AWARD NO. 27
CASE NO. 27

PUBLIC LAW BOARD NO. 4454

PARTIES TO DISPUTE) TRANSPORTATION-COMMUNICATIONS UNION
) NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

1. Carrier violated and continues to violate the provisions of Rule 1 (Scope) of the Agreement dated January 8, 1979, when on November 26, 1986 and continuous each day thereafter, when it requires and/or permits an outside company known as Brown's Limousine Crew Car Incorporated headquartered in Dallas, Texas to perform that portion of work assigned to the clerical position of Clerk-Callers and Ice House Foremen at Portsmouth, Ohio. This work involves that portion of clerical work of transporting of Carrier's service employes via Carrier's vehicles which was performed by the specified positions prior to January 12, 1979 and subsequent thereto until a portion of said work was removed commencing on November 26, 1986.

2. As a result of said violation of the Agreement, Carrier shall be required to compensate the senior idle clerical employe each eight (8) hour shift being a total of three (3) such employes each day commencing on November 26, 1986 and continuing thereafter until Carrier returns the clerical work which was arbitrarily removed. This pay to be based upon the average of the Clerk-Callers and Ice House Foremen position straight time rate of pay for eight (8) hours for each employe each shift. This covers each day with three (3) employes, each of which is to receive eight (8) hours pay.

(Organization File: 5582-E, Carrier File: CLK-PO-87-4)

OPINION OF BOARD

On November 26, 1986 the Carrier commenced utilizing the services of Brown's Limousine to transport certain crews at Portsmouth, Ohio. Prior to that time, transportation of those crews was performed by Yellow Cab Company. Additionally, the work was further shared by supervisors and clerical employees (Clerk-Callers and Ice House Foremen) using Carrier-owned vehicles.

The Organization asserts the Carrier violated the scope rule because of certain

previous changes in assignments and rest days coupled with an increased volume of crew hauling performed by Brown's after Brown's replaced Yellow. As such, the Organization seeks compensation for the three senior idle clerical employees. The Carrier asserts that the crew hauling work has always been shared work and the use of Brown's was merely a transfer of limousine services from Yellow who could no longer provide adequate service and such services are performed by Brown's when Clerk-Callers and Ice House Foremen are not available. While the Organization asserts that Brown's is using Carrier-owned vehicles to perform the crew hauling work, the Carrier asserts that it does not own any of the equipment used by Brown's and has not replaced any clerical employees with personnel from Brown's.

The parties further offered statistical information concerning the crew hauling work by Brown's. According to the Carrier, its data shows:

TRIPS		
Month	Yellow	Brown's
10/86	205	
12/86		114
01/87		202

Countering the Carrier's statistical information, the Organization asserts that it made a study covering a 70 day period in February, March and April 1988 and that study shows that Brown's made approximately 486 yard trips and 45 road trips for a total of 531 trips. According to the Organization, the Carrier's statistical information shows that Brown's performed just over five trips per day during December 1986 and January 1987 whereas the Organization's information shows that during the period it examined, Brown's performed an average of 7.5 trips per day - an increase of 50% over the period examined by the Carrier. *See* Carrier Exh. C at p. 19.

In cases such as this, the burden is upon the Organization to demonstrate a violation of the Agreement. Given the numerical approach that the parties have taken to this case, in

order to satisfy its burden in this matter, the Organization must make a demonstration based upon data that is, for all purposes, in the exclusive control of the Carrier. In an effort to meet its burden, the Organization conducted its own study and, understandably, relies upon the results of that study. While the Organization's study may have proceeded using inaccurate assumptions, examined a period of time too remote from the relevant dates, or may not otherwise have been as accurate as the Carrier's study, given the Organization's disadvantage of arguing about data that it does not have direct access to, we find that the Organization's study takes this case out of the realm of those cases where only unsupported assertions are made which ordinarily requires a denying award due to lack of evidence to support unfounded allegations. But, given the approach the parties have taken in this matter, the Organization's showing is sufficient to shift the burden to the Carrier not to rebut the Organization's evidence, but to at least warrant a more detailed examination of the Carrier's records. The Carrier cannot now attack the validity of the Organization's study when the data needed to resolve this dispute is solely within the control of the Carrier.

Therefore, standing back from this dispute, the only valid way to determine if Brown's is performing the same amount of work as Yellow previously performed (as argued by the Carrier) or more work than Yellow previously performed (as argued by the Organization) is for the parties to conduct a joint check of the Carrier's records covering an agreed upon relevant period of time spanning periods both before and after the date Brown's took over over Yellow's functions. We must caution the parties concerning the results of that check. Merely because Brown's performed more or less trips than Yellow during a relevant period may not be sufficient to conclusively establish either party's position in this matter. Other factors alluded to during the presentation of this dispute must also be taken into account. For example, was there a significant increase or decrease in the numbers of crews requiring transportation during the relevant period? Did the covered employees who claim the work experience an increase or decrease in their other duties so as

to affect that employee compliment? Were there increases or decreases in the numbers of other non-covered employees who performed crew hauling? Were the covered employees otherwise unavailable for call to transport the crews? The answers to those and other similarly relevant questions may not be apparently evident after the joint check of the records is made. But, based upon this record, we can only conclude that the record the parties have asked us to rule upon for such an important question is incomplete. The starting point in any analysis of the issues in this case must be at the amount of work Brown's performed as compared to Yellow and we do not have sufficient information to make a reasonable assessment of that question. We shall therefore remand these proceedings to the parties to conduct a joint check of the Carrier's records covering an agreed upon period of time and we shall retain jurisdiction for any disputes that may arise after such check is conducted. As always, the burden will ultimately be upon the Organization to demonstrate that the work it claims has been removed was, in fact "removed" and was, in fact, its work.

The Carrier's arguments do not change our conclusion. First, in the context of this case, we find that the employees on whose behalf the claim was pursued have been sufficiently described. The Claimants are the senior employees who have allegedly lost work or who have been deprived of work opportunities as a result of any improper removal of covered work. *See e.g.*, PLB 4289, Award 9 at 7 ("... Claimants need not be specifically named so long as they are easily and clearly identifiable ... [and] it is 'unnecessary to name the Claimant where he is so specified or designated that Carrier may identify him by its records.'").

Second, we find that the claim has been timely presented. Rule 38 requires that claims be filed "within 60 days from the date of the occurrence on which the claim or grievance is based." The focus of the dispute is not upon the Carrier's use of an outside contractor to perform crew hauling. In this case, the Organization does not contest the

Carrier's general right to do so. Rather, the focus of this dispute is upon the *effect* that the change from Yellow to Brown's may have had on the covered employees over a period of time as a result of allegedly increased crew hauling by Brown's to the determent of the covered employees.

Third, the Carrier's argument that the Organization has not demonstrated that the crew hauling work is *exclusively* its work is insufficient to cause a denial of the claim. *See* Award 3 of this Board at 4:

> The positions or work Scope Rule involved in this case "reserve[s] to employees that work which was assigned under the Agreement at the time the rule was adopted." Third Division Award 26507. As such, "The Carrier may abolish positions, but the work of those positions must be eliminated, not assigned to others either directly or ... by indirect means." Third Division Award 26773. Further, and contrary to the position of the Carrier in this matter, "'the Organization need not prove that the work at issue has been performed exclusively by members of its bargaining unit.'" Award 26507, quoting PLB 3178, Award 4.

Fourth, the previously decided awards relied upon by the Carrier as *res judicata* are not dispositive. PLB 1790, Award 98 found, as the Carrier argues, that "transporting train crews is not exclusively the work of clerks." *Id.* at 2. However, that award was issued under the 1976 Agreement and not under the current Agreement which, for the first time, contained the parties' positions and work scope rule.

PLB 2668, Award 67, which was decided under the current scope rule, did state (id. at 2) that:

> A review of the record of this case reveals that the Organization has not demonstrated that the work of crew hauling belongs exclusively to Clerks at Portsmouth nor has it demonstrated that crew hauling is totally preformed by Claimant when he is regularly assigned. It is clear from the record that crews have been transported by Clerks, by Supervisors, and by taxis at Portsmouth for an extended period of time prior to the claim date.

But, Award 67 is not dispositive for two reasons. First, from a reading of the award, it appears that the Organization did not demonstrate that the particular work at issue was actually the covered employee's work. That is, the evidence showed that the work

was shared and the Organization did not demonstrate that the particular work assigned to the taxi company would otherwise have been assigned to the covered employee. Under the positions and work scope rule, such is the Organization's burden in a shared work context. Second, and more fundamentally, the majority in Award 67 relied upon PLB 1790, Award 98, *supra*, as "the pertinent award ... on point in this instance". *Id.* at 3. However, as found earlier, Award 98 decided the issue under the parties' prior scope rule and not under the scope rule involved in this case which rule came about after a rather protracted and active labor dispute and was a revision from the prior scope rule to a rule that preserves "Positions or work within the scope of this Rule 1". The Carrier's reliance upon PLB 2668, Award 69 suffers the same flaw as its reliance upon Award 67 of that Board.

AWARD

The proceedings are remanded to the parties consistent with the Opinion of this Board to conduct a joint check of the Carrier's records to determine if Brown's Limousine has performed crew hauling work that would otherwise have been performed by covered employees. Jurisdiction over the matter is retained by this Board and, given the length of time this matter has remained in contest between the parties, any disputes shall be expeditiously resolved by this Board.

Edwin H. Benn
Neutral Member

Dissent
T. H. Mullenix, Jr.
Carrier Member

J. C. Campbell
Organization Member

Norfolk, Virginia

May 17, 1991

PUBLIC LAW BOARD NO. 4454

PARTIES TO DISPUTE) TRANSPORTATION-COMMUNICATIONS UNION
) NORFOLK AND WESTERN RAILWAY COMPANY

AWARD

On May 17, 1991, this Board (Carrier dissenting) remanded the proceedings to the parties for the production of further evidence through a joint check of the Carrier's records concerning the Organization's claim that the Carrier permitted Brown's Limousine to transport crews in violation of the scope rule.[1] Given the numeric approach that the parties took in presenting this matter through the use of information showing the volume of work performed by Brown's as compared to Brown's predecessor, Yellow Cab, and further given that the Carrier argued that the Organization failed to meet its burden of proof based upon information that was in the exclusive control of the Carrier, we held:

> ... [T]he only valid way to determine if Brown's is performing the same amount of work as Yellow previously performed (as argued by the Carrier) or more work than Yellow previously performed (as argued by the Organization) is for the parties to conduct a joint check of the Carrier's records covering an agreed upon relevant period of time spanning periods both before and after the date Brown's took over Yellow's functions.

Aside from being within our discretionary authority concerning the manner and method in which to conduct proceedings before this arbitral body, our action was in conformance with the specific authority given to us by the parties as set forth in the agreement establishing this Board dated November 2, 1987 at 3, ¶ 7:

* * *

> This Board shall have authority to request the production of additional evidence from any party ....

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1 The relevant facts are set forth in our opinion of that date.

Rather than submit to the joint check of its records, the Carrier brought suit in federal court to set aside our action. The Organization counterclaimed for enforcement. Finding that no final award issued, the court dismissed the action for lack of subject matter jurisdiction. *Norfolk and Western Railway Company v. Transportation Communications International Union*, Civil Action No. 91-312-N (E.D. Va., December 16, 1991).

The Carrier continues to decline to submit to a joint check of its records.

This Board has no enforcement power. We cannot compel the Carrier to submit to the joint check. Indeed, the agreement establishing this Board recognizes that we can only "request" the production of additional evidence. However, not being able to require a party to act does not leave us unable to resolve disputes when we deem that further information is necessary and that information is not forthcoming. We can draw inferences based upon the refusal of a party to produce evidence. It is well-accepted that failure to produce such records can lead to an inference that had those records been produced, the records would not have supported the position of the party refusing to disclose the records.[2]

Under the circumstances of this case, the Carrier's refusal to submit to a joint check of its records leaves us no choice but to draw an inference adverse to the Carrier's position in this matter. The Organization has attempted to persuade us concerning the merits of its claim through the use of a numerical analysis based upon information it gathered. The Carrier has attempted to refute the Organization's showing by reliance

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2 *See* Elkouri and Elkouri, *How Arbitration Works* (BNA, 4th ed.), 310 [citation omitted]:
"An arbitrator has no right to compel the production of documents ... by either side. He may, however, give such weight as he deems appropriate to the failure of a party to produce documents on demand. ...."
See also, Hill and Sinicropi, *Evidence In Arbitration* (BNA, 1980), 29 [citation omitted]:
In the arbitral setting, concepts of "best evidence" will generally be applicable in the case where more reliable evidence is available, yet the advocate fails to make use of the better evidence. In such a case, the mere failure, absent a satisfactory explanation, may, ... "have evidentiary weight adverse to the profferer of the lesser valued proof." As such, the advocate is advised to use the most reliable evidence available, irrespective of its form ....

upon information from its records. In light of the approach taken by the parties, this Board determined that the best source for the information would be from the Carrier's records and therefore, in accord with our discretion and further in accord with our authority, a joint check of those records was decided upon as the appropriate vehicle for best assisting in ascertaining the facts and the relative strengths and weaknesses of the parties' positions. The Carrier's refusal to submit to that joint check leaves us no choice but to conclude that had the Carrier produced those records, then the contents of those records would have been inconsistent with the Carrier's position in this case.[3]

But, what is the result of the adverse inference? Stated differently, in light of the adverse inference drawn, what becomes of the merits of the claim? We were previously careful to point out that:

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3 Examination of the record in this matter shows that after the claim was filed on January 15, 1987 (Car. Exh. A), on July 14, 1987 the Organization unsuccessfully requested "a mere check of the records for each specific shift and date". *See* Car. Exh. C at p. 8 of 34. Thus, while the Organization did request a joint check of the Carrier's records before this Board in its Submission at 12, the initial request for a joint check of the Carrier's records came long before the matter was submitted to this Board.

It was *the Carrier* who first cited the numbers of trips shown by its records. *See* Car. Exh. C at p. 11 of 34 dated September 7, 1987. It was in rebuttal dated June 28, 1988 that the Organization cited the results of its study of the volume of work performed by Brown's. *See* Car. Exh. C at p. 19 of 34. Thus, on the property, it was *the Carrier* who first raised the specific volume of work as indicated by its records. In its presentation to this Board, it was *the Carrier* who relied so heavily upon the numbers demonstrated by its records and argued that the Organization could not adequately refute that evidence. *See* Car. Submission at 12-13 [emphasis added]:

> Simply, the Organization never presented any information on the property relating to specific factual occurrences wherein work had been removed from the Scope of the Clerk's Agreement. The Carrier, however, did report that its records indicated that the Yellow Cab Company made 205 trips for the Carrier during October 1986. Brown's Limousine Service replaced the Yellow Cab Company in November, 1986, and subsequently made 114 trips during December, 1986, and 202 trips during January 1987. Based on these figures, it is clear that the use of Brown's Limousine Service was merely a transfer of service from the Yellow Cab Company.
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> While the Organization did cite a "study" of the outside firm using a 70 day period covering dates in February, March and April, 1988 ..., *these "statistics" are backed by no hard data* ....

Therefore, in terms of the numeric studies, "first blood" was drawn by the Carrier and not by the Organization. The Organization's study only came *after* the Carrier resorted to its numeric approach. In terms of presentation of the dispute to this Board, knowing how the record was developed on the property with the Carrier's reliance upon the data in its records which it would not further divulge, the Organization understandably relied (in part) upon the results of its study to argue that its burden had been met. *See* Org. Submission at 4. Having raised the issue, the Carrier cannot now rely upon the data in its records and at the same time refuse to divulge the contents of its records.

> We must caution the parties concerning the results of that check. Merely because Brown's performed more or less trips than Yellow during a relevant period may not be sufficient to conclusively establish either party's position in this matter. Other factors alluded to during the presentation of this dispute must also be taken into account. For example, was there a significant increase or decrease in the numbers of crews requiring transportation during the relevant period? Did the covered employees who claim the work experience an increase or decrease in their other duties so as to affect that employee compliment? Were there increases or decreases in the numbers of other non-covered employees who performed crew hauling? Were the covered employees otherwise unavailable for call to transport the crews? The answers to those and other similarly relevant questions may not be apparently evident after the joint check of the records is made. But, based upon this record, we can only conclude that the record the parties have asked us to rule upon for such an important question is incomplete. The starting point in any analysis of the issues in this case must be at the amount of work Brown's performed as compared to Yellow and we do not have sufficient information to make a reasonable assessment of that question. ... As always, the burden will ultimately be upon the Organization to demonstrate that the work it claims has been removed was, in fact "removed" and was, in fact, its work.

The key is the sentence "The answers to those and other similarly relevant questions *may* not be apparently evident after the joint check of the records is made" [emphasis added]. Under the circumstances of this case and given the Carrier's refusal to disclose the relevant records, the inference we are compelled to draw is that not only are the contents of the documents adverse to the Carrier's position in terms of the numerical information contained therein, but the answers to the types of questions discussed above are also adverse to the Carrier's position. In short, as a result of the adverse inference resulting from the Carrier's refusal to submit to a joint check of its records in this case, we find that the Organization has carried its burden. We shall therefore sustain the claim.[4]

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[4] We fail to understand the Carrier's reluctance in this matter. It is not uncommon in proceedings under the Railway Labor Act for carriers to produce information from their records to rebut or support a position. For example, in disputes concerning merger protection (e.g., such as under the 1964 agreement involving the shop crafts, disputes which are heard by SBA 570 and other similar agreements), carriers routinely supply information concerning revenues and other indices of levels of business in an effort to demonstrate a decline in business in response to assertions that employees are entitled to protective benefits. If in this case the Carrier was concerned about the disclosure of information that it considered sensitive, then steps could have been taken to sanitize that information or even to agree (or through invoking the assistance of this Board) upon procedures similar to protective orders utilized in court proceedings to ensure the integrity and confidentiality of the information. But the Carrier cannot expect to refute the kind of information developed by the Organization in this case and at the same time refuse to divulge any record information.

We do not view our decision in this matter to in anyway alter the traditional burden that is placed upon an organization in a contract dispute. That burden remains with the Organization and [continued]

Any further aspects of mitigation of amounts due the affected employees under this award are left to remedial procedures.

CONCLUSION

Claim sustained.

Edwin H. Benn
Neutral Member

Dissent
T. H. Mullenix, Jr.
Carrier Member

J. C. Campbell
Organization Member

Norfolk, Virginia

Dated: February 21, 1992

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our determinations throughout only underscore that burden. It may well have been that after the joint check of the records was completed that increased usage of Brown's would have been demonstrated as urged by the Organization. But, as quoted above, we were careful to point out that that showing alone would not necessarily have been sufficient to prevail in this matter because other questions remained concerning what those showings actually meant that the Organization had the burden of addressing. It was only the Carrier's refusal to provide *any* information after it first raised the issue (*see* note 3, *supra*) that left us with results of the adverse inference that not only were the numbers adverse to the Carrier's position, but the answers to the kinds of questions we posed as being part of the Organization's burden were similarly found adverse to the Carrier's position.

Finally, we do not view our decision as any future license for the Organization to have unfettered access to the Carrier's records. Our determination in this matter relates only to the specific and unique facts in this case. It is not our intention that our action in this matter be interpreted as requiring a joint check of the Carrier's records merely because the Organization alleges, without any proof, that scope rule protected work has been given to strangers to the Agreement. Here, the Carrier first raised the issue, refused to disclose information and the Organization demonstrated through the evidence it was able to gather that its position was more than just wishful speculation.