

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36108
Docket No. CL-36475
02-3-00-3-475

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Intermodal Terminals, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12627) that:

- (a) The Carrier violated the Clerks' Rules Agreement effective July 1, 1979, particularly Rules 1, 24, 40 and other rules, when it assigned and permitted outside contractor, Parsec, to perform clerical duties of the Gate Clerk by preparing damage report and authorization for repairs form, CT-7500, between the hours of 7:00 a.m. to 3:00 p.m. on June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29 and 30, 1999 and failed to call and use claimant Mr. B. J. Hubbard to perform that work on dates listed.**
- (b) Claimant Mr. B. J. Hubbard must now be allowed eight (8) hours pay at the appropriate punitive rate of pay for each day June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29 and 30, 1999 on account of this violation.**
- (c) Claimant was available and should have been called and used to perform this work.**
- (d) This claim has been presented in accordance with Rule 45 and must 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.

On July 9, 1999, the Organization filed a claim charging that the Carrier assigned an outside contractor to perform certain clerical duties during June 1999, at the Carrier's Trail-Van Terminal in Columbus, Ohio. On behalf of the Claimant, the Organization seeks eight hours of pay at the punitive rate for each regular work day in June 1999.

The Board initially observes that the correspondence exchanged between the parties on the property does not match the exhibits attached to the Submissions that were submitted to the Board. The major disparity concerns whether or not the Carrier received the Organization's April 28, 2000 appeal letter and the massive amount of evidence attached thereto. In addition, the Carrier contends that some of the Organization's arguments in its Submission were not handled on the property. The Organization counters that it properly mailed its April 28, 2000 appeal letter via certified mail and that it did not raise any new contentions in its Submission.

The Board is concerned about the flaws in the evidentiary record because there is the possibility that the issue was not fully joined on the property. Nevertheless, because this case can be properly decided on the express language in Agreement No. TN-01-98 dated November 2, 1998 as well as a precedential decision, the Board need not resolve all of the procedural contentions herein. Any procedural irregularities do not ultimately taint the outcome of the case. The Board reserves to both the Carrier and the Organization the right to raise their procedural contentions in any future case without prejudice.

Besides the possible procedural irregularities, the record contains some confusion about precisely what work is in dispute. The Organization's initial claim vaguely refers to an "... outside contractor, Parsec, ... perform[ing] clerical duties of the Gate Clerk by preparing damage report and authorization for repairs form, CT-7500. . . ." However, in its Submission to the Board, the Organization alleges that Packer/Crane Hostler Operators employed by an outside contractor, Parsec, inputted loading and unloading information from the Oasis System into the CATS RF work order subsystem, using PTC 860 IM units. The Organization then alleges that this work was previously performed by clerical employees on Conrail, but it fails to allege that these clerical employees were Gate Clerks. Later, in the Submission, the Organization vaguely alludes to the disputed work as gate inspection duties and preparing trailer exceptions. The Carrier contends that, regardless of what work is in dispute, the outside contractor is entitled to continue to perform the work. However, the description of the work is critical because the nature of the disputed work determines which precedential decision is applicable to this case.

After examining the record as a whole, the Board determines that the work in dispute involves Parsec employees recording trailer repair information as opposed to gate inspection duties. Thus, the Board specifically finds that work consisting of gate inspections and completing trailer damage exception reports is not within the ambit of this claim.

The Organization, the Carrier and other related corporate entities entered into Agreement No. TN-01-98 dated November 2, 1998, which became effective on June 1, 1999. Section 1 of the November 2, 1998 Agreement provides:

- "(a) Employees who, pursuant to the rundown procedures in the Implementing Agreement, select positions at former CRC Intermodal terminals acquired by CSXT at West Springfield, MA (former CRC Roster 1); South Kearney, NJ (former CRC Roster 4); Buffalo, NY (former CRC Roster 10); Columbus, OH (former CRC Roster 16); East St. Louis, IL (former CRC Roster 23); and Detroit, MI (former CRC Roster 19), will on split date become employees of the Fruit Growers Express Company (FGE). Such employees will be covered by a Collective Bargaining Agreement negotiated between FGE and TCU, which will be comprised of the former Conrail Clerical Collective Bargaining Agreement dated**

July 1, 1979, as amended, and the 1982 C&O Job Stabilization Agreement (as amended). These employees will continue to be covered by the Railroad Retirement Act (RRA) while they are employed by Fruit Growers Express Company (FGE).

In the event that FGE ceases to act as the employer of subject employees, or is hereafter removed from RRA coverage; it is agreed that the parties signatory hereto shall arrange for transfer of the work performed to another employer covered by the RRA; such employer to be bound by the provisions of this Agreement as though a primary signatory thereto; with subject employees to follow the work.

- (b) Terminal Company and TCU have negotiated a collective bargaining agreement, to be comprised of the former Conrail Clerical Collective Bargaining Agreement dated July 1, 1979, as amended, and the 1982 C&O Job Stabilization Agreement (as amended). Such agreement will cover employees hired after split date to perform gate inspection, tie down, yard inventory, and office clerical work at the aforementioned locations.
- (c) A separate seniority district will be established for each Terminal location operated by FGE and/or Terminal Company and seniority rosters will be prepared as provided in Rule 16 of the new collective bargaining agreement."

Pursuant to Section 1(b) of the November 2, 1998 Agreement, the parties carried forward the Collective Bargaining Agreement in effect between TCU and the former Consolidated Rail Corporation. Therefore, the TCU-Conrail Agreement governs the terms and conditions of employees on this property unless expressly abridged by the terms of the November 2, 1998 Agreement.

Section 5 of the November 2, 1998 Agreement reads:

"This confirms that certain work referred to in Item No. 1(a) of this Agreement is, in whole or part, currently performed by outside contractors at the following locations; Boston, MA (Beacon Park); North Bergen, NJ;

Syracuse, NY; Worchester, MA; Chicago, IL (63rd Street); Cleveland, OH; Indianapolis, IN; West Springfield, MA; South Kearney, NJ; Buffalo, NY; Columbus OH; East St. Louis, IL; and Detroit, MI.

In the event Terminal Company terminates its arrangements with said outside contractors and hires its own employees to perform work which is acknowledged to be consistent with that described in Item No. 1(a) as accruing to the TCU represented employees of the Terminal Company (at some unspecified date subsequent to Split Date), such employees will be covered under the scope of the agreement."

Pursuant to Section 1(b) of the November 2, 1998 Agreement, the former Conrail Scope Rule governs clerical work on this property unless, as stated above, the Scope Rule has been changed by other terms in the November 2, 1998 Agreement. As the Organization points out, the former Conrail Scope Rule is a "positions and work" Rule. See Special Board of Adjustment No. 1011, Award 124. In Award 62, of Public Law Board No. 6090, the Board held that, on the former Conrail property, the work of inputting loading and unloading information from the Oasis System into the CATS RF work order Subsystem was traditionally performed by the outside contractor, Parsec. Award 62 more specifically found that the Organization had not proffered sufficient evidence that clerical employees had performed such work at Columbus, Ohio. The Board went on to adjudge that to the extent that the clerical employees may have been involved in performing some duties ancillary to the disputed work, technological advancements eliminated this ancillary work.

In sum, Award 62 of Public Law Board No. 6090 found that the Carrier did not violate the "positions and work" Scope Rule.

The Organization relies heavily on Public Law Board No. 6090, Award 61. However, Award 61 concerned gate inspection work that the Board has already found is not within the ambit of the instant claim.

Because an outside contractor performed the disputed work herein at Columbus, Ohio, on and before the effective date of the November 2, 1998 Agreement, Section 5 of that Agreement permits outside contractors to continue to perform the work. The work remains with the outside contractor unless or until the Carrier terminates its arrangements with the outside contractor. In essence, Section 5 provides that the

clerical craft has a potential, conditional entitlement to certain work in the future. The work will accrue to the clerical craft only if the Carrier terminates its arrangement with the outside contractor and decides to hire its own employees to perform the work. If these two conditions occur, Section 5 provides that such hired employees will be covered by the Agreement and thus, the work will then come within the confines of the "positions and work" Scope Rule. However, until both conditions occur, if they ever occur, the Carrier is free to retain an outside contractor to perform the work in dispute.

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 22nd day of July 2002.