Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37761
Docket No. CL-37038
06-3-02-3-4

The Third Division consisted of the regular members and in addition Referee Edwin II. 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(00-1191)
(TCU File 1.2313(18)SCL)

1. Carrier violated the Agreement(s) on June 10, 2000, when it allowed D. F. Obryan to update class codes on track TO7 at Patio, Kentucky. This violation was performed in lieu of allowing this work to be performed by 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 $142.66 or the punitive rate, if applicable, for the above violation.

(Carrier File 6(00-1396)
(TCU File 1.2410(18)SCL)

1. Carrier violated the Agreement on August 30, 2000, when it allowed R. F. Obryan to update class codes on track N03. This violation was performed in lieu of allowing this work to be

performed by 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.

In these claims, the Organization alleges that the Carrier assigned a Clerk at Patio, Kentucky, to update, class codes rather than assigning that work to a Customer Service Representative ("CSR") at the Customer Service Center ("CSC") in Jacksonville, Florida.

The background for these claims is set forth in Third Division Awards 37227 and 37760.

As more fully set forth in Third Division Award 37760, the Board has jurisdiction to resolve these claims.

Under the three-part test set forth in Third Division Award 37227, the Organization failed to demonstrate that the disputed work was transferred from Patio 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. The evidence in this record fails to prove that the work was performed by a Clerk at Patio both prior to and after the effective date of the 1991 Implementing Agreement.

The Organization's argument that the work was actually performed at Corbin, Kentucky, does not change the result. The three-part test in Third Division Award 37227 requires that the Organization make the appropriate showings at Patio. The Organization has not done so.

AWARD

Claim denied.

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 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. Berm)

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 disputes 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 but-den of demonstrating with "positive assurance" that the Organization's claims did not arise from labor agreements; (3) disputes over the work assignments at 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 25983; 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, ronsistent 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 anv 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 the 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 al-bitrable. 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 repcatedfy 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 29, 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 UTLJ-Yardmasters Department be given advance notice and be party to the 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 bad 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 York 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 the UTU have appealed this decision to the 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

Bjarne 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 37765

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 jut-isdiction 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 tenns 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 properly. 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