Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31760
Docket No. CL-37062
06-3-02-3-26

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Union that:

(Carrier File 6(01-0352)
(TCU File 1.2614(18)SCL)

1. Carrier violated the Agreement(s) on November 4 and 11, 2000, when it allowed General Clerk, G. H. Lawrence to make Yard Inventory Adjustments (YSIA) on train/track/cut at Florence, South Carolina. This violation was performed in lieu of allowing this work to be performed by the Clerical employes in the Customer Service Center at Jacksonville, Florida.

2. Carrier shall now compensate the Senior Available Employe, extra or unassigned in preference, eight (8) hours at the applicable rate of $147.14 or the punitive rate, if applicable, 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.

Aside from the Labor Member and the Carrier Member of the Board, also present at the Referee Hearing in this matter were representatives of TCIU and the Carrier. In matters related to this case affecting the Yardmasters outside of this proceeding, the UTU – Yardmasters Department was permitted to participate and make presentations.

In these claims, TCIU alleges that the Carrier assigned a Genera1 Clerk at Florence, South Carolina, to make Yard Inventory Adjustments ("YSIA") rather than assigning that work to Clerks at the Customer Service Center ("CSC") in Jacksonville, Florida.

A. Background

In Third Division Award 37227, the Board with this Referee participating discussed at length the history and Awards concerning the establishment and transfer of Clerks' work from the field to the CSC for performance by TCIU represented employees, including those in the classification of Customer Service Representative ("CSR"). The analysis in Third Division Award 37227 examined the specific work and location in dispute, both before and after the establishment of the CSC. In that Award. the Board held:

> "There are a number of claims presently before the Board and also held in abeyance pending 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. If the Organization makes those showings, it has sufficiently shown that the work was transferred from the disputed location to the CSC under the terms

of the 1991 Implementing Agreement and was improperly performed by someone other than a CSR at the CSC. Successful showings by the Organization in that regard will result in those claims being sustained with a remedy requiring the Carrier to pay $15.00 per claim.?'

Third Division Award 37227 issued on October 27, 2004. On the same day, the Board issued Third Division Awards 37228, 37229, 37230, 37231, 37232, 37233, 37234, 37235 and 37236 (also with this Referee participating) which followed Third Division Award 37227, sustaining or denying claims, dependent on the facts of those cases and application of the three-part test set forth in Third Division Award 37227. Subsequent to the issuance of those Awards, other Awards (with Referees other than this Referee) relied upon the rationale of the October 27, 2004 Awards, applying the three-part test and partially sustaining claims in a similar fashion. See Third Division Awards 37345, 37346 and 37562.

I?. The Carrier's Jurisdictional Argument

The Carrier now argues that the Board lacks jurisdiction to resolve these disputes.

As more fully explained in Third Division Award 37227, the genesis of the multitude of cases brought to the Board concerning performance of work at the CSC started on October 25, 1990 when the Carrier served a New York Dock notice informing TCIU of its intent to transfer and consolidate certain clerical functions from the field to the CSC in Jacksonville, Florida. The January 29, 1991 Implementing Agreement followed, which was then followed by the December 1, 1994 Agreement. The December 1, 1994 Agreement resolved disputes concerning the performance of certain computer functions, with the parties further agreeing to disagree over which employees would perform other functions at various locations. In the December 1, 1994 Agreement, the parties agreed to ". . . submit to binding arbitration . . . to adjudicate these remaining disputes." Pursuant to that Agreement to arbitrate, on February 14, 1997, Public Law Board No. 5782, Awards 1-5 decided those matters. The claims underlying Third Division Awards 37227, 37228, 37229, 37230, 37231, 37232, 37233, 37234, 37235 and 37236 then followed, again, with the Board deciding those cases on October 27, 2004.

When the Board issued Third Division Award 37227 and the cases following that Award on October 27, 2004 and for the first time in the long history running from the genesis of the disputes through the issuance of our October 27, 2004 Awards (14 years), a Dissent to those Awards was filed on behalf of the Carrier on February 11, 2005 asserting that there was ". . . a mistake of the parties" and the ". . . Board lacked subject matter jurisdiction in this case.. . ." According to the Dissent, the ". . . mistake of the parties . . ." was that ". . . neither the Carrier nor TCIU had the right or authority under the 1991 Implementing Agreement to transfer work performed by Yardmasters to Jacksonville in order to give it to Clerks." Now, according to the Carrier, in this case "[d]isputes 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" rather than having the underlying claims decided by the Board.

We reject the Carrier's jurisdictional argument.

First, in this case (and even though it was not raised on the property in the handling of the dispute between the parties as the matter was progressed to this Board), for the first time, the Carrier now raises its jurisdictional argument to the Board. Indeed, in the Dissent to Third Division Award 37227 and the related cases, the Carrier Members conceded that ". . . the participants did not raise this threshold jurisdictional issue. . . ." The Carrier's failure to raise its jurisdictional argument on the property prevented the parties from having the opportunity to make their record and arguments for the Board's consideration. Further, the Carrier's failure to raise that argument on the property prevented the parties from considering the strength or weakness of their positions on the issue as a catalyst for potential settlement of the dispute by the parties. Even more significant is that the Carrier's jurisdictional argument was not previously raised before the Board in the presentation of the prior cases over the long period of time these disputes have existed. The advocates before the Board in the cases in which Awards issued on October 27, 2004, therefore, did not even have the opportunity to address the Carrier's jurisdictional argument. Finally, the Carrier came to the Board with these cases not as the Respondent, but rather as the Petitioner and now belatedly asserts that the Board lacks jurisdiction to decide them.

Thus, at first look and as far as this case is concerned, the Carrier's argument that the Board lacks jurisdiction is "new argument" and should not be considered. See Third Division Award 29909:

> ". . . Thus, it is new argument which, under our Rules, cannot be considered. This Board has long subscribed to the premise that matters that have not been dealt with on the property cannot be advanced for the first time before this Board.. . ."

However, notwithstanding the Carrier's failure to raise the jurisdictional argument on the property or before the Board in the past and our inclination to not even consider the Carrier's argument because it is new argument coupled with basic principles of estoppel, we are nevertheless obligated to now consider the Carrier's jurisdictional argument. See Third Division Award 29909, supra, concerning new argument:

> ". . . However, an exception to this general proposition is in place. And that exception concerns challenges to jurisdiction. Jurisdictional challenges, as opposed to procedural challenges, may be raised at any time. A failure to raise jurisdictional challenges on the property does not foreclose their consideration after the matter is placed before the Board. In this regard see Third Division Award 27575, wherein the Board stated:
>
> > The Organization's contention that the jurisdictional issue cannot be considered because it is new argument raised for the first time before this Board is not well-founded. This Board has over the years held that jurisdictional issues can be raised at any time. See Third Division Awards 8886, 9189, 10956, 16786, 19527, 20165 and 20832."

In short, if we do not have jurisdiction over the subject matter of a dispute (as opposed to a procedural jurisdictional argument) the Board cannot confer jurisdiction upon itself where no jurisdiction exists. If a substantive jurisdictional argument is raised-even if raised in this case after so many years and after so many Awards -we are still obligated to consider that argument.

Second, and from a general perspective, the Carrier argues that this is a New York Dock dispute (over which the Board does not have jurisdiction) and not a dispute arising from the parties' Collective Bargaining Agreement (the TCIU/SCL Schedule Agreement) concerning the assignment of work in violation of that

Agreement or Agreements flowing from the parties' collective bargaining relationship (over which the Board does have jurisdiction). In general terms then, the Carrier argues that the claims are not arbitrable - i.e., they do not arise from the parties' Collective Bargaining Agreements concerning terms and conditions of the employees' employment to be resolved under the parties' dispute resolution procedures, which are to be finally resolved by the Board pursuant to the Railway Labor Act, 45 U.S.C. Section 1.53, First (i), (k) and (m):

> "(i) The disputes between an employee or group 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 . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board.. . .
>
> * * *
>
> (k) . . . [which] shall have authority to . . . conduct hearings and make findings upon disputes.. . .
>
> * * *
>
> (m) . . . and the awards shall he final and binding upon both parties to the dispute.. . ."

Again considering the Carrier's argument from the general perspective, it has long been held that disputes arising under Collective Bargaining Agreements are presumptively arbitrable and should not be dismissed unless it can be said "with positive assurance" that the dispute is not covered under the grievance/arbitration provisions of the parties' Collective Bargaining Agreement. See Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960):

> ". . . [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that

> covers the asserted dispute. Doubts should be resolved in favor of coverage."

See also, Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 377 (1974) ("In the Steelworkers trilogy, this Court enunciated the now well-known presumption of arbitrability of labor disputes"); Wright v. Universal Maritime Service Corp., et al., 525 U.S. 70, 77 (1998) (referring to "the presumption of arbitrability this Court has found.. . ") and (id. at 78):

> "In collective bargaining agreements, we have said, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not he denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."' AT&T Technologies Inc. v. Communications Workers, 475 U. S. 643, 650 (1986) (quoting Warrior & Gulf, supra at 582-583)."

Because claims are presumptively arbitrable, the burden is on the Carrier to rebut that presumption. Here, that means that the Carrier must show "with positive assurance" that the work assignment disputes at issue do not arise from the parties' Collective Bargaining Agreements which TCIU can bring to the Board for resolution. The Carrier cannot make that showing.

In very simple and basic terms, the claims in these cases are work assignment disputes which TCIU asserts are violations of the Scope Rule of the TCIU/SCL Schedule Agreement; the December 1, 1994 Agreement (which resolved similar disputes at various locations or established arbitration of disputes) and the precedent set by Public Law Board No. 5782, Awards 1-5 issued pursuant to the December 1, 1994 Agreement. Indeed, although disagreeing with the merits of TCIU's position on the underlying work assignment disputes, in its Submission at 11-12 in this case, the Carrier essentially concedes that these disputes at least arise from those Agreements and precedent:

> "Position of Carrier:
>
> It is the Carrier's position that:

1. TCU failed to fulfill its burden to demonstrate that the Scope Rule of the TCU/SCL Schedule Agreement was violated.

* * *

3. The **Agreement** dated December 1, 1994 supports the Carrier's position, and precedent cited by TCU has no relevance in this case."

Thus, these claims are classic ". . disputes between an employee or group 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 . . . " which the Board has resolved since its inception under the Railway Labor **Act,** 45 **U.S.C.** Section 153 First, supra. It therefore cannot be **said** "with positive assurance" that the Board lacks jurisdiction to decide these disputes.

At best, from the Carrier's perspective and giving the Carrier the benefit of the doubt, its jurisdictional *argument is* debatable. However, a "debatable" argument that the Board lacks jurisdiction does not rise to the level of rebutting a presumption through a showing "with positive assurance" that the Board lacks jurisdiction.

Third, given the statutory language quoted above, the Scope Rule of the TCIU/SCL Schedule Agreement, the December 1, 1994 Agreement which resolved similar disputes at various locations and sent others to arbitration, the precedent set by Public Law Board No. 5782, Awards 1-5 issued pursuant to the December 1, 1994 Agreement, and considering the types of work assignment claims in these matters, we have no doubt that the Board has jurisdiction to resolve these disputes. These are disputes over work assignments which TCIU asserts belong to employees covered by the TCIU/SCL Schedule Agreement at the CSC, with the Carrier and the UTU –Yardmasters Department disputing those assertions. While we do not mean to diminish the importance of these particular disputes **(there** *are* many and they go to the heart of the Carrier's ability to efficiently run its operations as well as the rights of employees represented by TCIU or UTU to perform the work) these claims are run-of-the-mill disputes arising from Collective Bargaining Agreements which this Division, other Divisions of the Board, Public Law Boards and Special Boards of Adjustment have had to resolve in thousands of decisions. These run-of-the-mill disputes make up a sizeable portion of the caseload that the Board and

related Boards resolve in the performance of those tribunals' statutory function *under* the Railway Labor Act to maintain labor peace and stability in the railroad industry. Again, these cases are ". . . disputes between an employee or group 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 . . . referred . . . to the appropriate division of the Adjustment Board.. . [which] shall have authority to . . . conduct hearings and make findings upon disputes.. . and the awards shall be final and binding upon both parties to the dispute." 45 U.S.C. Section 153, First(i), (k) and (m).

Fourth, if there was any doubt about the Board's jurisdiction over these disputes, that doubt has now been substantially diminished, if not extinguished.

On February 11, 2005 - the same day that the Carrier Members filed their Dissents to Third Division Awards 37227, 37228, 37229, 37230, 37231, 37232, 37233, 37234, 37235 and 37236 - the Carrier filed suit in federal court seeking to vacate those Awards. TCIU later counter-claimed to enforce the eight Awards in which it prevailed and the Yardmasters, through the UTU, intervened. CSX Transportation, Inc. v. Transportation-Communications International Union, et al., Civil Action No. DKC-20050419 (D. Md.). The Carrier also later filed a separate action to vacate Referee Wesman's Award in Third Division Award 37562. The two federal court actions were consolidated.

By Memorandum Opinion dated February 6, 2006, Judge Deborah Chasanow found that the Board had jurisdiction to resolve the disputes and enforced the Awards. CSX Transportation, Inc. v. Transportation-Communications International Union, supra, slip. op. at 13, 28-32 [footnotes omitted]:

> ". . . Because CSXT certainly has not properly invoked the jurisdiction of the STB [Surface Transportation Board] by claiming an exemption from NRAB's authority, it has waived its right to invoke the New York Dock provisions as to these disputes. Moreover, the court also concludes that the NRAB did not act in excess of its jurisdiction. The court, thus, will deny CSXT's request to vacate the awards.
>
> * * *

> There is no question that the NRAB has jurisdiction to decide 'minor disputes' related to existing CBAs [collective bargaining agreements], if the STB provisions do not apply. The controversies at issue here are garden-variety 'minor disputes' regarding work assignment. See Slocum v. Del., L. & W.R. Co., 339 U.S. 239, 244 (1950) (holding that the NRAB had exclusive jurisdiction to resolve a work assignment dispute involving existing CBAs). Hence, their resolution is well within both the basic jurisdiction and the expertise of the ARAB. The mere fact that Arbitrator Benn referenced the 1991 Implementing Agreement to inform his analysis of whether the CBA was violated does not necessarily mean that the merger itself is being challenged, and it is not sufficient to strip the NRAB's jurisdiction of this CBA dispute, or supercede the application of the RLA. To the extent that Arbitrator Benn and Arbitrator Wesman found that the work was transferred and that CSXT violated the CBA, they had jurisdiction to make this determination and any merit-based challenge is foreclosed under the limited review powers of this court.
>
> * * *
>
> CSXT has not argued, either below or in this court, that where these particular tasks are performed is a critical factor that could impede the merger or the CSC consolidation. In fact, there is no question that both the merger and the consolidation of clerical functions at the CSC have already taken place. CSXT's arguments, taken to their logical end, would mean that no CBA work assignment dispute involving transferred work could ever be brought before the NRAB following a merger, because each would always require reference to. an Implementing Agreement. This surely was not the result that Congress envisioned; at some point, the STB's purview over a merger must end. . . .
>
> Moreover, the New York Dock arbitration provisions were put in place for the railroad to avoid lengthy NRAB processes concerning major disputes and to facilitate efficient mergers and consolidations; none of these policy rationales are relevant here. The parties have already gone through the NRAB process and resolution has been

reached. And, perhaps more importantly, the consolidation has already been accomplished. Conversely, the policies underlying the RLA confirm that the NRAB was the proper forum for resolution of these matters. These disputes are exactly the type of "daily grievances" that the Supreme Court emvisioned when it stated that the NRAB's effectiveness in ensuring stability in the railroad industry depends on the "finality of its determinations." Union Pac. R.R. Co. v. Sheehan, 439 U.S. 89, 94 (1978). See also Ry. Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R. Co., 845 F.2d 420, 423 (3rd Cir. 1988), reversed on other grounds, Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n, 491 U.S. 490 (1989) (stating that the judiciary "must reconcile [the RLA and the ICA] as much as possible and attempt to reach a result that will produce the minimum possible conflict with congressional intent."); Landis v. Burlington N. R.R. Co., 930 F.2d 748, 752 (9th Cir. 1991) (noting the ICC's policy of refraining from unnecessarily interfering in labor relations).

Work assignment disputes involving the CSC have been resolved under the NRAB process since 1994. Moreover, all but one of the current disputes were voluntarily submitted by CSXT to the NRAB. CSXT is unhappy with the outcome reached and now, under the guise of a jurisdictional argument, is attempting to obtain a different result. CSXT's assertions are without merit and ultimately lose sight of both the ICA's statutory text and its purpose. Accordingly, CSXT's petition to vacate the arbitration awards will be denied."

In conclusion on the Carrier's jurisdictional argument, if the Carrier's argument is examined from the general perspective that claims are presumptively arbitrable unless it can be shown "with positive assurance" that the disputes are not covered by the dispute resolution process in the parties' Collective Bargaining Agreements and ultimately by the Board, we find that the Carrier has not shown "with positive assurance" that the Board lacks jurisdiction over these claims. If the Carrier's jurisdictional argument is squarely addressed and considered on its merits, we have no doubt that the Board has jurisdiction to consider the merits of the claims, and we so find.

The Carrier's jurisdictional argument is therefore without merit.

C. The UTU's Position On Behalf Of The Yardmasters

While this particular dispute is a "Clerk to Clerk" dispute - i.e., a Clerk in the field performed the disputed work which TCIU asserts should have been performed by a CSR at the CSC in Jacksonville, this is the lead case for a number of claims, some of which involve allegations that Yardmasters in the field improperly performed work that should have been performed by CSRs at the CSC. Because this is the lead case, we will also address the UTU's position concerning Yardmasters.

In Third Division Award 37227, we discussed the ramifications that Award had on the Carrier and the Yardmasters:

> "We are cognizant of the effect that this Award concerning the assignment of work has on the Yardmasters. Given the UTU's intervention and participation in this proceeding - and if the conditions discussed in this Award are met requiring a finding that disputed work belongs to CSRs at the CSC - the UTU on behalf of the Yardmasters now have no valid claim to that disputed work. See Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157, 165 (1,966) ('The Adjustment Board . . . can, with its experience and common sense, handle this entire dispute in a satisfactory manner in a single proceeding.').
>
> Because of the number of disputes that have arisen as a result of the transfer of operations from the field to the CSC, we stress the need for stability and thus the need to follow the Awards in Public Law Board No. 5782. To do otherwise would be an invitation to chaos and would invite the tiling of voluminous numbers of claims for simple day-to-day operations because of conflicting decisions from Public Law Boards or the Board. We are fully cognizant of the ramifications that the conclusions of Public Law Board No. 5782, this Award and the Awards that follow this Award, may have on the Carrier's use of personnel (be they Clerks, Yardmasters or others) at locations other than the CSC to perform various routine functions on the Carrier's sophisticated computerized yard inventory operations. We further recognize that this Award may well cause

> operational difficulties for the Carrier. However, as shown by the 1991 Implementing Agreement, the parties reached agreement on how the operations would be transferred from the field to the CSC and disputes arose under that language which were settled and/or arbitrated. The parties and those impacted by those actions must live with those results until such time as the bargaining process - and not proceedings before the Board - determines otherwise."

The UTU was given the opportunity to participate as an interested Third Party in interest in Third Division Award 37227 and those other proceedings in that group of Awards affecting Yardmasters. However, the UTLJ was not allowed to participate as a full party with the right to attend any executive sessions and vote with the Board. The UTLJ has been given that same status in the present set of cases which affect the Yardmasters (i.e., TCIU's claims concerning assignments of work to Yardmasters which TCIU asserts should have been performed by CSRs at the CSC).

The Board's limitation on the UTU's participation in these proceedings was affirmed in CSX Transportation, Inc. v. Transportation-Communications International Union, supra. After discussing the statutory provisions of the Railway Labor Act and concluding that the statute did not give the UTU the full status it sought (see slip. op. at 32-33), the Court stated (id. at 33, 35):

> "'Where there is a labor dispute regarding work assignment that involves a second union, the Supreme Court has held that the second union must be given 'an opportunity to be beard.' Transp.-Commc'n Employees Union v. Union Pac. R.R., 385 U.S. 157, 165 (1966). Following the Supreme Court's decision, the Fourth Circuit held: '[U]ntil the record discloses whether the Board has taken into account the competing union's contract, it cannot be said that the mandate of Transportation-Communication has been complied with.' Bhd. of R.R. Signalmen of Am. v. S. Ry. Co., 380 F.2d 59, 65 (4th Cir. 1967).
>
> UTU points to no statutory provision that the NRAB violated.. . .
>
> * * *

> UTU was given 'an opportunity to be heard.' See Transp.-Commc'n Employees Union v. Union Pac. R.R., 385 U.S. at 165. UTU was provided with notice of the work assignment disputes and was allowed to file a written submission and to make oral arguments at the arbitration bearing. Moreover, in accordance with Brotherhood of Railroad Signalmen, 380 F.2d at 65, Arbitrator Benn expressly considered UTU's CBA in his analysis and noted the impact the awards would **have** on UTU and its members.. . ."

See also First Division Award 26087 where the UTU's similar request for full participation and voting status was denied in a dispute arising between the Brotherhood of Locomotive Engineers and the Union Pacific Railroad Company in that matter. As here, while not allowed to participate in executive sessions or vote with the Board, the UTU was allowed to present arguments on the merits of the dispute.

The UTU argues through the declaration, of retired Vice President D. R. Carver that it was not offered third party status in Public **Law** Board No. 5782 which decided Awards adverse **to the UTU's** interests. The UTU argues that it was not aware of those Awards from 1997 and because it was not offered Third Party status in those matters, it cannot **be** bound by them. That being the case, the UTU's argument is that Third Division Award 37227 and those Awards following it which relied upon the Awards of Public Law Board No. 5782 are palpably in error and not binding on the UTU.

We disagree.

First, it is unfortunate if, as it contends, the UTU was not offered Third Party status in Public Law Board No. 5782. But the UTU's argument here is really one of claimed ignorance of what was going on with the massive consolidation and shifting of work from the field to the CSC in Jacksonville which started in 1,990. **We are** unable to **find** that with that massive movement of work - much of which was performed by employees at the same locations in the field where Yardmasters performed their work - that the Yardmasters bad absolutely no idea that work was being shifted from the field and that the Yardmasters ability to continue to perform certain work might be impacted by such a large consolidation.

Second, by the same token, the Awards of Public Law Boards are not kept secret. While at the time the Awards from Public Law Board No. 5782 issued in 1997, those types of Awards may not have been uniformly published at a centralized location (similar decisions are now easily found in places such as the National Mediation Board's website or websites maintained by various Organizations, including the UTU), the Awards from Public Law Board No. 5782 were in the public domain. Coupled with the activity from the massive consolidation and shifting of work from the field to the CSC in Jacksonville, we are unable to accept the proposition that the UTU was in total ignorance of the awarding of work to CSRs at the CSC by those Awards. We take particular note of Public Law Board No, 5782, Awards 2, 3, 4 and 5 which found violations where Yardmasters were performing work instead of CSRs at the CSC. After those Awards issued and when those Yardmasters were no longer allowed to perform the work discussed in those Awards, we highly doubt that the transfer of work as a result of the outcome of those Awards remained unknown to the Yardmasters and hence, the UTU.

Third, if the UTU felt that it was wrongfully deprived of participation in Public Law Board No. 5782, one would have expected that upon learning of the results of that Board's decisions, the UTU would have taken steps to challenge those Awards. But, as we noted in Third Division Award 37227, "[t]he above-discussed Awards in Public Law Board No. 5782 *were* adopted on February 14, 1997 and, until this proceeding, were never challenged by the Carrier or the UTU in any other forum."

The LJTLJ had several options at its disposal. It could have challenged the Awards from Public Law Board No. 5782 in court arguing that it was not given "an opportunity to be heard" before that Board. See CSX Transportation, Inc. v. Transportation-Communications International Union, supra, slip. op. at 32-33 quoted above. Further, the UTU could have pursued claims against the Carrier under the Scope Rule of its Collective Bargaining Agreement with the Carrier and progressed those claims to the Board or established Public Law Boards or Special Boards of Adjustment to decide those claims. However, the UTU chose not to pursue any of those avenues. The UTU effectively slept on its rights and cannot now prevail on an argument that the Awards of Public Law Board No. 5782 should have no effect.

D. The Merits Of This Dispute

There is no dispute that the record in this case shows: (1) that someone other than a CSR at the CSC performed the YSLA function at Florence, South Carolina; (2) that work was performed by a Clerk at Florence prior to the 1991 Implementing Agreement; and (3) that work was performed by a CSR at the CSC after the 1991 Implementing Agreement took effect. Under the three-part test set forth in Third Division Award 37227, TCIU has shown that the work was transferred from Florence to the CSC under the terms of the 1991 Implementing Agreement and was later improperly performed by someone other than a CSR at the CSC in violation of the parties' Collective Bargaining Agreements.

Under the rationale stated in Third Division Award 37227, these claims shall be sustained at the $15.00 requirement.

AWARD

Claim sustained in accordance with the Findings.

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 25th day of April 2006.

CARRIER MEMBERS' DISSENT

TO

THIRD DIVISION AWARDS 37760, 37761, 37762, 37763, 37764, 37765

DOCKETS, CL-37062, CL-37038, CL-37048, CL-37059, CL-37086, CL-37089

(Referee Edwin H. Benn)

These Awards involve the performance of various computer functions, including adjusting yard inventory, at field locations by Clerks and Yardmasters.

We dissent on the ground that the Board lacks the subject matter jurisdiction to decide the claims.

In 1991, the Carrier began coordinating certain clerical computer input work from the field to the Customer Service Center in Jacksonville, Florida, via the 1991 Implementing Agreement. Because this coordination involved work from various former railroads that are now part of CSXT, that Agreement was an Implementing Agreement reached pursuant to, and in satisfaction of, the New York Dock employee protective conditions of the Interstate Commerce Commission, now the Surface Transportation Board ("STB"). Because it is well settled that the NRAB lacks subject matter jurisdiction over dispufes involving the interpretation or application of the New York Dock conditions or implementing agreements reached under them (see, e.g., Third Division Awards 37749, 37138, 35360, 29660 and 29317) the instant claims should have been dismissed without prejudice to the parties' right to refer them to arbitration under Section 11 of New York Dock.

Although the Carrier pointed out this lack of jurisdiction in a timely manner during the arbitration, the Neutral Member rejected this argument for four reasons: (1) the jurisdiction argument was a new argument, since it was not raised on the property or in prior arbitrations involving similar claims; (2) disputes arising under labor agreements are presumptively arbitrable under the Railway Labor Act, and the Carrier did not satisfy its burden of demonstrating with "positive assurance" that the Organization's claims did not arise from labor agreements; (3) disputes over the work assignments af issue were "run-of-the-mill" minor disputes; and (4) a recent District Court decision casts doubt on the Carrier's jurisdiction argument. We address each of these arguments in turn.

First, the Neutral Member criticizes the Carrier at length for not raising the jurisdiction argument previously. This is not the first time, however, and it will not be the last time that a party has mistakenly submitted claims involving the interpretation and application of a New York Dock implementing agreement or

protective conditions to the NRAB, rather than for arbitration pursuant to New York Dock. Over the years, there have been several instances where carriers and organizations (including TCIU) alike have mistakenly submitted such claims to the NRAB. See, e.g., First Division Award 25383; Second Division Award 13265; Third Division Awards 37449 and 35360; as well as Fourth Division Award 4219.

For example, in Third Division Award 37749, TCIU tiled a similar claim with the Board and argued, as it does here, that CSXT violated the terms of the Scope Rule in the applicable Collective Bargaining Agreement by abolishing two clerical 'positions and transferring the work to the Customer Service Center in Jacksonville, Florida. Ironically, TCIU also asserted that any such transfers must be handled pursuant to the New York Dock procedures, consistent with past precedent. Although the jurisdiction issue was not raised on the property; the Board held that, it lacked subject matter jurisdiction over the dispute. The Board reasoned that the "rights and remedies" invoked by TCIU's claims involved possible violations of a New York Dock Agreement, which the Board lacked the jurisdiction to decide.

The above-referenced Awards demonstrate that the submission of a claim to the Board does not relieve the Board of its independent obligation to evaluate whether that claim falls within its jurisdiction -- a fact that the Board itself is forced to concede. As the Board acknowledges, the issue of subject matter jurisdiction is not waivable and may be raised at any time. It also correctly observes that, with respect to the instant dispute concerning subject matter jurisdiction, "the Board cannot confer jurisdiction upon itself where no jurisdiction exists." For these same reasons, the failure of the Carrier to raise the jurisdiction issue in prior arbitrations involving similar claims is irrelevant.

Second, the Board contends that the Carrier has not satisfied its burden of demonstrating with "positive assurance" that TCIU's claims did not arise under the relevant labor Agreements. This "positive assurance" test, however, is a new analysis that is effectively allowing the Board in this case to resolve disputes outside its jurisdiction, contrary to prior Board precedent. As a threshold matter, the Board's analysis is based on a mischaracterization or misunderstanding of the Carrier's arguments. Specifically, the Neutral Member characterized the Carrier's argument as contending that the parties' dispute arises only under the 1991 Implementing Agreement, rather than the parties' Collective Bargaining Agreement, and the claims are not arbitrable. Those characterizations of the Carrier's position, however, are erroneous. In its written Submission, and again during the arbitration, the Carrier maintained that a threshold question presented by TCIU's claims was whether the 1991 Implementing Agreement transferred the disputed work to the Customer Service Center. Only if the answer to this question was answered in the affirmative did one reach the second question of whether there was a violation of the Scope Rule in tbe TCIU/SCL Collective Bargaining Agreement. Thus, the Carrier,

never argued that the Organization's claims did not present any issue under the TCIU/SCL Agreement. Moreover, the Carrier never argued that the Organization's claims are not arbitrable. Rather, it contends that the proper arbitral forum is arbitration under Section 11 of New York Dock, rather than arbitration under Section 3 of the Railway Labor Act, because the Organization's claims require the interpretation and application of both the New York Dock conditions and the 1991 Implementing Agreement.

In any event, the application of a "positive assurance" test in this case is contrary to the Board's statutory authority and precedent. **Under the Neutral** Member's logic, the Board has jurisdiction to decide disputes involving the interpretation or application of New York Dock implementing agreements or conditions if a collective bargaining agreement is also somewhere in the picture. **But** the Neutral Member does not point to any statutory provision, language in New York Dock, or any prior arbitration Awards to support this novel position. **Instead,** the Neutral **Member cites only 45 U.S.C. \$153,** First **(i), (k), and** (m). **That statutory** provision, however, only grants jurisdiction to the NRAB to hear disputes involving the interpretation or application of collective bargaining agreements. New **York Dock** implementing agreements or conditions, however, are plainly **not** collective bargaining agreements. Moreover, as this Board has repeatedly observed, the New York Dock conditions contain their own dispute resolution procedures, This is precisely why all four divisions of the Board have repeatedly held that **the Board** lacks jurisdiction to interpret or apply New York Dock implementing agreements **or** conditions. Moreover, as the Board determined in Third Division Award 37749, where "it [is] not clear that this dispute can be resolved solely by reference to the [collective bargaining] [a]greement, it is not of the kind or character contemplated by the statute as appropriate for resolution by the Third Division." (Emphasis added).

Further, we note that Section 11 of New York Dock requires that, if the parties cannot settle "any" dispute or controversy with respect to the New York **Dock** conditions or implementing agreements, such disputes or controversies must be referred to arbitration before a Section 11 tribunal. Because the plain language **of** that section broadly requires the submission of "any" dispute, and the Board **itself** found that the Carrier's jurisdiction argument was at least "debateable," it was obligated to dismiss the matter and refer the parties to Section 11 arbitration, rather than attempting to resolve the issue itself.

The Board, however, attempts to evade these issues by characterizing the parties' disputes as involving "run-of-the-mill" minor disputes over work assignments. In doing so, the Neutral Member contends that TCIU asserted violations of the Scope Rule of the TCIU/ SCL Schedule Agreement and the December 1, 1994 Agreement and asserts that CSXT conceded that the disputes

arose from those Agreements. What the Neutral Member omits, however, is the fact that both parties also relied on the 1991 Implementing Agreement to establish their claims and defenses. For example, in its initial claim, the Organization asserted violations of both the 1991 Implementing Agreement and the Scope Rule in the TCIU/SCL Agreement. Moreover, in its written Submission, the Carrier explicitly framed the Statement of Issue as involving whether the performance of the, disputed work violated the Scope Rule and/or the 1991 Implementing Agreement. Furthermore, the Carrier devoted the second section in its argument, entitled "[t]he Memorandum Agreement dated January 19, 1991 was not violated and does not support the claim," to addressing the text of the 1991 Implementing Agreement and explaining why it never transferred the disputed work in the first instance.

The Board's erroneous description of the parties' dispute also ignores another threshold issue in these cases. Prior to the consolidation, the computer work was performed by Yardmasters, Clerks, and other employees. According to the Organization's interpretation of the 1991 Implementing Agreement, that Agreement took work away from Yardmasters and transferred it to Clerks at the Customer Service Center in Jacksonville. However, Article I, Section 4 of New York Dock requires that the UTU-Yardmasters Department be given advance notice and be party to rhe Implementing Agreement before that Agreement could take any work from them and transfer it to another craft. It is undisputed that the UTU-Yardmasters Department was not named in the New York Dock notice served on TCIU that led to the 1991 Implementing Agreement. Nor was it a party to the 1991 Implementing Agreement. Accordingly, neither the Carrier nor TCIU had the right or the authority under the 1991 Implementing Agreement to transfer work performed by Yardmasters to Clerks in Jacksonville. Although TCIU disputed the Carrier's argument, the parties' dispute over whether a New I'ork Dock' implementing agreement could address work affecting another Organization, when that Organization was not a party to the Implementing Agreement, clearly involved the "interpretation, application, or enforcement" within the meaning of Section 11 of the New York Dock conditions. The Board's analysis simply ignores this issue altogether. But that does not alter the conclusion that the parties' dispute was not within the Board's jurisdiction.

Finally, the Board attempts to bolster its "positive assurance" analysis by citing to a recent District Court decision, CSX Transp., Inc. v. Transp. Comm. Int'l Union, 413 F. Supp. 2d 553 (D. Md. 2006). As a preliminary matter, we note that both the Carrier and fhe UTU have appealed this decision to fhe United States Court of Appeals for the Fourth Circuit. In any event, any reliance on this District Court decision ignores the fundamental differences between the instant Awards and the District Court's analysis. As explained above, the Board properly recognized that CSXT's jurisdiction argument is a question of subject matter jurisdiction and, citing prior Third Division Awards, acknowledged that such an argument may be

raised at any time and cannot be waived. In contrast, the District Court rejected those positions and found that the dispute between the parties was not a matter of subject matter jurisdiction, and the argument could be and had been waived. 413 F. Supp. 2d at 563-70. Moreover, the District Court made no effort to reconcile its conclusions with Third Division Awards cited by the Board. Because the District Court's analysis of the Board's jurisdiction was contrary to longstanding Board precedent, the Board's reliance on the District Court's decision was palpably' erroneous.

We dissent.

Michael C. Lesnik

Martin W. Fingerhut

Biarne R. Henderson

John P. Lange

April 25, 2006

LABOR MEMBER'S RESPONSE

TO
CARRIER MEMBER'S DISSENT

OF

THIRD DIVISION AWARDS 37760, 37761, 37762, 37763, 37764 and 37165

DOCKETS CL-37062, CL-37038, CL-37048, CL-37059, CL-37086 and CL-37089

(Referee Edwin H. Benn)

A review of the Carrier's Dissent of the aforementioned Awards smacks of "sour grapes" and reveals nothing more than a regurgitation of arguments previously rejected by three other Neutrals as well as the named Neutral Member.

Absent the fact that there is no merit to any of the arguments offered by the Minority (Dissenters) I take strong exception to its mischaracterization of TCIU's position in recent Third Division Award 37749 set forth on page two of its Dissent. It incorrectly states:

> "Ironically, TCIU also asserted that any such transfer must be handled pursuant to New York Dock procedures, consistent with past precedent. Although the jurisdiction was not raised on the property, the Board held that it lacked subject matter over the dispute."

The Minority opinion did not get its facts correct. In Award 37749, TCIU attempted to establish a New York Dock tribunal, but the Carrier refused. Absent an agreement to establish a NYD tribunal the Organization took that case to the NRAB petitioning the Board to direct the parties to establish a NYD tribunal which it did. A thorough reading of Award 37749 indicates that TCIU's position regarding the NRAB jurisdiction was not an after thought and was set forth on the property which is revealed on page five of the Award wherein the Neutral stated the following:

> "Notwithstanding, they (TCIU) consistently have pled thereafter in terms of violations of New York Dock provisions, maintaining that Article III and VII of the modified C&O Job Stabilization Agreement are inapplicable."

Unlike the facts in Award 37749 the Carrier's jurisdictional argument in the instant cases was never set forth on the property. In previous Awards such as the lead decision on this subject Third Division Award 37227 it wasn't even raised until several months after the Award was issued in the form of a Dissent. However, in this group of

Awards it was raised by the NRAB Carrier Member in a timely fashion to the Neutral at the Hearing and it was properly rejected by him just as Referee E. C. Wesman did in Third Division Award 37562 and the District Court did in its decision CSX Transp., Inc. v. Transp. Comm. Int'l Union, 413 F. Supp. 2d 553 (D. Md. 2006). The Dissenter's jurisdictional argument has no merit.

In closing we reiterate that even though the Carrier does not like the fact that it has lost its jurisdictional arguments and merit arguments its Dissent does not detract from the soundness of the aforementioned Awards which are well reasoned, logical and follow the established precedence on the CSXT properties.

Respectfully submitted,

William R. Miller

William R. Miller
TCU Labor Member, NRAB
April 26, 2006