool arrangement issue on the property during the handling of the claim. The basic case of both parties must be made on the property before the Organization properly files its Notice of Intent to File an Ex Parte Submission. Second Division Award No. 8303 (Dennis). The purpose of this rule is twofold. First, Section Two, First of the Act imposes a duty on the parties to make every reasonable effort to settle a dispute before it reaches this Board. 45 U.S.C. §152, First. Requiring both parties to disclose all their arguments on the property encourages and facilitates the resolution of claims at the lower levels. Second, an opposing party could be unduly surprised by an argument not raised on the property. If a dispute cannot be settled, this Board should have a complete record of all pertinent arguments and the opposing party's informed response to each contention.

The Carrier did not raise the maintenance pool matter until November 19, 1979 which was almost five months after the claim was progressed to this Board. Since the maintenance pool contract is dated July 1, 1977, the Carrier could have raised the matter much earlier. Though the Carrier attempted to discuss the pool arrangement at a reconference on December 11, 1979, the Organization could rightly refuse to discuss the maintenance pool since it was new material. A conference held pursuant to the Act on this claim had been previously held on December 13, 1978. 45 U.S.C. §152, Second, §153, First (i). Therefore, we must

reach a decision in this case without considering the propriety of the maintenance pool arrangement.

The Carrier's only defense which was timely raised on the property is that it had leased Track 40 1/2 to Rescar and, as an inherent consequence, the disputed work was beyond the Carrier's control. However, the Carrier received the same benefit from Rescar that it would have received if Claimant had performed the work. Second Division Award No. 7660 (Williams). The Carrier's main purpose for leasing the track was to evade its obligation to assign Carmen to perform work squarely covered by Rule 110. Second Division Awards No. 3633 (Watrous); No. 7653 (Williams); No. 6529 (Shapiro) and No. 6800 (O'Brien). Thus, the Carrier violated Rules 110 and 28(a).

Claimant is entitled to two and two thirds hours of pay per day but at the straight time rate in effect for the forty-two days during the period from July 5, 1977 to August 31, 1977.

A W A R D

Claim sustained to the extent consistent with our Findings.

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 10th day of March, 1982.

CARRIER MEMBERS' DISSENT
TO
AWARD 8970, (DOCKET 8455)
(Referee LaRocco)

Dissent to this Award is required because the Majority has far exceeded the limited scope of the jurisdiction of this Board, and has enunciated dicta on issues not within its competence.

The question submitted to this Board was whether on certain dates in 1977 the Carrier had violated the collective bargaining with the Carmen Organization.

The Carrier made several arguments in this matter, both jurisdictional and substantive.

On the jurisdiction issues, the Majority made the following pertinent observations:

> "....in January, 1980 when the United States District Court issued the Order for the Trustee of the Rock Island to liquidate the Rock Island Estate." (P.2) (Emphasis added)

The action of the Court is not subject to review by this Board, and having "acknowledged that it was a 'carrier' at the time this claim arose ....", it was clearly beyond the jurisdiction of this Board for the Majority to blithely interject the following dicta.

> "....The Rock Island is a 'carrier' within the definition stated in the Act." (Page 3).

> "Regardless of whether or not the Rock Island is presently a 'carrier' within the definition of the Act (though we have found that it clearly is a carrier), we can independently assume jurisdiction over this claim since an employment relationship between the Rock Island and the Employee was present at the time this claim arose." (Emphasis added) (Page 4).

Clearly, within our jurisdiction to resolve disputes concerning the interpretation and application of agreements, it is unwarranted dicta to assert conclusions of law when the governing judicial opinion is otherwise. Further, it

was pointed out that the status of the trustee, under the Railway Labor Act, subsequent to the liquidation order, was a matter in litigation, and this Board should have respected that forum and not interjected itself into matters that were not before it.

Second, also on jurisdictional grounds, is the matter of the proper forum. The initial claim asserted that:

> "....three men employed by Resco....were doing carmen work of 'repairing interior doors on D.F. cars....in the area of Track 41 for the H. J. Hines Co."

It was the Employees' position that the Rock Island had contracted this work out to an outside firm, and the Rock Island had denied the claim on the basis that:

> "....employees of Resco Corporation were used to repair cars on leased trackage...." and that "classification of work rules apply solely to work within the control of the Carrier."

Clearly, the alleged dispute involved from the Employees' perspective, the removal of work that they believed to be protected by contract, to an enterprise having no railroad connection. That the Employees submitted this case to this Board does not foreclose the Carrier from raising objections as to the propriety of the forum.

Article VI, Section 1 of the September 25, 1964 National Agreement, as amended, states:

> "In accordance with the provisions of the Railway Labor Act, as amended, a Special Board of Adjustment, hereinafter referred to as 'Board", is hereby established for the purpose of adjusting and deciding disputes which may arise under Article I, Employee Protection, and Article II, Subcontracting, of this agreement. The parties agree that such Board shall have exclusive authority to resolve all disputes arising under the terms of Articles I and II of this Agreement,

> "as amended by the Agreement of December 4, 1975. Awards of the Board shall be subject to judicial review by proceedings in the United States District Court in the same manner and subject to the same provisions that apply to awards of the National Railroad Adjustment Board."

and Section 8 of the Article VI states:

> "The Board shall have exclusive jurisdiction over disputes between the parties growing out of grievances concerning the interpretation or application of this agreement." (Emphasis added).

It is manifest that Special Board of Adjustment No. 570 is the proper industrial forum for shop craft subcontracting disputes. That the Rock Island raised this matter after the Employees had docketed this case with this Board, is not novel. The Rock Island was not privy to the Employees' choice until after the fact; and that the Carrier did not immediately challenge such choice on jurisdictional grounds does not preclude that argument being raised before this Division. (Second Division Awards: 5939 - Dugan; 6086 - McGovern; 6534 - Lieberman; 6641 - Zumas; 7951 - Van Wart). Despite the Majority's erroneous catagorization of this matter as "an incidental issue", that the Employees assert a violation of the classification rule, does not warrant the Majority ignoring the Rock Island's jurisdictional argument in this regard.

On the merits, there was no evidence of the Carrier deliberately evading its contractual obligation, yet that is what the Majority concludes. Nor was there any evidence that the Carrier was doing something that had not been done in the past. Finally, there was evidence that even if Carrier's action was improper, only 15% of the work was done on the leased track, and 85% was

done on Heinz property and under the control of the H. J. Heinz Co., and not the Carrier. Yet, the claim asserted was substantially sustained without regard to these factors.

On the basis of the foregoing, we dissent.

P. V. Varga

J. M. Fagnani

D. M. Lefkow

J. E. Mason

J. R. O'Connell