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

Award No. 42258
Docket No. SG-42268
16-3-NRAB-00003-130276

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Terminal Railroad Association of St. Louis:

Claim on behalf of P. W. Morton, for an additional 2% compensation over and above the amount he earned working straight-time and overtime, between July 1, 2010, and April 29, 2011, account Carrier violated the Scope Rule and the National Agreement dated February 6, 2012, when it refused to compensate the Claimant his retroactive pay increase for the referenced period as stipulated in the National Agreement. General Chairman's File No. UPGC-SR, 059. BRS File Case No. 14844-TRRA."

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.

The Carrier is one of 12 Carriers along with 23 affiliated railroads that entered into a mediated National Agreement with the Organization. The Agreement became effective February 6, 2012. Pertinent to this dispute, the Agreement provided for six general wage increases, two of which were retroactive beginning with a general wage increase effective July 1, 2010. The second general wage increase became effective July 1, 2011 and, thereafter, the other general wage increases were set to take effect on July 1 for the years 2012, 2013, and 2014. The sixth general wage increase was made effective January 1, 2015. The first retroactive general wage increase was memorialized in Article I – Wages, Section 1, which reads, in relevant part, as follows:

> **"On July 1, 2010, all hourly, daily, weekly, and monthly rates of pay in effect on the preceding day for employees covered by this Agreement shall be increased in the amount of two (2) percent applied so as to give effect to this increase in pay irrespective of the method of payment."**

Other pertinent provisions of the February 6, 2012 National Agreement relative to the instant claim are Article VI – General Provisions, Section 2(b) and Letter No. 2, also dated February 6, 2012.

Article VI, Section 2(b) reads as follows:

> **"This Agreement shall be construed as a separate agreement by and on behalf of each of said carriers and their employees represented by the organization signatory hereto, and shall remain in effect through December 31, 2014 and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended."**

Letter No. 2 reads, in relevant part, as follows:

> **"This refers to the increase in wages provided for in Sections 1 and 2 of Article I of the Agreement of this date.**
>
> **It is understood that the retroactive portion of those wage increases shall be applied only to employees who have an employment relationship with a carrier on the date of this Agreement or who retired or died subsequent to June 30, 2010."**

It is undisputed that the Claimant resigned his employment with the Carrier on either April 24, 2011 - according to the Carrier - or on April 29, 2011 -according to the Organization. In Third Division Award 40948, the Claimant was reinstated as a Signalman with the Kansas City Southern Railway Company and after resigning from the TRRA, he immediately assumed his reinstated position. In any event, the record evidence establishes that he was not employed by TRRA on February 6, 2012 – the date the National Agreement became effective. Nevertheless, the Organization argues that the Carrier here, pursuant to the provision of Article I, Section 1, in conjunction with the language set forth in Letter No. 2, is obligated to pay the Claimant the retroactive general wage increase of two percent (2%) for the period beginning July 1, 2010 to the date he resigned his employment at TRRA on April 29, 2011. The heart of the Organization's argument lies in its interpretation of the phrase in Letter No. 2 which states that ". . . those wage increases (referring to the retroactive wage increases set forth in Article I, Section 1 and 2) shall be applied only to employees who have an employment relationship with a carrier on the date of this Agreement." While the Claimant was not employed by TRRA on February 6, 2012, he was employed at that time with the Kansas City Southern Railway Company – a signatory affiliated railroad to the National Agreement, which the Organization asserts is included in the reference in Letter No. 2 in the term, "a carrier." The Organization supports its position by noting that the negotiators for the National Agreement possessing great expertise in propounding the provision for Lump Sum Payment as set forth in Article II, Section (a) used the term, the carrier and not the term, a carrier. Section (a) reads, in relevant part, as follows:

> **"A lump sum payment shall be made to each employee subject to this Agreement who has an employment relationship with the carrier as of the date such lump sum is paid . . . ."**

The Organization argues the distinction that exists between the terms, a carrier and the carrier is meaningful in that in its interpretation, the term a carrier references all railroads signatory to the National Agreement, whereas the term, the carrier references the current employer of the employee.

While the Carrier addressed the merits of the claim in that it disputes the Organization's interpretation of the two cited terms – asserting that if the expert negotiators wanted to differentiate them in Letter No. 2, they could have stated, ". . . employees who have an employment relationship with a carrier listed in Exhibit A on the date of this Agreement . . ." nevertheless, the Carrier argues the claim should be dismissed on jurisdictional grounds. The Carrier acknowledges that it did not raise

the jurisdictional argument on the property, but it contends that arbitral tribunals have consistently recognized that a jurisdictional argument may be raised at any time, meaning, if argued for the first time before the Board, it is not treated as a "new argument." The Carrier submits that the Board lacks subject matter jurisdiction to decide the claim on its merits based on the fact that the Claimant was not an "employee" of the Terminal Railroad Association of St. Louis (TRRA) as that term is defined in Section 151, Fifth of the Railway Labor Act – either when the National Agreement was signed on February 6, 2012, or when the claim was filed on May 8, 2012. As a result, the instant claim is not a dispute between an "employee" and a "carrier" as set forth in Section 153, First (i) of the Railway Labor Act, as amended. The Carrier asserts that arbitral tribunals have held that the Board has no jurisdiction when the Claimant, as here, is not an employee, and an employee voluntarily severing the employment relationship as occurred here has no contractual rights under the Controlling Agreement.

Upon a comprehensive review of all evidence and argument before us, the Board concurs in the Carrier's position that given the fact that the Claimant was not in its employ at the time the February 6, 2012 National Agreement was made effective, the Board is barred from resolving the claim on its merits due to the absence of an employer-employee relationship. Accordingly, the Board rules to dismiss the instant claim.

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 29th day of February 2016.