Award No. 1184
Docket No. CL-923

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

BALTIMORE & OHIO RAILROAD COMPANY NEW YORK TERMINALS

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the work of checking and unloading perishable freight (night operation) on Pier 22 North River, N. Y., which is now being performed by employes of a contractor, is work which is subject to the scope and operation of our agreement, and further that such work shall now be classified, rated, bulletined and assigned in accordance with rules of our agreement, and employes whose seniority rights have been violated by the carrier shall be reimbursed for wage losses, retroactive to February 16th, 1936."

EMPLOYES' STATEMENT OF FACTS: "(1) On February 16th, 1936, Carrier started night operations of handling perishable freight at its Pier 22 North River Station, N. Y. The Carrier failed and refused to assign the work connected with this operation to its employes, in accordance with the provisions of agreement between it and the Brotherhood, dated February 1st, 1922, and revised October 1st, 1927.

"(2) The freight shipments handled in this operation is in the possession of the Carrier and is being handled interstate commerce in accordance with provisions of the published tariffs. Such published tariffs provide for regular freight charges, in the division of which the Carrier participates, and in additional charges to be assessed and collected by the Carrier as delivering line for specific services at Pier 22 Station.

"(3) The freight shipments here involved consist of perishable commodities, such as melons, vegetables and fruit. Such freight is received in cars by this Carrier from connecting lines and after moving over the line of this Carrier into its New York Terminals. Said cars of freight are placed at regular freight station of this Carrier at Pier 22 North River for unloading, checking, sorting and delivery to consignees or owners of said freight shipments and for such other service as the Carrier is permitted to perform under the provisions of the tariffs governing.

"(4) Cars containing said freight shipments after being placed at Pier 22 Station are unloaded and said freight is deposited, after being checked, at designated points on the platform floor, where it is sorted and piled to accomplish future delivery or further handling, all of which handling occurs while the freight is in the possession of this Carrier and performed under the direction of said carrier, acting through its own supervising employes.

men available at night on the neighboring piers. The Ex Parte notice of February 8, 1939 makes claim for reimbursement for wage losses retroactive to February 16, 1936 for employes whose seniority rights have been violated. In view of the fact that the Brotherhood have recognized that the nature of the work is such as cannot be taken care of under the rules and working conditions of the agreement in effect and were agreeable to and did, in fact work out a tentative understanding as to rules and regulations which would fit this particular operation as well as the fact that no claim has previously been made or discussed as to reimbursement for wage losses, the railroad respectfully submits that this feature of the claim is not properly before your honorable Board and should be disregarded."

There is in evidence an agreement between the parties bearing effective date of February 1, 1922 and revised October 1, 1927.

OPINION OF BOARD: The disposition of this proceeding involves two basic issues: first, whether or not the Adjustment Board, through the Third Division, is vested with jurisdiction to entertain the dispute as here submitted; and second, whether or not, assuming that the dispute as submitted is properly before the Board and this Division thereof, the petitioner is entitled to the relief sought.

The proceeding was first deadlocked on the question of jurisdiction (it being the contention of the Carrier Members of the Division that the petitioner was seeking in effect to have the Board settle a jurisdictional dispute between the Clerks' Brotherhood and the Longshoremen's Association, and that the Board was without authority to act in such circumstances), and hence the dispute was not set for the hearing requested by the parties. In due course the present Referee was appointed by the National Mediation Board to sit as a Member of the Division and make an award in the proceeding. Thereupon the Division, after further study and deliberation, held that the ex parte submissions established a prima facie case for the assumption of jurisdiction. The grounds for this determination were as follows: that the parties to the dispute are carrier and employes within the meaning of the Railway Labor Act; that the claim as submitted is predicated upon an alleged violation of a collective agreement subsisting between these parties; that it is the primary function of the Board to consider disputes growing out of the interpretation or application of such agreements; and that the effect upon the rights of the parties under this agreement of the arrangementts which resulted from the efforts of the President's Emergency Board in the jurisdictional dispute between the Clerks and the Longshoremen goes to the substantive validity of the claim as submitted rather than to the propriety of the Board's assuming jurisdiction in the premises. The additional contention that the Board's jurisdiction, if found to exist, is vested in the Fourth Division rather than in the Third Division was likewise found to be without merit, since the work of the employes involved is clearly that of freight handlers and is ancillary in its controlling aspects to rail transportation and not to transportation by water. Accordingly, the proceeding was set for hearing. The notice thereof to the parties contained the following: "This hearing is to be held before the Third Division with Referee Isaiah L. Sharfman sitting as a Member thereof to consider the questions of jurisdiction and of merit and all questions relating to the dispute." While the question of jurisdiction was thus left open for further consideration, no grounds were disclosed in the course of the hearing or in the subsequent deliberations for altering the earlier determination that the Adjustment Board, acting through the Third Division, is vested with jurisdiction over the dispute involved in this proceeding.

The disposition of the claim on the meritts must depend upon the requirements of the Agreement of February 1, 1922 as revised October 1, 1927, and upon such modifications of these requirements, if any, as may have been made by the arrangements, agreed upon May 14, 1937, which resulted from the efforts of the President's Emergency Board in the jurisdictional dispute between the Clerks and the Longshoremen.

The scope rule of the Agreement embraces "laborers employed in and around stations, warehouses, and freight houses, including callers, stevedores, truckers, scalers, coopers, and other laborers." There can be no question that the laborers employed by the contractor in the night operation on Pier 22 are freight handlers operating at one of the Railroad's freight stations. Unless, therefore, the work of checking and unloading perishable freight here in dispute is excepted by the provision that the agreement "shall not apply to laborers on elevators, piers, wharves, and other waterfront facilities not a part of the regular freight station forces," it must be held to fall within the scope of the Agreement between the carrier and the Brotherhood. While the carrier contends that this work is excluded under the above exception, there is no convincing evidence of record to support the assumption involved that these laborers are "not a part of the regular freight station forces." In this connection, the President's Emergency Board declared: "The work of the employes of the stevedoring companies (that is, the employes of the contractors) is performed on railroad property and with railroad facilities and equipment; and it does not differ essentially from that performed by the direct employes of the railroads." Under these circumstances the unilateral contracting out of the work of the night operation on Pier 22 to the Spencer Corporation, as of February 16, 1936, may well have constituted an improper removal of this work from the scope of the Agreement and hence a violation thereof subject to redress, There is evidence of record that under date of February 23, 1936 the Brotherhood protested this contractural arrangement as a violation of the Agreement, and that under date of March 4, 1936 the carrier, without expressly denying the alleged violation, explained the competitive circumstances which induced its establishment. Had this protest ripened into the formal claim as now submitted prior to the development of the jurisdictional dispute between the Clerks and the Longshoremen into a condition of emergency which resulted, through the efforts of the President's Emergency Board, in the Agreement of May 14, 1937 to which the present petitioner and respondent were parties, there is every likelihood, in view of previous awards of this Division in similar circumstances, that the claim would have been sustained.

In point of fact, however, as will appear presently, the rights of the parties in this connection under their Agreement as revised October 1, 1927 were merged in the larger issues created by the emergency of April 1937; and the disposition of this claim must now be governed by the supplementary agreement of the parties which resulted from the handling of that emergency.

The report to the President by the Emergency Board created April 26, 1937, which sets forth in full detail the circumstances surrounding the jurisdictional dispute between the Clerks and the Longshoremen and the nature of the settlement effected through the efforts of that Board, is part of the record in this proceeding; and the record also contains a survey of subsequent developments. It will suffice for our purposes to state summarily the outstanding facts of the situation, particularly in their bearing upon the validity of the instant claim.

Among the pertinent circumstances which constituted the background of the settlement effected May 14, 1937 are the following: the trouble underlying the emergency which threatened serious interruption of commerce in the New York Harbor area in April 1937 sprang from a jurisdictional dispute between the Clerks and the Longshoremen with respect to the organization and representation of the laborers who handled freight between floating equipment and railroad piers; the roots of this jurisdictional dispute had extended back for a period of about two decades; during this period there had been considerable shifting of actual jurisdiction over these freight handlers as between the Clerks and the Longshoremen; the American Federation of Labor, with which both organizations are affiliated, had been appealed to on a number of occasions but had proved ineffective in removing the jurisdictional dispute; the situation became especially threatening, from the standpoint of interruptions of service, in April 1937; on April 8 operations on Piers 20 and 21 of the Erie Railroad (where an agreement was in effect between the contractor and the Clerks) and on Pier 22 of the Baltimore and Ohio Railroad (where there

was no agreement between the contractor and either the clerks or the Longshoremen) had been stopped at the instigation of the Longshoremen; the Longshoremen thereupon negotiated agreements with the contractors on these piers (including, as of April 15, the one with the Spencer Corporation on Pier 22 which covered the work involved in this proceeding), as well as with the contractors on a considerable number of other piers in the New York Harbor area; the Longshoremen were also seeking to represent the pier freight handlers directly employed by a number of railroads in this area, including the Baltimore and Ohio Railroad, which had agreements with the Clerks; on April 14 the Clerks advised the carriers,, in effect, that "as a result of activities of the Longshoremen, a situation had arisen which could not be dealt with adequately except by joint handling between a committee representing the railroads entering the port of New York and a similar committee representing their employes"; the proposal submitted by the Clerks at the resulting conference, on April 16, was made "in an effort to prevent the Longshoremen from making inroads on the membership of the Brotherhood"; this proposal, which was to apply on all railroads entering New York Harbor, included among other things, requests that wage rates for the classes of employes involved be increased as specified, that "all contract labor" be eliminated, and that "on and after May 1, 1937, none of the participating carriers to permit any employes to work unless a member of the Brotherhood . . . or of A. F. of L. Local Union 18882" (the Federal Union composed of colored workers directly affiliated with the American Federation of Labor and represented by the Brotherhood); the pressure of the jurisdictional dispute upon the carriers was thereupon intensified; on April 21 the carriers invoked the services of the National Mediation Board, declaring it to be obvious "that regardless of whom the railroads may recognize the other organization will not accept the situation"; beginning on April 23 a representative of the National Mediation Board sought to compose the dispute; on April 25 arbitration was proposed by the National Mediation Board but rejected by all the parties; and on April 26, upon receiving notice from the National Mediation Board that the pending dispute threatened substantially to interrupt interstate commerce, the President appointed the Emergency Board, directing its members not only to investigate the facts of the dispute but to make every effort to effect an adjustment.

On May 14, 1937 the Emergency Board wired to the President "that the threatened interruption of commerce in the New York Harbor area has now been averted through agreement of the parties to settle their differences by reverting to the established procedures of their own organizations and the orderly processes of the Railway Labor Act, certain differences in wage rates provocative of controversy having been removed by agreement." Both agreements are set forth in full in the final report to the President. All of the arrangements contained in these agreements were approved by the carriers (including the Baltimore and Ohio Railroad, respondent in this proceeding), the Longshoremen, and the Clerks, and the agreement with respect to the disposition of the jurisdictional dispute was also made binding upon Local 18882.

The wage adjustment, the terms of which need not be here stated, was "conditioned upon satisfactory assurances being given to these railroads that the jurisdictional dispute between the Brotherhood and the Longshoremen will be terminated through orderly procedure without any stoppage of work, and the withdrawal of all proposals to these railroads made subsequent to March 4, 1937, by either the Brotherhood or Local 976 of the International Longshoremen's Association."

The assurances as to the orderly disposition of the jurisdictional dispute upon which the wage adjustment was thus conditioned were incorporated into an agreement the controlling terms of which, in their bearing upon the instant dispute, were set forth as follows:

> "The Longshoremen and the Brotherhood shall proceed forthwith to a final determination of the jurisdictional dispute, it being

understood that either of them may proceed with any legal step, whether under the machinery of the American Federation of Labor for the settlement of jurisdictional disputes or under the Railway Labor Act or other applicable law, as may seem to either of them appropriate to the bringing about of such final determination; and it being further understood that any proceedings taken under the machinery of the American Federation of Labor for the settlement of jurisdictional disputes shall be so taken and so proceeded with that the dispute will be submitted, if it has not sooner been settled, to the annual convention of the American Federation of Labor to be held in October, 1937. It is further understood and agreed that both the Longshoremen and the Brotherhood will abide by such final determination until and unless the same may be changed by lawful procedure.

"Pending such final settlement of the jurisdictional dispute between the Longshoremen and the Brotherhood, the Longshoremen shall be recognized as the representatives, for the purpose of collective bargaining (unless changed under the provisions of the Railway Labor Act) of all those employes whom they now represent by virtue of existing contracts with various stevedoring companies; and the Brotherhood shall be recognized as the representative, for the purpose of collective bargaining (unless changed under the provisions of the Railway Labor Act) of all the employes directly employed by railroad companies with whom the Brotherhood now has contracts.

"Such right to represent the respective employes up to the final disposition of the jurisdictional dispute shall not be disturbed if any employes now directly employed by the railroads with whom the Brotherhood has contracts, should come to be employed through the instrumentality of contractors, or if any employes now employed by contractors with whom the Longshoremen now have contracts should come to be employed directly by the railroads; it being the object of this paragraph that the status quo as now established shall be maintained by all parties hereto in good faith pending the said final settlement of the jurisdictional dispute."

In conformity with this agreement the jurisdictional dispute was considered and acted upon at the Denver Convention of the American Federation of Labor in October 1937. The Convention approved the report of the Executive Council, which defined the complaint received from the Clerks as one in which the Longshoremen were violating the jurisdiction of the Clerks' Organization by admitting to membership freight handlers and clerks "employed by railroad companies in the New York Harbor district," and which declared that jurisdiction over these workers belonged to the Clerks. It will be noted, however, that no express mention was made of freight handlers employed by contractors in this area, and hence the jurisdictional dispute, though apparently somewhat narrowed in scope, continued. With a view of clarifying the situation an agreement between the Clerks' Brotherhood and the Longshoremen's Association, approved by the President of the American Federation of Labor, was entered into on February 19, 1938. This agreement accepted the decision of the Denver Convention and provided that it "will be immediately complied with"; it specified that " 'The Association' will immediately disassociate from its membership all members employed by Railroads, shall cease and desist from organizing any such employes into membership in its organization, and shall refuse to admit to membership in its organization any employes of the railroads in the future, but will cooperate with 'The Brotherhood' in organizing such employes into either 'Brotherhood' lodges or 'Federal Unions' chartered under the American Federation of Labor, such members to be under the jurisdiction of 'The Brotherhood' "; and it further provided that " 'The Brotherhood' does not, in any manner, relinquish its jurisdiction over any employes covered by its Charter with the American Federation of Labor."

It will be noted once more that no express mention was made of freight handlers employed by contractors in this area, and on this basis the Longshoremen contended that this agreement "in no way changed their jurisdiction of the night operation on Baltimore & Ohio Pier 22 N. R., which is handled by contract, and that no consideration was being given to relinquishing its jurisdiction, the men in question all being members of the Longshoremen's Organization." When this position was called to the attention of President Harrison of the Clerks' Organization, he wired on March 22, 1938 as follows: "When Agreement February nineteenth was negotiated with Ryan it was definitely understood that freight handlers employed by contractors New York Harbour district were to remain with the Longshoremen so long as they were so employed but that the Brotherhood was free to take up with Railway Managements the question of terminating the contractors contracts and that should the contracts be terminated and the railway handle the work then the terms of the February nineteenth Agreement would apply."

At this time the carrier was conferring with the Clerks in the matter of discontinuing the contractural arrangement with the Spencer Corporation for the handling of the night operation on Pier 22, and the negotiations had proceeded to the point of formulating a memorandum of agreement between the carrier and the organization establishing special rules to govern the working conditions of the railroad employes who would then perform this work, the intent being to put the new arrangement into effect on April 15, 1938, concurrent with expiration of the Spencer Corporation's agreement with the Longshoremen. When, however, the Longshoremen, after a reportedly unanimous vote of its members employed on Pier 22 that they desired to continue to be represented by the Longshoremen's Organization, "decided that if the railroad cancelled its contract and the Brotherhood took over the jurisdiction they would completely withdraw from the operation and would not permit their members to work on the pier," the carrier declined to sign and execute the formulated memorandum of agreement and informed the Clerks' Brotherhood that "the proposition should continue in status quo until such time as the question of jurisdiction is definitely and permanently settled."

It is obvious from this survey of developments that the validity of the claim submitted in this proceeding cannot be properly determined by relying solely upon the Agreement between the parties revised October 1, 1927, as the employes have done both in their original submission and in their rebuttal brief. The arrangements agreed upon May 14, 1937, to which the petitioner and the respondent in this proceeding were likewise parties, are equally binding upon them; and these arrangements not only involved the withdrawal of the demand that contract labor be eliminated, but expressly provided that, pending the final settlement of the jurisdictional dispute, the status quo was to be maintained—the Longshoremen to continue to be recognized as the representatives of the employes of the stevedoring companies with which they had contracts, and the Clerks to continue to be recognized as the representatives of the employes directly employed by the railroad companies with which they had contracts. The Clerks contend that the instant proceeding involves no jurisdictional dispute, since they make no claim to represent the employes of the Spencer Corporation; but in essence they are contending that the Clerks' Agreement with the carrier, rather than the Agreement in effect between the Longshoremen and the Spencer Corporatioin, governs the work performed in the night operation on Pier 22, and hence, as disclosed above, they inevitably come into conflict with the claims of the Longshoremen. It is clear that no "final settlement of the jurisdictional dispute" between the Clerks and the Longshoremen, pending which the status quo as agreed upon was to be maintained, has yet been achieved. It appears that the Longshoremen are no longer asserting jurisdiction over the direct employes of the railroads; but it is also manifest that there has yet been no removal of the disagreement as to jurisdiction over the work now being performed by employes of contractors. As con-

templated by the agreement of May 14, 1937, this difficulty between the Clerks and the Longshoremen, unless voluntarily composed, must likewise be eliminated either through further efforts of the American Federation of Labor or through services or determinations of some appropriate governmental tribunal. It is beyond the authority of this Board, which is charged with the disposition of disputes involving the interpretation or application of agreements, to order the alteration of the status quo as recognized by the deliberate action of the parties themselves.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the evidence of record does not disclose any violation of the Agreement effective February 1, 1922 and revised October 1, 1927 as modified by the arrangements agreed upon May 14, 1937.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of September, 1940.