Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42227
Docket No. MW-42029
15-3-NRAB-00003-120399

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Kanza Construction) to perform Maintenance of Way and Structures Department work (loading, stockpiling and assisting in undercutting track) with System Undercutting Gang 9041 on the Marysville Subdivision beginning on April 26, 2011 and continuing (System File D-1152U-224/1556980).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 National Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant C. Johnson shall now '* be allowed the same number of hours worked by the contractor employee at his respective straight time rate of pay as compensation for the hours worked by the outside contracting force as described in this claim. ***'"**

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.

At the Hearing before the Board, the Carrier raised for the first time the defense that the instant claim is duplicative of another claim – Third Division Award 42229 – and asserted that because the Board lacks jurisdiction to decide duplicate claims, both cases must be dismissed.[1] As unfair as it may seem to the opposing party surprised by a late jurisdictional argument, it is well-recognized that jurisdictional challenges may be raised at any time and are never waived. If a forum lacks jurisdiction, it cannot properly hear or decide a matter outside its authority. Jurisdiction cannot be obtained merely because time has passed without the issue having been raised.

From the state of the record before the Board, it is, frankly, impossible to tell if there is a single claim that was filed twice, or two separate claims, inartfully filed so that there appears to be only one claim. Both claims allege that only one employee of the contractor worked on the dates in question. The language of the two claims is virtually the same, but for the names of the Claimants and the piece of equipment alleged to have been used: a dump truck in Award 42229, and a front end loader in this case. It is impossible to tell if there was only one contractor employee who worked (in which case the two claims are duplicates), or if the Organization intended to assert that one contractor employee operated a front end loader and a second contractor employee operated a dump truck (i.e., there are two claims). It is the obligation of the

[1] **The Carrier indicated that it only recognized that there were duplicate claims in the course of preparing for the Hearing before the Board.**

party with the burden of proof – here the Organization – to present facts sufficient for the Board to make reasoned findings of fact and conclusions of contract interpretation. It has not done so in these two claims in terms of whether there is one claim or two. Board precedent has held that where there are duplicate claims, the Board must dismiss both of them, and the Board is constrained by that precedent.

That said, the Board also notes that there is substantial evidence in the record that the work in dispute was done as part of a very large project and that the Carrier did not have adequate forces and equipment to handle the work, which would have made the contracting out in both claims, if there were two separate claims, permissible under one of the exceptions to Rule 52(a) in any event.

AWARD

Claim dismissed.

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 17th day of November 2015.

LABOR MEMBER'S DISSENT
TO
AWARD 42227, DOCKET MW-42029
AWARD 42229, DOCKET MW-42038
(Referee Andria S. Knapp)

In these cases, the majority erred in dismissing both claims as duplicative. The Carrier improperly raised the argument of duplicate claims for the first time at the oral hearing. It is a fundamental principle of arbitration under the Railway Labor Act ("RLA") that the National Railroad Adjustment Board ("NRAB") has appellate jurisdiction and cannot consider arguments that were not raised during the on-property handling of a claim. Nonetheless, in these awards, the Majority improperly allowed the Carrier to raise a procedural objection for the first time at the oral hearing. This ruling is contrary to established precedent, which blind-sides the Organization thereby not allowing it to present evidence to the contrary. Such a finding rewards a party for not operating in good faith during the handling on the property and is in serious error.

As a threshold matter, Congress specifically provided the NRAB jurisdiction in the RLA, 45 U.S.C. Section 153, First (i), which reads:

> "(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, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The cases involved herein meet the RLA's requirements for jurisdiction. Moreover, the Supreme Court further clarified the meaning of "jurisdiction" under the RLA in Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen (2009):

> "Recognizing that the word 'jurisdiction' has been used by courts, including this Court, to convey 'many, too many, meanings,' Steel Co. v. Citizens for Better Environment, 523 U. S. 83, 90 (1998) (internal quotation marks omitted), we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory 'prescriptions, however emphatic, are . . . properly typed jurisdictional,' we explained in Arbaugh v. Y & H Corp., 546 U. S. 500, 510 (2006) (internal quotation marks omitted). Subject-matter jurisdiction properly comprehended, we emphasized, refers to a tribunal's 'power to hear a case,' a matter that 'can never be forfeited or waived.' *Id.*, at 514 (quoting *United States v. Cotton*, 535 U. S. 625, 630 (2002)). In contrast, a 'claim-processing rule, . . . even if unalterable on a party's application,' does not reduce the adjudicatory domain of a tribunal and is

> "ordinarily 'forfeited if the party asserting the rule waits too long to raise the point.' *Kontrick v. Ryan*, 540 U. S. 443, 456 (2004)." (Emphasis in original)

The Carrier's argument of "duplicate claims" in these cases was not a subject-matter jurisdiction question, but rather a "claim-processing rule" as referenced above in the Supreme Court Decision. See also, Second Division Award 12900 and Third Division Awards 29654, 37008 and 40980 all classifying a "duplicate claim" argument as a procedural argument. Accordingly, said argument was forfeited when the Carrier failed to raise the argument during the on-property handling. Moreover, the RLA contains a presumption of arbitrability, which must be overcome "with positive assurance." See Third Division Award 37760, which held:

> "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."

In the cases involved herein, there is no evidence that the Organization filed duplicate claims. Rather, the Board in Award 42227 has stated:

> "From the state of the record before the Board, it is, frankly, impossible to tell if there is a single claim that was filed twice, or two separate claims, inartfully filed so that there appears to be only one claim. ***"

The Majority's finding that it is "... impossible to tell if there is a single claim ***" is not sufficient to overcome the presumption of arbitrability contained within the RLA as referenced in above-quoted Award 37760.

While the filing of duplicate claims would render one (1) of the two (2) claims procedurally defective, it does not remove jurisdiction from this Board. Nonetheless, the Majority improperly held that "*** Board precedent has held that where there are duplicate claims, the Board must dismiss both of them, and the Board is constrained by that precedent." The majority is simply wrong. It should be noted that the majority failed to cite any precedent supporting its position. In fact, the majority of precedent supports the conclusion that even if the Organization filed duplicate claims (which it did not do here), this Board is required to decide the first case on its merits and only then can it dismiss a claim proven to be duplicative of another claim. For instance the following claims were dismissed or denied as being duplicative because another claim was decided on its merits and disposed of the issue. See Second Division Awards 11999 and 12900 and Third Division Awards 18619, 20714, 28247, 28922, 29654, 30783, 31229, 31985, 32337, 32944, 32952, 36362, 36363, 36510, 36679 and 37173. Typical thereof are Second

Division Awards 11999, 12900 and Third Division Awards 28922 and 29654 which, in pertinent part, read:

AWARD 11999: (Second)

"This Board has held in the past that progression of duplicate claims covering the same subject is inconsistent with the Railway Labor Act, and, such must be dismissed. (See Third Division Awards 19966, 20455, 20714, 20586 and Fourth Division Award 4590.)

The merits of the matter have been given final and binding adjudication in Award 11773 of this Division. We are without a basis, under the Railway Labor Act, to modify, overturn or affirm, indeed for that matter even review, Award 11773, which we would constructively be doing if we did anything but enter a dismissal Award here."

AWARD 12900: (Second)

"The Board, on the basis of many past holdings by the National Railroad Adjustment Board, finds that this claim is a (sic) improper pyramiding of claims, which renders the second claim progressed to the Board (the instant claim) procedurially (sic) defective. ***"

AWARD 28922: (Third)

"*** This Claim is entirely duplicative of the second Claim, which was fully developed on its own through the Claim handling procedure. Thus, the dispute as to whether the positions should be re-advertised was in the hands of the parties in the second Claim and needs no resolution here."

AWARD 29654: (Third)

"Even though the Organization began referring to the proper date for the onset of the infraction by the end of April 1989, there is some basis for finding the first claim (Docket MW-380) to be procedurally defective because of the initial error. More important, the first claim is, for the most part, duplicative of the second claim (Docket MW-379). Thus, because of these two factors, this Board concludes that only the second claim is properly before us and the first must be dismissed."

In accordance with the above-cited precedent, if the Board makes a factual determination that a claim is duplicative of another claim, it is not permitted to dismiss or deny both claims but is required to decide one of the two on its merits.

Clearly, the Majority erred initially in considering the Carrier's procedural argument that was never raised during the on-property handing. The Majority compounded its error when it improperly applied that new argument to dismiss both claims, rather than to consider the claims on their merits. Further, the Majority erred when it first found that it could not determine if the claims were duplicates, but nonetheless dismissed the claims as duplicate. Finally, even if the Majority were correct in considering the claims to be duplicates, it grievously erred when it failed to consider the initial claim on its merits and then dismiss the second, duplicate claim, in accordance with logic and established precedent. For all of the reasons explained above, Awards 42227 and 42229 are palpably erroneous and have no precedential value.

Therefore, I respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member