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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36685
Docket No. CL-36396
03-3-00-3-571

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Intermodal Terminals, Inc. (Fruit Growers Express)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (FG99-009)
that:

The following claim is hereby presented to the Company in behalf of
Claimant Mr. M. S. Fickell.

- (a) The Carrier violated the Clerks' Rules Agreement effective July 1, 1979, particularly Rules 1, 24, 40 and other rules, when it assigned and permitted an employee of Trans International to perform the duties of Gate Clerk by inspecting, writing the necessary documents and presenting to the driver for movement of outbound K-Line chassis and containers on June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29 and 30, 1999, hours 7:00 a.m. to 3:00 p.m., located at the Trail-Van Terminal, Columbus, Ohio, and failed to call and use Claimant Mr. M. S. Fickell to perform this work on dates listed.
- (b) Claimant Mr. M. S. Fickell be allowed eight (8) hours pay at the appropriate punitive rate of pay for each day June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29 and 30, 1999 on account of this violation.
- (c) Claimant is qualified, available and should have been called and used to perform this work.

- (d) This claim has been presented in accordance with Rule 45 and must be allowed."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

An understanding of the chronology of events leading to this claim is essential to the proper determination of this matter. The instant claim was filed on July 9, 1999 under the terms of Agreement No. TN-01-98 dated November 2, 1998, which became effective on June 1, 1999. Agreement No. TN-01-98 was entered into by TCU, CSX Intermodal Terminals, Inc. Fruit Growers Express Company ("CITI" or "FGE") and other related corporate entities prior to the Conrail acquisition by Norfolk Southern and CSX.

Among other things, Agreement No. TN-01-98 specified in pertinent part:

"Section 1.

- (a) Employees who, pursuant to the rundown procedures in the Implementing Agreement, select positions at former CRC Intermodal terminals acquired by CSXT at West Springfield, MA (former CRC Roster 1); South Kearney, NJ (former CRC Roster 4); Buffalo, NY (former CRC Roster 10); Columbus, OH (former CRC Roster 16); East St. Louis, IL (former CRC Roster 23); and Detroit,

MI (former CRC Roster 19), will on split date become employees of the Fruit Growers Express Company (FGE). Such employees will be covered by a Collective Bargaining Agreement negotiated between FGE and TCU, which will be comprised of the former Conrail Clerical Collective Bargaining Agreement dated July 1, 1979, as amended, and the 1982 C&O Job Stabilization Agreement (as amended). These employees will continue to be covered by the Railroad Retirement Act (RRA) while they are employed by Fruit Growers Express Company (FGE).

In the event that FGE ceases to act as the employer of subject employees, or is hereafter removed from RRA coverage; it is agreed that the parties signatory hereto shall arrange for transfer of the work performed to another employer covered by the RRA; such employer to be bound by the provisions of this Agreement as though a primary signatory thereto; with subject employees to follow the work.

b) Terminal Company and TCU have negotiated a collective bargaining agreement, to be comprised of the former Conrail Clerical Collective Bargaining Agreement dated July 1, 1979, as amended, and the 1982 C&O Job Stabilization Agreement (as amended). Such agreement will cover employees hired after split date to perform gate inspection, tie down, yard inventory, and office clerical work at the aforementioned locations.

(c) A separate seniority district will be established for each Terminal location operated by FGE and/or Terminal Company and seniority rosters will be prepared as provided in Rule 16 of the new collective bargaining agreement.

* * *

Section 5.

This confirms that certain work referred to in Item No. 1(a) of this Agreement is, in whole or part, currently performed by outside contractors at the following locations; Boston, MA (Beacon Park); North Bergen, NJ; Syracuse, NY; Worchester, MA; Chicago, IL (63rd Street); Cleveland, OH; Indianapolis, IN; West Springfield, MA; South Kearney, NJ; Buffalo, NY; Columbus OH; East St. Louis, IL; and Detroit, MI.

In the event Terminal Company terminates its arrangements with said outside contractors and hires its own employees to perform work which is acknowledged to be consistent with that described in Item No. 1(a) as accruing to the TCU represented employees of the Terminal Company (at some unspecified date subsequent to Split Date), such employees will be covered under the scope of the agreement."

The instant claim for dates in June 1999 is a "pilot claim" for a number of other identical claims filed since June 1, 1999 up to the present time. Except for the dates and the named Claimant, the instant claim, filed on July 9, 1999 for work performed on various dates during the month of June 1999 following the effective date of Agreement No. TN-01-98, supra, is identical to a claim filed by the Organization against Conrail some five years earlier for work performed on the date of August 25, 1994, under the "positions and work" Scope Rule of the Conrail/TCU Agreement. By the terms of a Claims Settlement Letter-Agreement of May 11, 2001, between TCU, CSX and NS that August 25, 1994 claim ("CK-2213") was one of several unresolved claims referable to arbitration "for a decision on the merits only . . . [t]he railroads will incur no additional financial liability."

While the instant claim for the post-June 1, 1999 occurrences was awaiting arbitration before the Board, the claim for August 25, 1994 ("CK-2213") was sustained by Award 61 of Public Law Board No. 6040 (Arbitrator Marx). In a May 24, 2001 decision, Public Law Board No. 6040 held in Award 61, as follows:

"The Carrier in 1994 expanded its truck trailer storage and service operation at its TrailVan Terminal, Columbus, Ohio, acquiring additional space. Thereafter, the Carrier entered into a contract with an outside firm (Trans - International) whose employees were directed to inspect truck trailers and containers prior to leaving the facility. Reports of such inspection were given to Gate Clerks, who entered such data into computer records. Trans-International employees performed their work on the property of the Trail Van Terminal.

The Claimant is a Gate clerk. The Organization argues that the carrier violated the Agreement's Scope Rule when it "permitted employees of an outside company to commence making on-going inspections of trailers and containers to ascertain what, if any, damage the trailers and containers have before they depart Carrier's property".

*** * ***

There is no dispute that computer entry of resulting data was and continued to be performed by Gate Clerks. Further, the organization recognizes that a vehicle driver, for obvious purposes, will inspect the condition of the trailer and containers he is transporting. From the record, it is apparent that this differs from the inspection and reports for which Trans-International was contracted.

*** * ***

In contending that the Trans-International work is identical to that previously performed by non-Carrier drivers, the Carrier is making an affirmative defense. There is, however, no offer of supporting documentation to demonstrate this.

The conclusion must therefore be reached that gate or postgate inspections on Carrier premises is inappropriately assigned to those not covered by the Clerical Agreement.

The parties agreed that the Board, if it sustains the claim, will limit itself to a resolution of the merits of the dispute, but without monetary remedy. The Award will so provide.”

The Organization maintains that the above-quoted holding of Award 61 by Public Law Board No. 6090 regarding the claim for August 25, 1994 is res judicata and dispositive of the instant “pilot claim” for dates on and after June 1, 1999. We disagree because the decision in Award 61 by Public Law Board No. 6090 manifestly is based solely on the Conrail “positions and work” Scope Rule, without reference to the existence of the above-quoted provisions of the November 2, 1998 Agreement, which had become effective June 1, 1999. Thus, while it should be considered res judicata insofar as it decides the issue under the TCU/Conrail Agreement as it was applied on Conrail on August 25, 1994, its failure to take into account the impact of the November 2, 1998 Agreement No. TN-01-98 means it lacks the identity of Parties and contract language which would give it colorable authoritative value for post-June 1, 1999 application of the governing Agreement between TCU and CSX Intermodal Terminals, Inc. (Fruit Growers Express).

A more persuasive precedent involving these same Parties is found in Third Division Award 36108, wherein the Third Division, citing the express language of §§ 1 and 5 of the November 2, 1998 Agreement No. TN-01-98, supra, held: “Pursuant to Section 1(b) of the November 2, 1998 Agreement, the former Conrail Scope Rule governs clerical work on this property unless, as stated above, the Scope Rule has been changed by other terms in the November 2, 1998 Agreement.”

In deciding Award 36108, which involved “the work of inputting loading and unloading information from the Oasis System into the CATS RF work order Subsystem,” the Board quite properly disclaimed any intent to decide the issue concerning the work which was the subject matter of Public Law Board No. 6090 Award 61, to wit: “the Board specifically finds that work consisting of gate inspections and completing trailer damage exception reports is not within the ambit of this claim.” Therefore, contrary to the assertions of the Carrier in the instant

matter, denial Award 36108 lacks the identity of subject matter or issue which would make it dispositive per se of the instant claim. Nonetheless, after carefully considering the voluminous record in this case, we conclude that Award 36108 is persuasive authority for a denial Award in the instant case. We come to that conclusion not as a matter of res judicata or stare decisis, but because the following well-reasoned analysis therein, concerning the supervening impact of the November 2, 1998 Agreement on post-June 1, 1999 interpretation and application of the former Conrail "positions and work" Scope Rule at specified locations referenced in Section 5 of Agreement No. TN-01-98 applies also to the gate inspection/damage exception report work at Columbus, Ohio, which is the subject matter of the instant pilot claim:

"Because an outside contractor performed the disputed work herein at Columbus, Ohio, on and before the effective date of the November 2, 1998 Agreement, Section 5 of that Agreement permits outside contractors to continue to perform the work. The work remains with the outside contractor unless or until the Carrier terminates its arrangements with the outside contractor. In essence, Section 5 provides that the clerical craft has a potential, conditional entitlement to certain work in the future. The work will accrue to the clerical craft only if the Carrier terminates its arrangement with the outside contractor and decides to hire its own employees to perform the work. If these two conditions occur, Section 5 provides that such hired employees will be covered by the Agreement and thus, the work will then come within the confines of the "positions and work" Scope Rule. However, until both conditions occur, if they ever occur, the Carrier is free to retain an outside contractor to perform the work in dispute."

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of August 2003.