Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11225
SECOND DIVISION Docket No. 10955-T
2-B&O-CM'87

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(
(The Baltimore & Ohio Railroad Company

Dispute: Claim of Employes:

1. That the Baltimore and Ohio Railroad Company violated the contractual rights of Claimant, Carman H. G. Ely, M & K Junction, Rowlesburg, WV, depriving him of work which accrues to the carmen craft by virtue of Rule 144 1/2 of the controlling Agreement, whereas Carrier placed Claimant Ely in furloughed status, and henceforth have continuously allowed others, with no contractual right to do so, to perform his work, coupling, inspection and testing, and in so allowing, Carrier is in violation of Rule 29 of the controlling Agreement, as well.

2. That accordingly, Carrier be ordered to compensate Claimant herein for all time lost as a result of such violation, i.e., this instant claim, two (2) hours and forty (40) minutes as per Call Rule 4 of the controlling Agreement.

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.

As third party in interest, the United Transportation Union was advised of the pendency of this case, but chose not to file a Submission with the Division.

The Claimant was employed as the sole Carman at the Carrier's M & K Junction, Rowlesburg, W.V., when his position was abolished on November 21, 1982, allegedly due to adverse business conditions. On June 9, 1983, a train arrived at M & K Junction and picked up eighteen carloads of coal. The train crew did the necessary coupling, testing, and inspecting and the train departed.

On August 7, 1983, the Organization filed a Claim contesting the Carrier's assignment to the regular train crew of the duties of coupling the air hoses between the cars and of inspecting and testing the air brake system. The Organization claimed that this is Carman's work. Although Claimant was furloughed on the Claim date, the Organization made the Claim on his behalf because he held the seniority rights to any Carman position at the site.

The Carrier responded asserting that the train in question had been in the yard on the Claim date for less than 25 minutes, and there was insufficient work to justify employing a Carman at the site. Furthermore, according to the Carrier, the work in question is not the exclusive property of the Carmen. Lastly, the Carrier argued that Rule 144 1/2 of the controlling Agreement would not guarantee this work to a Carman, since it applies only if a Carman is on duty at the time the work is done.

The Parties eventually agreed to a joint check to determine how much of this work was going on at the Claim site. The Parties disagreed over the results of this joint check, however, and eventually the Claim proceeded to this forum.

At this point the Carrier objects for the first time, to the jurisdiction of this Board. Rule 144 1/2(f) of the Agreement between the Parties specifies that if a dispute under this Rule is not settled by Agreement after a joint check, it shall be handled under Section 3, Second of the Railway Labor Act. That Section of the Act assigns the resolution of certain disputes to Public Law Boards, rather than to this Board.

The Organization contends that the Carrier has not raised this issue previously, did not raise it even in its written submission to the Board and therefore should not be permitted to raise it for the first time on oral argument. The Carrier argues that a jurisdictional issue can be raised at any time.

This Board concurs that generally a jurisdictional issue may be raised at any time. However, Section 3, Second permits either party to return a dispute from a Public Law Board to the jurisdiction of this Board, with ninety days Notice to the other party. Although neither Party specifically addressed the jurisdictional issue in their correspondence with each other prior to this Hearing, the Board is of the opinion that the Organization's Notice to the Carrier that it intended to pursue relief in this forum was sufficient to trigger the optional forum provision of Section 3, Second. Because the Carrier did not object to this jurisdiction, it acquiesced in the Organization's choice, and should not be allowed to change its mind at this late date. Therefore the Board concludes that it has jurisdiction over this dispute.

The Board concludes however, that the Claim must be denied. Rule 144 1/2(a) assigns the inspecting and testing of air brakes and the related coupling of air hose incidental to such inspection to the Carmen, only if there is a Carman on duty. The Parties agree that there was no Carman on duty during the shift in question.

However, the Organization argues that the Carrier cannot create a Carman vacancy arbitrarily and then allow employees other than Carmen to peform Carmen's work. Clearly, certain provisions of Rule 144 1/2 prevent the elimination of Carmen positions "unless there is not sufficient work to justify employing a carman."

Thus, the original elimination of Claimant's position is the real nub of the dispute here. The Organization filed 84 additional Claims regarding Carmen work being performed at this yard since the elimination of the position. By letter dated September 24, 1984 the parties concurred to hold those Claims in abeyance pending final disposition of the instant test case. And in a letter written after the joint check, the Organization included quite a bit of data concerning the number of railroad cars that had been loaded at area mines over the past several years.

However, this data is not adequate by itself to prove that there is sufficient work to employ a Carman at this site. The Carrier adopts the standard that the Organization must prove that an average of more than four hours per day of work exists in order to meet the requirement that there be sufficient work to justify employing one Carman. Other Awards have required that there be enough work to employ one Carman full-time on a shift. (Second Division Award No. 10742.) No matter which standard we adopt the Organization has failed to meet its burden.

Furthermore, the data presented by the Organization is too remote. It does not reveal how many of the cars loaded at these mines passed through this yard; nor does it reveal whether Carmen duties were necessitated, or how much time they required.

Lastly, the results of the joint check apparently were inconclusive. Neither Party has presented any evidence actually emerging from the joint check itself. If the Organization objected to the Carrier's method of participating in the joint check, as its Intra-Organization correspondence suggests, it has not directly confronted the Carrier on this point, or presented evidence to the Board on this point.

Therefore, for all the reasons above, the Board concludes that the Organization has not met its burden of proof.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 18th day of March 1987.

CARRIER MEMBERS'
CONCURRING AND DISSENTING OPINION
TO
AWARD 11225; DOCKET 10955-T
(Referee Lamont E. Stallworth)

By historical practice, when a Referee submits his proposed Award to this Board for adoption, if the claim is denied or dismissed, the Carrier Members move for its adoption. Contrariwise, if the claim is sustained, the Labor Members move for its adoption. This is one of those rare exceptions where, although the claim was denied, the Labor Members moved for its adoption, because we refused to do so.

Rule 144 1/2 of the Parties' Agreement (December 4, 1975 National Agreement) reads in relevant part as follows:

> "(f) Any dispute as to whether or not there is sufficient work to justify employing a carman under the provisions of this Article shall be handled as follows:
>
> At the request of the General Chairman of Carmen the parties will undertake a joint check of the work done. If the dispute is not resolved by agreement, it shall be handled under the provisions of Section 3, Second, of the Railway Labor Act, as amended, and pending disposition of the dispute, the railroad may proceed with or continue its determination." (Emphasis supplied)

As the Award points out commencing with the fourth paragraph on Page 2 thereof, the Board's jurisdiction was initially challenged during oral argument. We do not find it necessary to cite all of the Awards of this Board which have held that jurisdictional issues can be raised for the first time at the Board level, or at any time whatever in the proceedings. However, we do invite attention to Third Division Awards 20832, 20165, 19527, and Awards cited therein. In this regard, the Referee found that

> "This Board concurs that generally a jurisdictional issue may be raised at any time."

The Referee concluded that Rule 144 1/2 (f)

> "...specifies that if a dispute under this Rule is not settled by Agreement after a joint check, it shall be handled under Section, 3, Second of the Railway Labor Act. That Section of the Act assigns the resolution of certain disputes to Public Law Boards, rather than to this Board." (Emphasis added)

While the Majority properly recognized that Second Division Awards 8619, 8410, 8286, 8129, 6086, 5667 and Third Division Awards 23193, 23043, 18577, among others, stand for the proposition that this Board is without jurisdiction to issue awards when exclusive jurisdiction to resolve disputes under certain circumstances has been granted to other forums, the Referee in an apparent effort to afford the Claimants their day in Court, embraced the Labor Member's novel, if not bizarre position concerning the intent of the below-quoted paragraph in the Railway Labor Act.

> "§153. National Railroad Adjustment Board
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> Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards
>
> Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board." (Emphasis added)

Although the Referee, as previously noted, acknowledged that generally a jurisdictional issue may be raised at any time, based on the foregoing, he erroneously concluded that

> "...Section 3, Second permits either party to return a dispute from a Public Law Board to the jurisdiction of this Board, with ninety days Notice to the other party. ...[T]he Organization's Notice to the Carrier that it intended to pursue relief in this forum was sufficient to trigger the optional forum provision of Section 3, Second. Because the Carrier did not object to this jurisdiction, it acquiesced in the Organization's choice, and should not be allowed to change its mind at this late date." (Emphasis added)

The Referee's understanding of the above-quoted paragraph of the Railway Labor Act is wrong for several reasons. At the outset, and perhaps most importantly, the Referee seriously erred in finding that a party may unilaterally remove a dispute pending before a "Public Law Board" to this Board after providing 90 days' notice. The 90-day provision refers specifically to a dispute pending before a "system, group, or regional board of adjustment." The Act does not provide for removal of disputes pending before "Public Law Boards" which were initially provided for when the second paragraph of Section 153 Second was added by enactment of Public Law 89-456 on June 20, 1966.

Secondly, this Board has held time and time again that a Carrier is under no obligation to perfect a claim against itself. Even a perfunctory reading of the involved agreement provision shows the Parties removed any unresolved disputes following a joint check from the jurisdiction of this Board. Once the Parties have mutually agreed to the establishment of certain procedures and machinery to resolve disputes and specifically

removed this Board from assuming jurisdiction, this Board has no alternative other than to dismiss the claim. Contrary to the opinion of the Referee, the Agreement makes no provision for an "optional forum." The one and only procedure established by the Parties for resolving such disputes must be respected. The Referee's reliance upon the heretofore quoted provision of the Railway Labor Act to conclude that this Board had jurisdiction of this dispute is misguided. The claim should have been dismissed rather than denied.

For the foregoing reasons, we register our concurring and dissenting opinion.

Michael C. Lesnik
M. C. Lesnik

Martin W. Fingerhut
M. W. Fingerhut

Robert L Hicks
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P. V. Varga
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