

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37562
Docket No. CL-37725
05-3-03-3-167**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

**“Claim of the System Committee of the Organization (GL-12981)
that:**

- (1) The Carrier violated the terms of the Agreement, specifically Rule 1 and the Customer Service Center Agreement, when on November 18, 2001, it allowed Data Processing Clerk R. D. Keefauver located at Busch (Jacksonville), Florida to issue the plant switch on cars to be placed at customer C. C. Bulk Liquid Transfer Company located at Blount Island, Florida. This was allowed in lieu of allowing this work to be performed by the clerical employees here in the Customer Service Center at Jacksonville, Florida.**
- (2) Carrier shall now be required to compensate the Senior Available Employee, extra or unassigned in preference, eight (8) hours at time and one-half at the applicable rate of \$150.18, for the above violation.”**

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.

This is certainly not a case of "first impression." The issue in this case has been considered at length and with admirable clarity by previous Boards cited in the body of this Award. Moreover, the history of this and similar cases is laid out in great detail in Third Division Award 37227.

The instant case arose when the Organization filed its January 2, 2002 claim alleging that a Data Processing Clerk at Busch, Florida, (part of the former SCL territory) had used the IIPS (Industry Inventory Plant Switch) computer function to issue plant switch instructions to a train crew at Blount Island, Florida, on November 18, 2001. In its claim the Organization asserted that the task should have been performed by a Clerk in the Customer Service Center (CSC) in Jacksonville, Florida.

The Carrier denied the claim by letter dated March 6, 2002 on three grounds: first, that the work performed by Data Processing Clerk R. D. Keefauver has always been performed by that position at that location; second, the claim was defective on its face, because the Organization failed to specify a Claimant by name; and third, that even if, arguendo, there was a violation, the amount of compensation claimed was disproportionate to the actual time spent. At no time in its denial did the Carrier deny that the work had been performed by Clerk Keefauver as alleged in the Organization's claim.

The Organization asserts that in this case it has met the "three tests" set out in Third Division Award 37227. In that Award, the Board held the following:

"There are a number of claims presently before the Board and also held in abeyance pending the outcome of this Award and the other similar disputes. Therefore, as a guide to the parties for determining these disputes, in order to prevail the Organization

must show that the disputed work: (1) was performed by someone other than a CSR at the CSC; (2) was performed by a Clerk at the specific location in dispute before the 1991 Implementing Agreement took effect; and (3) was performed by a CSR at the CSC after the 1991 Implementing Agreement took effect.”

Specifically, the Organization notes that the Carrier, in its first denial of the claim, admitted that Clerk Keefauver performed the work at Busch, Florida, on November 18, 2001. Moreover, the Carrier also acknowledged that “this work has always been performed by this position at this location.” With respect to the final of the three tests, the Organization points out that the 1999 Job Bulletin of the Data Processing Clerk position at Busch Yard does not list the disputed duties - eight years after the CSC was established - while the 1991 Position Description for Customer Service Representatives includes the duties “make patron notifications; process switching and other work orders.”

Finally, the Organization maintains that this and other Boards have held that where it is a simple matter of reviewing employment records to ascertain, for example, which employees were on duty when the alleged violation occurred, claims that do not specify a named Claimant, if otherwise sufficient, are not procedurally defective. On that threshold point the Board concurs. Accordingly, we may reach the merits of this matter.

The Board reviewed the entire record in this case, including the preceding Awards cited by both parties to the dispute. We find that the Organization has, in fact met the three tests set forth by Referee Benn. The Board concurs with the Board’s finding in Third Division Award 37345 that Third Division Award 37227, which followed the reasoning set forth in Public Law Board No. 5782, Awards 1 through 5, is dispositive in this and similar cases. Moreover, we see no reason to diverge from the pattern established in those Awards, i.e., unless the Organization can show that the time spent at the disputed task was other than de minimus - which it has not in this case - the established remedy is \$15.00 per incident.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 4

Award No. 37562
Docket No. CL-37725
05-3-03-3-167

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of July 2005.

LABOR MEMBER'S RESPONSE

TO

CARRIER MEMBERS' DISSENT

TO

THIRD DIVISION AWARD 37562, DOCKET CL-37725
(REFEREE ELIZABETH C. WESMAN)

After reading the Minority Dissent, we find it necessary to set the record straight. The Minority Dissent in its third paragraph states:

“ . . . It is well founded that jurisdictional arguments may be raised at any time. Although the Carrier Member brought forth the jurisdictional argument to the Board in writing well before the decision was rendered in this case, the Neutral Member inexplicably elected to completely ignore the argument in deliberation and decision . . . “ (underlining our emphasis)

After first stating it had the right to raise a jurisdictional argument, the Minority then concludes in its final paragraph that the Labor Member in his Special Concurring Opinion inappropriately elected to quote from its correspondence to the Neutral Member wherein it set forth its jurisdictional argument and additionally that he should not have attached the actual correspondence. That argument is classic “sour grapes”.

The Minority is correct when it states it can raise a jurisdictional argument anytime before a Neutral renders their decision, but contrary to its suggestion, such correspondence is not confidential nor is there anything inappropriate about quoting from it or attaching it to a Concurring Opinion. The attachment of the correspondence merely verifies the accuracy of the quotations made therein.

Contrary to what the Minority Dissent states, the record is clear the Carrier Member made an extensive jurisdictional argument which was rejected because the Neutral resolved the dispute based upon its merits.

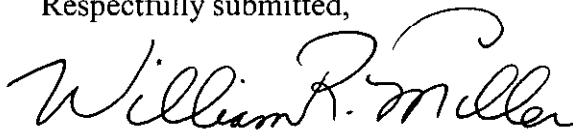
Turning to the merits the Carrier suggests that TCU did not meet the "three tests" set out by Referee Edwin H. Benn in Third Division Award 37227. That argument is incorrect and contrary to the record. In the Carrier's letter of August 15, 2002 (TCU Exhibit "G" pg. 1, para. 5) the Senior Director, Labor Relations stated: "For this reason the duties and the bulletin of an aggrieved employee are critical to determining if there was a violation, to whom the work accrued and who was the claimant." The Neutral correctly ascertained from that argument that the disputed duties were not assigned to the clerical position at Busch, Florida, whereas they were assigned to the Customer Service Representatives at Jacksonville, Florida, therefore accruing to those positions. Furthermore, the Neutral specifically stated in the final paragraph the following:

"... We find that the Organization has, in fact met the three tests set forth by Referee Benn. The Board concurs with the Board's finding in Third Division Award 37345 that Third Division Award 37227, which followed the reasoning set forth in Public Law Board No. 5782, Awards 1 through 5, is dispositive in this and similar cases . . . "

The record is clear the Carrier Member made his argument before Referee Wesman that she did not have jurisdiction to hear the case. That argument has been rejected by an experienced Neutral as the case was resolved on its merits following the previous decisions of Arbitrator R.E. Dennis, E.H. Benn and G.E. Wallin. Bottom line is the Carrier has now lost the same issue before four different Neutrals.

The Minority Dissent does not detract from Third Division Award 37562 that resolved the jurisdictional issue raised by the Carrier and is precedential on the subject. The Referee properly took jurisdiction of the claim and correctly sustained it.

Respectfully submitted,

A handwritten signature in cursive script that reads "William R. Miller". The signature is written in dark ink and is positioned above the printed name.

William R. Miller
NRAB Labor Member
August 15, 2005

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37562
Docket CL-37725**

(Referee Elizabeth C. Wesman)

Third Division Award 37562 dealt with the issue of performance of various computer functions such as issuing plant switch instructions to a train crew at Busch, Florida.

We dissent on both jurisdictional and merit issues regarding this Award.

Jurisdictionally, it is well settled that the Board lacks subject matter jurisdiction over disputes involving New York Dock Implementing Agreements. (See Third Division Awards 29317, 29660, 35360 and 37138 in support of the Carrier's position in this regard). Disputes requiring the interpretation or application of a New York Dock Implementing Agreement must be handled in accordance with the exclusive arbitration procedures set forth in New York Dock. It is well founded that jurisdictional arguments may be raised at any time. Although the Carrier Member brought forth the jurisdictional argument to the Board's attention in writing well before the decision was rendered in this case, the Neutral Member inexplicably elected to completely ignore the argument in deliberation and decision. The Neutral Member also failed to address why the NRAB is the proper forum for the dispute or even acknowledge the written correspondence on this issue. Contrary to the Labor Member's Special Concurring Opinion, the Neutral Member did not reject the jurisdictional argument in the Award. Moreover, her failure to do so cannot be cured by the Special Concurring Opinion of the Organization's partisan member of the Board.

Rather, the Neutral Member elected to bypass the threshold jurisdictional issue and apply the interpretation of the 1991 Implementing Agreement of Referee Edwin H. Benn by using the "three test" process set forth in Third Division Award 37227 to determine whether there was an Agreement violation. Two of the three steps in making that determination involve the 1991 New York Dock Implementing Agreement. Moreover, the Neutral Member ignores the fact that Referee Benn also lacked the subject matter jurisdiction to issue Award 37227.

**CARRIER MEMBERS' DISSENT TO
THIRD DIVISION AWARD 37562**

Page 2

Further, we note that the Organization's alternative argument in the Benn cases, that the Carrier somehow compromised its jurisdictional rights because it progressed the cases to the NRAB and failed to proffer its jurisdictional argument until after the Awards were issued, is not applicable here. Here, TCU progressed the case to the Board, and the jurisdictional arguments were presented long before the decision was rendered. Yet the Neutral Member has elected to simply ignore a major threshold argument presented and failed to address the issue in any way in the Award.

Turning to the merits, even if the Board had jurisdiction, which it does not, it failed to recognize the foundation upon which the work was transferred to Jacksonville, Florida. When the Carrier established its Centralized Customer Service Center in Jacksonville, it served notice on TCU of what work was being transferred. That New York Dock Notice dated October 25, 1990, a copy of which is attached hereto and was identified in the record as Carrier Exhibit No. 1, specifically states, ". . . the Carrier will transfer, consolidate, coordinate and/or otherwise mechanize various yard, agency and customer service functions performed by employees at (or under the jurisdiction of) the Transportation Service Centers (TSCs) shown on the Attachment to this notification . . ." (Emphasis added).

The Neutral Member elected to ignore the listing of locations absorbed into the Jacksonville Centralized Customer Service Center. The Notice shows the Jacksonville TSC and the seven specific Sub-locations under that jurisdiction. The satellite location of Busch, Florida, is conspicuously absent from the list. This was the very reason the Carrier argued as shown in the Award that, "this work has always been performed by this position at this location." There was no reason to state otherwise. Busch Yard was not part of the consolidation and coordination. Consequently, the work remained with the Data Processing Clerk (who is also represented by TCU) throughout the years. His work did not come to the Centralized Customer Service Center. Stated differently, unlike the records in most of the Benn Awards, the record here contained no statements from Customer Service Representatives documenting that the work was performed at the Centralized Customer Service Center after the 1991 Implementing Agreement took effect. Hence, the "three test" standard established by Referee Benn was not met in this case.



500 Water Street
Jacksonville, FL 32202

Labor Relations Department

October 25, 1990

File: 2135

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. C. H. Brockett, General Chairman
Transportation Communications
International Union
5885 Richard Street
Jacksonville, Florida 32216

Dear Sir:

Please consider this as appropriate notification as required in Appendix III, Section 4 of the so-called "New York Dock" employee protective benefits and conditions that commencing on, or about, April 1, 1991 and continuing thereafter on a progressive basis, the Carrier will transfer, consolidate, coordinate and/or otherwise mechanize various yard, agency and customer service functions performed by employees at (or under the jurisdiction of) the Transportation Service Centers (TSCs) shown on the Attachment to this notification, and in the Centralized Waybiling Center at Jacksonville, for the purpose of establishing a Centralized Customer Service Center ("CCSC") which will be located on the roster covering District No. 18 at Jacksonville, Florida.

This notification contemplates that inasmuch as the functions now performed in the Centralized Waybiling operations at Jacksonville, Florida are directly related to those functions that will be performed on a consolidated basis in the CCSC at Jacksonville, on April 1, 1990 all operations now performed in the Centralized Waybiling Center, located on Seniority District No. 7 (former SBD) at Jacksonville, Florida will be transferred to, and consolidated with, CCSC clerical functions that are (or will be) performed on the roster of Seniority District No. 18 (former SBD) at Jacksonville, Florida.

Simultaneously, commencing on, or about, April 1, 1991, and continuing progressively on the basis that is presently anticipated and shown in the Attachment, clerical work and functions presently associated with the foregoing activities that are performed at the locations indicated will be transferred, consolidated, otherwise mechanized, and thereafter performed on a coordinated basis by employees located in the CCSC operation, District No. 18 (former SBD) at Jacksonville, Florida. Of course, technological, operational, or other forces over which the Carrier has no control may affect this anticipated schedule.

An estimate of the Clerical positions affected by this matter, based on present forces, is incorporated in the Attachment to this Notice. A copy of this notice is being posted so as to be accessible to employees affected.

CARRIER'S EXHIBIT, 1

**CARRIER MEMBERS' DISSENT TO
THIRD DIVISION AWARD 37562
Page 3**

One final comment is necessary. Not only did the Labor Member elect to extensively quote from correspondence between the partisan members of the Board and the Neutral Member, he inappropriately elected to attach the correspondence to his Special Concurring Opinion. Suffice to say, such correspondence was not handled on the property and obviously was not part of the official record of the case.

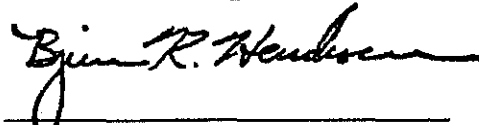
We dissent.



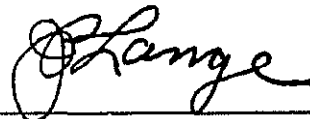
Michael C. Lesnik



Martin W. Fingerhut



Bjarne R. Henderson



John P. Lange

Attachment

August 12, 2005

Similar to the anticipated schedule, several factors may impact on this estimate of affect on positions such as technological and/or operational changes or considerations, other initiatives which may be undertaken by the Carrier that is outside the purview of this notification at a particular location involved in this matter, or local/state political decisions impacting upon the manner in which we anticipate performing certain functions that are involved herein.

Also, please consider this as notification as required by the provisions of the Employee Protective Agreements in effect on the former properties covered by our schedule agreements with you (except former B&O) that should the positions being transferred from the various locations to the coordinated CCSC operation at Jacksonville not be accommodated under the terms of the implementing agreement reached by the parties under the requirements of "New York Dock", or should a need for Clerical employees arise at other locations as a result of the progressive implementation of this matter that are not accommodated under the auspices of any "New York Dock" arrangements applicable to the parties, it is the Carrier's intent to fill any such need which may remain through the utilization of "off-in-force" protected employees under the terms and conditions of the Employee Protective Agreements in a manner as contemplated therein.

We suggest that a meeting be held commencing at 10:00 AM on Thursday, November 1, 1991 in the Labor Relations Department Conference Room located on the 7th Floor of the 500 Water Street Building at Jacksonville, and that our meetings continue thereafter for the purpose of arriving at the appropriate arrangements providing for the selection of Forces from all employees involved on a basis accepted as appropriate for application in this particular case.

Will you please advise if the time and date suggested for meeting is agreeable with you.

Yours truly,

ATTACHMENT
TO CARRIER'S NOTICE OF OCTOBER 25, 1990
(Sheet 1 of 3)

Controlling TSC and Sub-Location	Estimated Implementation Date	Estimate Of Employee Affect Based On Present Forces		
		Estimated Number Of Positions To Be:		
		Abolished	Retained At Location	Total Etab. In GCSC At Jacksonville
Jacksonville TSC	April-May, 1991	47	20	47
Attapulugus, GA		1	0	
Chattahoochee, FL		2	0	
Newberry, FL		1	0	
Palatka, FL.		1	0	
Tallahassee, FL.		4	4	
Wildwood, FL.		1	3	
Perry, FL.		1	0	
Tampa TSC	June-July 1991	40	25	46
Bradenton, FL.		1	0	
Miami, FL.		0	1	
Mulberry, FL.		7	5	
Orlando, FL.		9	3	
Winston, FL.		8	4	
Waycross TSC	August, 1991	29	17	24
Albany, GA.		3	0	
Brunswick, GA		0	1	
Fernandina, FL		2	1	
Thomasville, GA		2	4	
Savannah TSC	October, 1991	22	10	31
Charleston, SC		13	6	
Columbia, SC		2	9	
Estill, SC		2	0	
Lugoff, SC		2	0	
Macon, GA		4	0	
Vidalia, GA		5	0	
Hamlet TSC	November, 1991	21	15	31
Charlotte, NC		6	5	
Florence, SC		13	10	
Georgetown, SC		0	2	
Monroe, NC		1	1	
Orangeburg, SC		0	1	
Raleigh, NC		4	1	
Sumter, SC		2	1	
Wilmington, NC		6	3	

ATTACHMENT
TO CARRIER'S NOTICE OF OCTOBER 25, 1990
(Sheet 3 of 3)

Controlling TSC and Sub-Location	Estimated Implementation Date	Estimate Of Employee Affect Based On Present Forces		
		Estimated Number Of Positions To Be:		
		Abolished	Retained At Location	Total Etab. In GCSC At Jacksonville
Birmingham TSC	May-June, 1992	42	19	43
Bainbridge, GA		3	1	
Calera, AL		2	1	
Decatur, AL		4	5	
Dothan, AL		3	4	
Gadsden, AL		4	1	
Guntersville, AL		1	0	
Montgomery, AL		25	10	
Saffold, GA		0	2	
Selma, AL		1	0	
Nashville TSC	August, 1992	29	24	23
Bruceton, TN		4	5	
Memphis, TN		4	5	
N. Johnsville TN		0	2	
Murfreesboro, TN		0	1	
Louisville TSC	September-October, 1992	39	17	33
Bowling Green, KY		3	1	
Brandenburg, KY		1	0	
Obannon, KY		0	1	
Owensboro, KY		2	0	
Skiliman, KY		1	1	
Corbin TSC	November, 1992	17	11	23
Bostic, NC		0	4	
Dante, KY		0	4	
Erwin, TN		1	4	
Hazard, KY		0	5	
Kingsport, TN		17	6	
Knoxville, TN		2	4	
Lexington, KY		1	1	
Loyall, KY		1	4	
Pennington, VA		1	0	
Ravenna, KY		9	7	

NOTE: Above are estimates based on existing factors as of date of notice. Scheduling and force estimates may be impacted by unforeseen technological, operational, or political factors beyond control of the Carrier; or by other initiatives undertaken by the Carrier during the period covered above.

CARRIER'S TRANSIT

PAGE 5

- 4 -

ATTACHMENT
TO CARRIER'S NOTICE OF OCTOBER 25, 1990
(Sheet No. 2 of 3)

Controlling TSC and Sub-Location	Estimated Implementation Date	Estimate Of Employee Affect Based On Present Forces		
		Estimated Number Of Positions To Be:		
		Abolished	Retained At Location	Total Estab. In ECSC At Jacksonville
Rocky Mount TSC	December, 1991	20	8	15
Fayetteville, NC		1	3	
Goldsboro, NC		1	0	
Greenville, NC		1	0	
Hopewell, VA		2	1	
Petersburg, VA		2	0	
Portsmouth, VA		2	5	
Atlanta TSC	February-March, 1992	31	28	42
Athens, GA		1	0	
Augusta, GA		14	5	
Bridgeport, AL		0	1	
Cartersville, GA		2	1	
Catawba, SC		2	1	
Chattanooga, TN		10	6	
College Park, GA		1	0	
Cordale, GA		2	1	
Etowah, TN		4	4	
Fitzgerald, GA		3	1	
Fulco, GA		1	0	
Greenville, SC		1	0	
LaGrange, GA		1	1	
Laurans, SC		1	0	
Manchester, GA		2	5	
Spartansburg, SC		1	0	
Sylacauga, AL		1	0	
Talladega, AL		2	0	
Greenwood, AL		3	4	
Cedartown, GA		1	0	
Mobile TSC	April, 1992	16	12	22
Flomaton, AL		2	4	
New Orleans, LA		8	6	
Pascagoula, MS		0	1	
Pensacola, FL		4	4	

CARRIER'S EXHIBIT 1

PAGE 4