Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38351
Docket No. CL-38927
07-3-05-3-379

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna 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 TCU (GL-13085) that:

The following claim is hereby presented to the company in behalf of Claimants R. Klopfenstein (140-MSG), B. Doeing (101-MSG), F. Neilson (205-MSG), W. Bryant (240-JAN), C. Hampton (300-MSG), M. Thomas (R07-MSG), T. Batey-Wren (999-GXB), and all subsequent incumbents.

(a) The Carrier violated the terms of the CSXT-North Clerical Agreement, particularly Rule 1 – Scope when it allowed Asst. Trainmaster, Trainmasters, Asst. Terminal Superintendents, other CSX management and personnel (if any), as well as outside taxi contractors and contract employees of other crafts (if any), to haul and transport crew working and/or being relieved within the limits of Barr Yard, commencing on February 1, 2004. The transporting of crews assigned at Barr Yard and being relieved at Barr Yard is assigned to the Clerical Employees represented by TCU and accruing to clerical employee under the Scope of the Agreement;

(b) The Carrier shall now allow the incumbents of clerical assignments at Barr Yard on all shifts, 24-hours per day, 7-days per week, their relief employees, replacements and/or successors, 1-hour at the overtime rate of pay calculated on a

daily rate of pay of their respective positions/guarantee in addition to other earnings, if any, for each violation; and

(c) This continuing claim commences on February 1, 2004 and is for each and every subsequent 8-hour shift until this work is returned to the Clerical Craft and employees working under the TCU/CSXT-North Clerical Agreement and the Carrier ceases this violation.

(d) This claim is being presented in accordance with Rule 45 and should 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.

A. Background

The issue before the Board is whether the Carrier violated the Clerk's Agreement beginning on or about February 1, 2004, by using outside contractors not covered by the Agreement to transport train crews to and from the Super 8 Motel located outside the limits of Barr Yard as constructed in 1993 by R. M. Morriss, then Terminal Superintendent of Barr Yard.

Prior to February 1, 2004, the Carrier had contracted with the Days Inn to provide lodging for its train crews. The Days Inn is located within the boundaries set by Morriss in 1993. During the time period covered by the Carrier's contract with the Days Inn, it was undisputed that TCU-represented employees were used to

transport train crews between Barr Yard and the Days Inn lodging facility. In or about the later part of 2003, following a number of complaints from crew members about the Days Inn facility, the Carrier entered into a contract with the Super 8 Motel. The Super 8 Motel is located approximately five miles from Barr Yard, and slightly outside the boundaries set by Morriss in 1993. Once the arrangement with the Super 8 Motel was made, the Carrier began utilizing the services of outside contractors to transport its train crews between Barr Yard and the Super 8 Motel. The decision by the Carrier to utilize outside contractors in lieu of TCU-represented employees resulted in the filing of the instant claim.

B. Public Law Board No. 6290, Award 33

On March 4, 1993 the Carrier and the Organization entered into CSXT Labor Agreement No. 6-146-92 that provided for the transfer of certain clerical work from various locations including Barr Yard. Relevant to the matter before the Board, Paragraph 7 provided:

> "It is further understood and agreed that all work that remains on C & O Seniority Districts, and not specifically named in this Agreement, shall continue to be in and under the C & O General Agreement unless and until otherwise agreed in writing between the Carrier (CSXT) and the General Chairman of the C & O System Board of Adjustment."

Thereafter, the Carrier re-established eight crew hauling positions in Barr Yard for the purpose of transporting train crews to and from their on and off-duty points (within Barr Yard) to a lodging facility. By letter dated August 31, 1993 addressed to "Trainmasters," Terminal Superintendent Morriss advised:

> "When requesting a driver within the limits of Barr Yard. Every effort must be taken to contact a Messenger/Checker. There are 2 drivers per shift 7 days a week. They both have a radio and should be contacted by telephone at #5221 or via the radio.
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> Before you dispatch P.T.I. drivers, every effort must be taken to utilize our Messenger/Checkers. If you use a P.T.I. driver within the yard leave a note for Pfeiffer with the reason.

The limits of Barr Yard will include:

South to I-294
West to Cicero Ave.
North to 123rd Street
East to Torrence Ave."

For approximately three and one-half years following the Morriss letter clerical employees transported train crews to and from their lodging facility which was located within the boundaries set forth by Morriss as noted above. On March 31, 1997, a "Yard Clerk-Messenger" filed a claim contending that the Carrier violated Scope Rule 1 ". . . when it allowed P.T.I., a stranger to the Clerical Agreement, to haul crews within the area reserved to clerical crew haulers (Yard Clerk-Messenger positions) in the vicinity of the Carrier's Barr Yard facility on 3-31-97. The train crew was hauled from Red Roof Inn to the locker room." This action by the Carrier became the subject of a claim that was ultimately resolved by Public Law Board No. 6290, Award 33. In rendering a final determination in favor of the Organization, Referee Muessig relied upon Paragraph 7 of CSXT Labor Agreement No. 6-146-92 and the 1993 letter authored by Morriss.

C. Position of the Parties

The Carrier's Position: In a nut-shell, it is the Carrier's position that the boundaries established by Morriss that described Barr Yard, relied upon by Referee Muessig in Award 33, represent the parameters within which Clerks have claim to transport crews. Accordingly, during the three and one-half years that the Carrier used Clerks to transport train crews to and from their lodging facility, a facility within the bounds established by Morriss, there was neither a complaint nor a claim filed by the Organization. The Carrier, therefore, asserts that the Organization came to accept these boundaries without complaint. The Super 8 Motel with which the Carrier established a contractual relationship in 2004 is outside of these boundaries, and, therefore, outside the parameters relied upon by Referee Muessig in Award 33. Accordingly, the Carrier reserved its right to utilize outside contractors not represented by the Organization for its transportation needs. This contention made by the Carrier is bolstered by the fact that the Organization cannot claim an exclusive right to the work at issue.

The Organization's Position: It is the Organization's position that: (1) the Carrier is attempting to re-litigate the case decided by Referee Muessig in Award 33, (2) the notion of exclusivity of performance of work is not relevant, even though Referee Muessig noted that the Organization did enjoy this right, and (3) the rectangle Morriss drew was not specifically endorsed by Referee Muessig in Award 33. In this regard, the Organization noted that Referee Muessig only cited the importance of the Morriss letter in determining if the work at issue was previously performed by the Organization or by outside contractors. Finally, the Organization asserts that because the nature of the work at issue has not changed, it properly belongs to TCU-represented employees.

DISCUSSION

As an initial note, it is well settled by controlling authority that the Board has no power to impose principles of equity or justice. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute, for to do so would deprive them of the bargain struck. With this principle firmly in place, we now review the relevant facts and authority set forth in the record of this case.

There are four relevant and related factors that must be reviewed in this matter. Those factors are as follows:

1. The Scope Rule – This is a conventional positions and work Rule providing, in very specific terms, that "positions and work covered by this Scope Rule belong to employees covered thereby and shall not be removed therefrom except by agreement between the Highest Designated Officer and the General Chairman."

2. CSXT Labor Agreement No. 6-146-92 at Paragraph 7 which provides in relevant part that "It is further understood and agreed that all work that remains on C & O Seniority Districts, and not specifically named in this Agreement, shall continue to be in and under the C & O General Agreement unless and until otherwise agreed in writing between the Carrier (CSXT) and the General Chairman of the C & O System Board of Adjustment." It is undisputed that the work that

remained included crew hauling as performed by TCU clerical employees as of March 4, 1993.

3. The August 31, 1993 Morriss letter directed that "every effort" must be taken to utilize Messenger/Checkers to perform crew hauling work within the "limits of Barr Yard" as set forth above, and finally

4. The decision of Referee Muessig in Public Law Board No. 6290, Award 33, which was adopted on January 18, 2001.

The relationship between a Memorandum Agreement (here, CSXT Labor Agreement No. 6-146-92) and the Scope Rule (Rule 1) alleged by the Organization to have been violated in the instant matter was explained in on-property Third Division Award 24492 (BRAC vs. C&O) wherein Referee Robert Silagi held:

> "At the outset it should be pointed out that while the Scope Rule is system-wide in application, the Memorandum Agreement is limited to one geographic area. A scope rule does not necessarily classify or describe the work, but the Memorandum Agreement does precisely that. The language of the Memorandum Agreement is clear and unambiguous. The duty to 'transport crews' is tersely stated. No doubt the phrase could be embellished but redundancy would not change its meaning. The same comments are equally pertinent to paragraph 5 of the Memorandum Agreement and to Rule 1(b). No amount of sophistry can change their obvious sense."

Referee Muessig's decision in Award 33 viewed the significance of the Scope Rule and CSXT Labor Agreement No. 6-146-92 in much the same fashion as the Board did in Third Division Award 24492. In this regard, Referee Muessig stated in relevant part that:

> ". . . the Parties entered into a Memorandum Agreement dated March 4, 1993. The Memorandum Agreement provided for the transfer of certain clerical work from various locations including Barr Yard. The Memorandum Agreement and the actions that flowed from it are vital to our conclusions in this dispute.
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> * * *

> On March 19, 1993, the Carrier provided notice to re-establish (emphasis added) five (5) Driver-Janitor and two (2) Relief Clerk-Driver positions effective on May 30, 1993. The preponderance of the assigned duties for these positions involved crew hauling.
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> * * *
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> Obviously, the Carrier could not transfer crew hauling at Barr Yard, because it is an active facility and crews still need to be transported. Just as obviously, the crew hauling took place on a C&O Seniority District. Therefore, Paragraph 7, quoted above is controlling and specifies that the work at issue, crew hauling, would remain under the C&O General Agreement. Simply stated, the Memorandum Agreement supplemented and confirmed that crew hauling remained under the C&O Agreement and would be performed by TCU clerical employees."

It is clear that Referee Muessig's interpretation of Paragraph 7 of CSXT Labor Agreement No. 6-146-92 supports the conclusion that once work is placed under the jurisdiction and protection of the collective bargaining agreement (CBA) that work becomes vested and accrues to TCU-represented clerical employees under the application of the Scope Rule.

In addressing the Morriss letter, Referee Muessig determined that its "primary thrust . . . was to use clerical employees and, if they were not used, the failure to do so had to be justified." With respect to the limits of Barr Yard as defined by Morriss, Referee Muessig noted that in the case before him, the Carrier asserted that such boundaries merely represented a "guide line for the Trainmasters to follow when dispatching outside Carriers. This contract carrier should not be within these limits." Unlike the position espoused by the Carrier in the instant matter, Referee Muessig did not find the boundaries set forth in the Morriss letter as etched in granite. It is also significant to the Board that had Morriss who designated the boundaries in the first instance wished to establish a firm and unmovable boundary, he would have done so. The fact that he chose not to do so, but rather chose to establish a boundary as a "guide" is supportive of the Organization's position in this case.

Given the foregoing, the Board finds, in the context of the entire record, including those cases cited by the Carrier in its case-in-chief, that the work of hauling train crews between their on and off-duty points and the lodging facility designated by the Carrier is work properly claimed by the Clerks. It is also worth noting that upon careful review of the on-property record of the instant matter, the Carrier's arguments before Referee Muessig are substantially identical to those now before the Board. As Referee Muessig did in the case before him, and for the reasons noted above, the Board respectfully rejects the Carrier's arguments.

With respect to the remedy, the Board notes that aside from the claim made by the Organization for one hour of pay, at the overtime rate, for each violation, there is no record showing the number of incidents for which the Organization claims a remedy. Respectfully, the Board cannot direct a remedy of this type and magnitude because it is well established that without clear and authoritative contractual language, the Board will not direct a remedy that could be construed as punitive in nature. It is also significant to the Board that there was no showing that any TCU-represented employee was deprived of or otherwise lost work or pay as a result of the Carrier's improper actions. Accordingly, we shall therefore remand this matter to the parties to conduct a joint check of the Carrier's records. The Carrier shall be obligated to pay 30 minutes at the straight-time rate for each documented violation where the Carrier utilized an outside contractor in lieu of a TCU-represented employee to perform the disputed crew hauling services.

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 5th day of September 2007.