

NATIONAL RAILWAY LABOR CONFERENCE

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Director of Labor Relations

November 10, 1997

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Ms Priscilla C. Zeigler
Staff Coordinator - Arbitration
National Mediation Board
1301 K Street, N.W.
Suite 250 East Tower
Washington, DC 20572

Dear Ms Zeigler:

Enclosed is a copy of **Award No. 513 (Case No. CL-76-E)** rendered by **Special Board of Adjustment No. 605**, established by Article VII of the February 7, 1965 National Agreement.

Very truly yours,

A. K. Gradia

A. K. Gradia

Enclosures

Ms Priscilla Zeigler

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November 11, 1997

cc: Messrs. S. E. Crable (3)
R. A. Scardelletti (10)
M. A. Fleming (2)
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I. Monroe (2)
J. B. LaRocco (1)

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SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) Transportation•Communications International Union
TO THE)
DISPUTE) and
)
) CP Rail System,
) Soo Line Railroad Company
) Delaware & Hudson Railway Co. Inc.

THE ORGANIZATION'S QUESTIONS AT ISSUE:

- (1) Did the consolidation and unilateral transfer of interchange work performed exclusively by Delaware & Hudson Railway Co., Inc. employees to the CP Rail/Soo Line Railroad employees at Milwaukee, Wisconsin, without a Section 4 notice and negotiations constitute a violation of the Agreement of May, 1936, Washington, D. C.?
- (2) If the answer to Question No. 1 is in the affirmative shall the carriers be required to restore the status quo and compensate all employees affected thereby as if said coordination had not taken place pending compliance with Section 4 and 5 of the Washington Job Protection Agreement?

**OPINION OF
THE BOARD:**

I. INTRODUCTION

In this case, the Organization charges that the Delaware & Hudson Railway Company (D&H) and the Soo Line Railroad Company (Soo Line) violated Sections 2(a) and 4 of the 1936 Washington Job Protection Agreement (WJPA) because certain clerical work was ostensibly shifted from D&H clerical employees to Soo Line clerical employees. At the time of the alleged coordination of work between the two railroads, both the D&H and Soo Line were wholly owned subsidiaries of the CP Rail System (CP Rail).

Sections 2(a) and 4 of the WJPA provide:

"Section 2 (a). The term 'coordination' as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through separate facilities.

* * *

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employees of each such carrier and by sending registered mail notice to the representative of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employees to be effected by such coordination, including an estimate of the number of employees of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice."

In essence, the Organization alleges that CP Rail caused the D&H and Soo Line to consolidate certain clerical functions without first providing the Organization with the appropriate Section 4 notice and without entering into an implementing agreement. The Organization requests this Board to undo the alleged coordination and return to the *status quo* that existed prior to the alleged coordination. The Organization also seeks protective benefits for five clerical employees who allegedly suffered monetary damage as a result of the alleged coordination.

The Carriers claim that no coordination occurred and more specifically, that no clerical work was shifted from the D&H to the Soo Line. The Carriers contend that D&H clerical work was

eliminated but, alternatively, if any work was transferred from the D&H to the Soo Line, the amount of work was either *de minimus* or the work was incidental to the primary duties of the Soo Line clerical employees. The Carriers also contend that Soo Line employees are doing new work.

II. BACKGROUND AND SUMMARY OF THE FACTS

While the Carriers and the Organization incorporated a plethora of documentary evidence into the record, neither party provided understandable explanations for much of the documentation. The absence of an explanatory narrative forced this Board to draw factual implications from the evidence. However, where the evidence was vague, the Board could not fill in the gaps in the facts.

Electronic Data Interchange (EDI) is an interactive computer program utilized by most railroads. EDI was designed to provide a uniform system for shippers, customers and users to enter waybill information from the user's facility (via computer modem or other communication devices) directly into a railroad's computer system and, if applicable, the information is electronically communicated from railroad to railroad when freight is interchanged. Thus, EDI, among other functions, keeps track of freight as it is transported across the country. Although EDI was supposed to be uniform across the country, there are evidently variances and discrepancies in EDI stemming from the type of computer system utilized by each railroad. Therefore, the EDI on one railroad may not be compatible with EDI on another railroad even though both railroads can accept data inputted from their respective users and customers. The railroads' right to implement EDI is covered by the 1986 National Agreement. In this case, Rule 29 of the applicable clerical Agreement makes it permissible for the D&H to utilize EDI. There is no dispute that the D&H may avail itself of EDI.

Prior to 1988, the D&H was wholly owned by Guilford Transportation Industries. On June 20, 1988, the D&H filed Chapter 11 bankruptcy and a trustee was appointed in lieu of permitting Guilford to operate the corporate entity while the D&H was reorganized.

Effective June 23, 1988, the New York Susquehanna and Western Railway Company (NYS&W) began providing service over D&H lines pursuant to an Interstate Commerce Commission directed service order.

In the latter part of 1989, the NYS&W implemented EDI on the D&H utilizing the NYS&W's computer system. According to the Organization, the D&H clerical forces monitored car interchange data, verified waybill information and corrected errors in the EDI system. If an error was detected, D&H clerks contacted customers, users or foreign railroads to collect information needed to correct the error. The clerks then inputted the corrections into EDI.

The Organization alleges that D&H clerks also updated yard inventory, released suspended waybills and performed all ancillary clerical tasks associated with interchanging cars between the D&H and foreign railroads.

On the other hand, the Carriers claim that the D&H clerks manually inputted car interchange information into the NYS&W computer system. While the record is unclear, the Carriers apparently contend that EDI was not extensively or completely implemented on the D&H during the time it was operated by the NYS&W. The Carriers also specifically deny that D&H clerks did any monitoring of car interchanges within the EDI system.¹

¹ What is unclear from the Carrier's submission is the extent to which shippers directly inputted information into the computer during this period.

On August 1, 1990, the Interstate Commerce Commission authorized D&H Corporation/CP Rail to operate the D&H under directed service. On January 18, 1991, the D&H Corporation/CP Rail purchased the D&H. In essence, CP Rail was the parent company of the former D&H and the D&H was incorporated into CP Rail as the Bridge Line Division.²

Sometime earlier, CP Rail had acquired the Soo Line Railroad Company.³ The CP Rail EDI system is operated by Soo Line clerical employees at the Transportation Service Center in Milwaukee, Wisconsin. The D&H and the Soo Line do not interchange.

The Organization submits that, as the D&H was being integrated into CP Rail, the Carriers discovered the D&H computer system was not compatible with the CP computer system.⁴ Therefore, the Organization charges that the Carriers, in May, 1992, connected the D&H to the Soo Line computer system, at least, for purposes of running the EDI program. On the other hand, the Carriers state that on May 20, 1992, CP Rail activated a new EDI system for the entire CP Rail network including the Soo Line and the D&H.⁵ The Carriers alternatively assert that the prior NYS&W EDI system was obsolete because, when customers accessed the NYS&W EDI system, D&H clerks had to manually input the data into the CP EDI system. The Carriers deny that D&H clerks ever monitored EDI operations. Therefore, the first major factual contention is whether the

² The Board will continue to refer to the former Delaware and Hudson Railway as the "D&H."

³ The corporate shells are not entirely clear from the record. Apparently, Canadian Pacific owns or controls CP Rail, Soo Line Railroad as well as the D&H Corporation/CP Rail.

⁴ The record does not disclose the nature of the incompatibility or whether it was possible to make the system compatible.

⁵ In its submission, the Carriers stated that the advent of EDI occurred on May 20, 1993. The year must be a typographical error.

advent of the CP Rail EDI was new technology for the first time being applied to the D&H or whether the CP Rail EDI system merely replaced the NYS&W EDI system.

To reiterate, the Organization asserts that D&H clerks previously accomplished EDI related tasks prior to the acquisition and then these tasks shifted to the Soo Line when the new EDI CP Rail EDI system was connected to the D&H. The Carriers contend that D&H clerks manually inputted interchange information and the advent of EDI simply eliminated this redundant or middleman clerical function. Nevertheless, about the same time as the implementation of CP Rail EDI, the D&H abolished five clerical positions at Clifton Park, New York during August and September, 1992. According to the Carriers, nobody was affected by any alleged coordination because these positions were temporary and the occupants were informed of the temporary nature of the positions.

The Carriers and the Organization agree that Soo Line clerical employees monitor the CP Rail EDI which manipulates all of the car interchanges on the D&H. The parties also concur that when errors are detected in interchange information the Soo Line clerical employees correct the information. However, the Carriers intimated that, if the errors are not readily correctable, the exceptions are returned to D&H clerical employees for reworking.⁶ The Carriers further contend that, to the extent that Soo Line clerical employees correct errors in the data, the work is incidental to their primary duty to monitor the entire CP Rail EDI system.⁷ Alternatively, the Carriers contend

⁶ The Carriers take an inconsistent position about the extent to which Soo Line employees perform exception and correction work in Milwaukee. Compare the Carriers' August 31, 1992 correspondence with their letter dated June 28, 1993.

⁷ The Carriers attempt to explain that the D&H clerks previously inputted all waybill data into the CP system after correcting errors in the data originally placed into EDI by D&H's shippers. Once the computer systems incompatibility was solved, the shippers input directly into CP's EDI system with CP clerks checking for all errors. Thus, the predominant work of D&H clerks, inputting into the CP system, was eliminated.

that, inasmuch as the correction work consumes less than three hours per shift, the amount of work in dispute is *de minimus*.

Therefore, the second factual dispute concerns the extent to which Soo Line clerks engage in EDI corrections without the assistance of D&H clerical employees. The third factual dispute is whether the work is *de minimus*.

The Organization also charges that certain ancillary work, such as inputting yard inventory, train reporting and releasing waybills in suspense were also transferred from Clifton Park to Milwaukee. As a result of a site visit, the Organization determined that Soo Line employees at Milwaukee were handling advance train lists and releasing waybills for cars on D&H trains. The Soo Line employees, the Organization asserted, were doing more than just pressing a single key on the computer as part of maintaining the EDI system.

The Carriers respond that clerical forces continue to maintain track inventory and that the work concerning releasing bills was eliminated because the CP Rail EDI system automatically transmits data and correspondingly, releases bills from suspense. The Carriers specifically deny that EDI does any train reporting.

Therefore, the fourth factual dispute concerns whether any ancillary EDI tasks are being performed by Soo Line employees in Milwaukee.

The fifth and final factual dispute goes back to exactly what work D&H clerks performed between the time the NYS&W ended its directed service in August, 1990 and the advent of CP Rail EDI in May, 1992. From the scant evidence of record, it appears as though neither the Carriers nor the Organization have adequately addressed this crucial time frame. If D&H customers and users

were inputting data directly into the NYS&W EDI system then D&H clerks were not manually inputting data into the EDI. However, when the CP Rail computer system took over, the D&H clerks apparently obtained hard copies of waybills from the NYS&W EDI system and then inputted the information into the CP Rail computer system because the two systems were incompatible. When the Carriers hooked the D&H directly into the CP Rail EDI system, D&H customers were henceforth entering the information directly into the CP Rail EDI computer system as opposed to entering it into the NYS&W EDI system. Connecting the former D&H property to the CP Rail system rendered it unnecessary for the D&H clerks to input car interchange data from the NYS&W EDI system (which was abandoned) into the CP Rail EDI system.

III. THE STATEMENT OF THE ISSUE

The gravamen of this case is whether the Carriers' utilization of the CP Rail EDI system for recording and billing all D&H car interchanges constituted joint action by CP Rail, Soo Line and D&H to achieve a coordination within the meaning of the WJPA. Simply stated, the main issue is whether CP Rail engaged in a WJPA coordination when it connected the D&H to the CP Rail EDI system exclusively maintained and handled by Soo Line clerical employees.

The second issue is if the Carriers did engage in a Section 2(a) coordination, what is the appropriate remedy?

IV. DISCUSSION

This Board observes that the advances in computer technology over the last 20 years could not have been foreseen by the drafters of the 1936 WJPA. The coordinations envisioned by those negotiators involved real property and personal property as opposed to electronic or intellectual property. Thus, this Board realizes that it is setting new ground by applying the 1936 WJPA to late 1990s computer technologies. Nevertheless, the WJPA is still a viable, effective agreement governing joint actions, involving new technology, between and among separate railroads. This Board is also aware that the record before it is incomplete. Because of the gaps in the record and due to the intricacies of the facts, this Board initially finds that it must restrict its decision to the particular record before it.

At the onset, the Board finds that connecting shippers to a particular railroad's EDI system does not result in a coordination within the definition of Section 2(a) of the WJPA. Therefore, the mere fact that D&H shippers were once entering data into the NYS&W mainframe computer and then they switched to the CP computer, does not constitute joint action by two railroads within the meaning of WJPA Section 2(a).

Next, the Board finds insufficient evidence that Soo Line employees perform ancillary clerical tasks. The Organization failed to show that the D&H and CP/Soo Line coordinated the handling of train lists or car inventories. Furthermore, to the extent any such work is being accomplished by Soo Line clerks, the work is either new work or incidental to their primary duties to monitor traffic on the CP Rail System. Thus, this Board must focus on the correction work.

The advent of EDI on the CP Rail System eliminated the need for D&H clerks to input waybill data into the CP EDI. The inputting work vanished. The elimination of this redundant task is not a coordination inasmuch as the 1986 National Agreement gives the Carriers the right to implement EDI.

However, the consolidation (by the D&H and CP/Soo Line) of the data error correction work which occurs after D&H shippers inputted the data into EDI constituted a coordination. This joint action by the D&H and the CP/Soo Line shifted work from the D&H clerks to the Soo Line clerks. This Board is drawing a fine line. Transferring the error correction work from the D&H to the CP rail clerks in Milwaukee constituted a coordination within the meaning of the WJPA because correcting waybill errors is work separate and distinct from implementing EDI.

Prior to the joint action, the D&H clerks corrected errors in the EDI data entered by D&H shippers. Subsequent to the coordination, CP clerks corrected the errors. The consolidation of all error correction work into the Milwaukee Transportation Service Center was a Section 2(a) coordination.

We must consider what is the appropriate remedy.

The Organization has the burden of proving all aspects of its case, including facts controlling the remedy. In this particular case, the Organization failed to come forward with sufficient evidence showing the quantum of work that was involved in the coordination. The Organization wants this Board to assume that the work amounted to 40 hours per day because simultaneous with the introduction of the CP EDI, five D&H clerical positions were abolished. There is not a scintilla of evidence to support this assumption. Rather, the elimination of the redundant, middleman function

buttresses the Carriers' representation that the error correction work consumed less than three hours per shift.⁸ In addition, the record is void of evidence that any D&H clerk was adversely affected by the shifting of the work to Milwaukee.

Therefore, this Board concludes that it cannot award any monetary remedy, in the form of a WJPA protective allowance to any D&H clerks.

The Organization's other requested remedy, that is, that this Board order the Carriers to undo the coordination and then direct the Carriers to follow the proper notification procedures under the WJPA, poses a different dilemma. Since we found that the Carriers engaged in a coordination, it is obvious that the Carriers breached the notification provisions in Section 4 of the WJPA.

Due to the lack of proof concerning the amount of the work transferred as a result of the coordination, undoing the coordination is inequitable. While the Organization developed sufficient evidence demonstrating that a coordination occurred, the dearth of evidence concerning an adverse impact on D&H clerks leads us to rule that the substantiated hardship on the Carriers to undo the coordination outweighs any hardship on employees precipitated by the coordination. Nonetheless, the Carriers must be held accountable for their failure to give notice and to bargain with the Organization over the terms of an implementing agreement.

Therefore, we will order the Carrier, within the next 60 days, to give notice of the coordination of error correction work and to thereafter negotiate with the Organization with respect to an implementing agreement. While the notice and negotiations ensue, the Carriers may continue

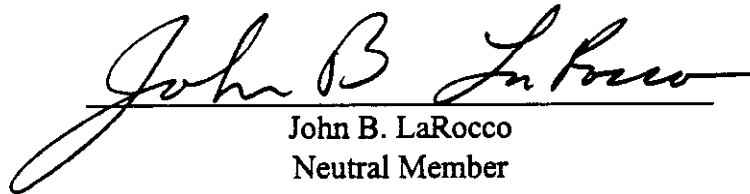
⁸ The D&H clerks were no longer manually inputting data into the CP computer. The Board can infer that this work was the predominant duty of the incumbents of the abolished positions.

to utilize Soo Line clerks to perform the coordinated work. If the parties are unable to reach an implementing agreement, they should invoke the impasse procedures in the WJPA.

AWARD AND ORDER

- 1.) The Answer to the First Question at Issue is, Yes, but only to the extent specified in our Opinion.
- 2.) The Answer to the Second Question at Issue is that the Carriers are not required to restore the *status quo* or to compensate any D&H employees but the Carriers are required to comply with the notice and negotiation provisions in Section 4 of the Washington Job Protection Agreement as explained in our decision.

Date: October 10, 1997



John B. LaRocco
Neutral Member