Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28838
Docket No. MW-27452
91-3-86-3-696

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Portland Terminal Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Burlington Northern Railroad) to dismantle, rehabilitate and construct trackage at Guilds Lake Yard beginning July 15, 1985 (System File BMWE 503).

(2) The Carrier also violated the Agreement when it did not give the General Chairman proper advance written notice of its intention to contract said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Sectionman A. C. Johnson, L. D. Hubbard, M.A. Bradford, R. J. Lewis, S. Blacknall, D. E. Woodruff, M. J. McGuire, D. Taylor, R. S. Mendez, G. L. Harrison and B. J. Lewis shall each '*** be paid at his applicable Sectionman straight time rate an equal proportionate share of the total man-hours consumed by the fifteen (15) Burlington Northern Sectionmen (Trackmen) performing the work in question; that Mr. C. F. Johnson be allowed at his applicable Truck Operator straight time rate, pay in an amount equivalent to the total hours consumed by the three (3) Burlington Northern Truck Operators performing the work in question; that Mr. G. Kasahara be allowed at his applicable Section Foreman straight time rate, pay in an amount equivalent to the total hours consumed by the one (1) Burlington Northern Foreman performing the work in question; that Mr. R. P. Niiranen be allowed at his applicable Assistant Foreman straight time rate, pay in an amount equivalent to the total hours consumed by the one (1) Burlington Northern Assistant Foreman performing the work in question; and that Mr. P. E. Holland be allowed at his applicable Operator straight time rate, pay in an amount equivalent to the total hours consumed by the eight (8) Burlington Northern Operators performing the work in question. This CLaim in behalf of these employees, which is to continue until said violation of the Agreement ceases to exist, is to compensate said employees for the enormous loss of work opportunity being suffered."

FINDINGS:

The Third 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.

This dispute involves the alleged subcontracting of track work to the employees of another railroad, instead of assigning the work to the Claimants, who are trackmen and foremen for the Carrier. The work occurred on land located in the Carrier's Guild Lakes Yard.

The Carrier asserts that it did not violate the Agreement because it had leased the property on which the work was performed to the Burlington Northern Railroad. According to the Carrier, the Burlington Northern first leased the land in the 1950's for the purpose of constructing and operating a facility for handling intermodal equipment. Over the years Burlington Northern has expanded the facility and leased additional land from the Carrier, including the additional sixteen (16) acres on which the work in question here occurred.

According to the Carrier, once it leased the property to the other Carrier, it had no control over what work was performed. The Organization asserts, however, that there was no actual lease, and that even if there were a lease, the land leased was an integral part of the yard and the Carrier benefited from the work performed. The Organization suggests that the alleged lease of the premises to another Carrier is a way for the Carrier to circumvent using its own employees to perform the track work.

At the Hearing before this Board, the Carrier raised for the first time the objection that this issue is not properly before the Board. According to the Carrier, this is not a typical contracting out situation in which the Carrier pays another non-railroad company to perform work on its equipment or facilities or to perform other services which were formerly or normally performed by its employees. Instead, the situation here, according to the Carrier, is one in which there is a coordination between two railroads. Because a coordination is at issue, the Carrier contends, the Washington Job Protection Agreement applies, and this Board is without jurisdiction to decide the issue.

The Board concurs that if the issue falls under the Washington Job Protection Agreement, it does not have jurisdiction over the complaint. Furthermore, the fact that this issue was not raised on the property is not controlling because if this Board does not have jurisdiction it may not adjudicate the case. Third Division Award 27103. A jurisdictional issue may be raised at any juncture in the proceedings.

Under the Washington Job Protection Agreement a coordination is defined as:

> "Joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."
>
> WJA, Section 2(a).

The Board concludes that the situation described by the Parties in this case, if it were proven, would constitute a coordination under the WJPA. As the Carrier points out, this is not a typical subcontracting situation. The Carrier did not pay any money to have the work done. Instead the Carrier allegedly leased the property to the Burlington Northern which had the work performed. The Organization urges that the Carrier benefited from this work, which was performed on an integral part of its yard. The Organization also suggests that the use of the Burlington Northern was a way for the Carrier to circumvent using its own employees to do work from which it derived a benefit.

These arguments suggest a situation in which two railroads have pooled facilities or operations formerly performed by each separately. The Carrier claims that another railroad has control over the area, facilities and operations in question. The Organization contends that the Carrier still retains control and gains a substantial benefit from the work performed by the other railroad's employees. Whether this is true, the transaction as characterized by the Organization is more like a coordination than a typical subcontracting situation. Therefore, the Board concludes that it does not have jurisdiction over the issue and the Claim should be dismissed for lack of jurisdiction.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.

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THIRD DIVISION

LABOR MEMBER'S DISSENT
TO
AWARD 28838, DOCKET MW-27452
(Referee Stallworth)

The Referee's discussion to dismiss this docket supports the adage that one should "Never let the facts stand in the way of a good decision". The facts in this case are straight forward in that it was a contracting out of work dispute between this Carrier and this Organization. During the handling on the property, the parties discussed the appropriate rules and the Carrier raised the defense that it had leased the property to another Carrier where the work was done. The Organization challenged the lease but the Carrier failed to present a copy of same during the handling on the property. Nevertheless, the Majority apparently not only gave credence to the Carrier's assertion that a lease existed, but that the alleged lease was a "coordination" agreement. In this connection, the Carrier presented a one (1) page document entitled "TEMPORARY AGREEMENT COVERING ADVANCE RIGHT OF ENTRY AND OCCUPANCY". However, inasmuch as said document was never presented during the handling of this dispute on the property, it can only be viewed as new evidence not properly before the Board.

With respect to the "coordination" argument, such was not made during the handling on the property <u>nor</u> in its submission, <u>nor</u> in its rebuttal submission to this Board. Instead, this issue was first raised by the Carrier Member in panel discussion with this Referee. During the panel discussion before this Referee, the Carrier Member argued that this was a coordination between two railroads, that the Washington Job Protection Agreement applied and, consequently, this Board did not have jurisdiction to decide the issue. The Referee then found that "The Board concludes that the situation described by the Parties in this case, if it were proven, would constitute a coordination under the WJPA. ***" **Then, without any evidence whatsoever,** the Referee held that "These arguments suggest a situation in which two railroads have pooled facilities or operations formerly performed by each separately." **The salient point here is that this record is totally devoid of any evidence that a "coordination" occurred.**

In order for carriers to actuate a "coordination", a notice must be provided as stipulated in Section 4 which, for ready reference, reads:

> "Each carrier contemplating a coordination shall give at least ninety (90) day written notice of such intended coordination by posting a notice on bulletin boards convenient to the interest employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice."

Since no evidence of a coordination is in this record and since the Carrier involved here did not serve notice as required by Section 4, apparently no coordination was anticipated, negotiated or consummated. Obviously, the Carrier Member's arguments that Carrier's actions in this docket was the result of a coordination begs the question of reasonableness and more dramatically begs this Board's concurrence in a totally unsubstantiated and clearly unsupportable position.

This award is not based on evidence, is not factually correct and therefore, palpably erroneous. Therefore, I dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member