Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36984
Docket No. MW-36053
04-3-00-3-192

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated Article XV of the September 26, 1996 National Agreement when it contracted out the work of welding rail ends on District 11 near Elk Point and Watertown, South Dakota and failed to afford furloughed employes B. A. Graves, G. G. Skogen and P. D. Anderson the level of protection which New York Dock provides for a dismissed employe (System Files NYD-147/11-99-0236, NYD-148/11-99-0237 and NYD-149/11-99-0238 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant B. A. Graves shall be afforded the level of protection which New York Dock provides for a dismissed employe beginning November 11 through December 16, 1998, Claimant G. G. Skogen shall be afforded the level of protection which New York Dock provides for a dismissed employe beginning November 8 through December 16, 1998 and Claimant P. D. Anderson shall be afforded the level of protection which New York Dock provides for a dismissed employe beginning November 18 through December 16, 1998."

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.

This is a claim for protective benefits under Article XV of the 1996 National Agreement. The Organization asserts that the Claimants are entitled to those benefits as a result of the Carrier's contracting out welding work that the Claimants could have performed. The claims were originally filed on a separate basis, but have been consolidated for decision before the Board.

In Third Division Award 36983 the Board addressed the issues raised in this case and remanded that matter to the parties to permit the Organization to inspect the source documents used by the Carrier in establishing the ratios specified in Article XV of the National Agreement. That Award controls this matter. In this case we shall therefore require the same result.

However, with respect to Claimant Graves, the record shows that on November 27, 2000, Graves and the Carrier entered into a settlement in another dispute and Graves signed a settlement Agreement which released the Carrier ". . . from all claims and liabilities of every kind or nature . . . any . . . claims relating to any employment practices, labor claims . . . in any way related to my employment with . . ." the Carrier. That release covers this dispute. The claim with respect to Claimant Graves is therefore dismissed.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 12th day of May 2004.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 36984 (DOCKET MW-36053)
(Referee Edwin H. Benn)

This case involves the same issues and parties as were involved in Award 36983. We dissent to Award 36984 on the grounds that we presented in our dissent to that earlier Award.

John P. Lange

Martin W. Fingerhut

Bjarne R. Henderson

Michael C. Lesnik

June 8, 2004

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 36983 (DOCKET MW-36035)
AND THIRD DIVISION AWARD 36984 (DOCKET MW-36053)
(Referee Edwin Benn)

While the Carrier Member's Dissent runs for nearly six (6) pages, the single theme that emerges throughout is that BNSF desperately desires to avoid making its records available for an objectively verifiable audit required to enforce the terms of a collective agreement voluntarily entered into by the parties. Indeed, it is difficult to imagine another industry where advocates would publicly complain that objectively verifiable accounting would "have a mischievous and onerous impact" with "objectionable legal and practical consequences". The simple truth is that Article XV is essentially meaningless without timely and objectively verifiable accounting and a fair reading of BNSF's effort to thwart timely transparency leads to the conclusion that BNSF is either attempting to undermine Article XV or prevent the disclosure of suspect accounting practices. Whatever BNSF's motive, the inexorable conclusion is that the excuses advanced by the Carrier Members to support BNSF's continued obfuscation are largely recycled from BNSF's submission and have already been tacitly or explicitly rejected by the Board.

The Carrier Members Have
Misstated The Threshold Issue

In an apparent effort to avoid having the question of BNSF's accounting methodology and timeliness even considered, the Carrier Members open their dissent by misstating the threshold issue. Contrary to the Carrier Members' assertion, the threshold issue is not whether the Claimant was furloughed as the direct result of subcontracting. Rather, pursuant to the plain language in the first sentence of Article XV, the threshold issue is whether the amount of subcontracting on a carrier, measured by the ratio of adjusted Engineering Department purchased services (such services reduced by costs not related to contracting) to the total Engineering Department budget for the five-year period 1992-1996, has increased. Consequently, the Majority correctly issued a procedural ruling that the Carrier was required to allow the Organization to review the source data necessary to determine if, as a threshold issue, subcontracting had increased above the 1992-1996 base period.

The Carrier Members are also wrong when they state that, "[n]owhere in its claim has the Organization requested a right of discovery of documents ***". Contrary thereto, the Organization repeatedly requested the relevant data for both the base period and subsequent periods, including requests made in letters dated January 24, 1997 (Employes' Exhibit "A-3"), April 4, 1997 (Employes' Exhibit "A-4") and specific requests for monthly data in a letter dated August 6, 1997 (Employes' Exhibit "A-5"). Instead of producing the requested data and supporting documents,

the Carrier continued to assert, as an affirmative defense, that subcontracting had not increased over the base period. At that point, the Majority could very well have sustained the claim based on the adverse inference principle as was done by the Board in the conceptually similar dispute decided by Third Division Award 31879. This principle is so well established that it is addressed in the Hill and Sinicropi hornbook where they state, "[a]n arbitrator may likewise resolve and issue against a party that refuses a request for relevant information." However, instead of simply sustaining the claim, as urged by the Organization, the Majority bent over backwards to be fair and afforded the Carrier an additional opportunity to support its affirmative defense. The Carrier simply has no cause to complain, unless its real motive is to avoid a timely and objective evaluation of its accounting methods and practices.

The Summary Information
In The R-1 Reports
Is Wholly Insufficient

The Carrier's attempt to rely on its R-1 Reports to satisfy its obligations under Article XV is wholly insufficient for at least four (4) reasons. First, the Carrier Members' assertion that the R-1 Reports were, "*** apparently good enough for PEB 229 when it fashioned Article XV. ***", is patently wrong. Neither the Report of PEB 229 or Article XV say one word about R-1 Reports. The truth is that the Carrier made reference to R-1 Reports in its presentation to PEB 229, but the PEB did not see fit to reference the R-1 Reports in its recommendations and the parties did not reference R-1 Reports when they adopted those recommendations as Article XV. Moreover, at least one of the budget categories the parties did reference in Article XV - - "adjusted Engineering Department services" -- is not an R-1 reporting category.

Second, the ratios contemplated by Article XV can not possibly be based upon R-1 Reports because Article XV applies to all carriers that were signatory to the September 29, 1996 National Agreement, including many small carriers that are not required to file R-1 Reports and do not file such reports.

Third, relying on R-1 Reports to calculate Article XV ratios would render Article XV meaningless as a procedural matter. The national claim and grievance handling rule (BNSF Rule 42) requires all claims to be presented within sixty (60) days from the date of the occurrence on which the claim is based. If an employe was furloughed during January of 2004, using R-1's to calculate the Article XV ratio would make it impossible to determine if the employe had a basis for filing a claim until April of 2005 because annual R-1 Reports are not required to be filed until March 31st of the following year. In other words, by the time the R-1 Reports for 2004 were published, not only the initial sixty (60) day time limit, but the time limits for the entire appeal process, would have expired. Simply put, using R-1 Reports to calculate Article XV ratios would mean that the time limits to file and appeal a claim would expire in most cases before the threshold issue on which the claim must necessarily be based (whether subcontracting had

increased) could be determined and would make any remedy ultimately due to the employe's paid years after the employe suffered the harm protected by Article XV.

Fourth, relying on R-1 Reports to calculate Article XV ratios would undermine Article XV as a practical matter. That is, the obvious purpose of Article XV is to provide employes with a *New York Dock* derived protection during their protective period. As explained above, if an employe was furloughed as a result of subcontracting in January 2004 and R-1 Reports were used to calculate Article XV ratios, it would not be possible to determine if the employe was entitled to benefits until at least April of the following year. Hence, some fifteen (15) months of the employes' six (6) year protective period would pass without the receipt of the benefits to which he was contractually entitled. Delaying the payment of such benefits undermines their very purpose which is to provide compensation when the employe needs it most, i.e., during periods of furlough or reduced compensation.

Monthly Reporting Is Essential For The Application Of Article XV

Contrary to the Carrier Members' assertions, monthly reporting of total Engineering Department budgets and adjusted Engineering Department purchased services, rather than annual reporting, is essential for the application of Article XV for at least two (2) reasons. First, monthly reporting of this data allows a furloughed employe to determine whether or not the threshold increase in subcontracting has occurred by examining the budget numbers for the twelve (12) months immediately preceding a month in which he is in furloughed status as a result of subcontracting. This is the only reasonable way to determine if subcontracting has increased above the base period as contemplated by Article XV because it measures the subcontracting that occurred in the 12 month period preceding the date the employe alleges his furloughed status resulted from the Carrier's increase in subcontracting Maintenance of Way work, rather than measuring subcontracting that occurs during an arbitrary calendar year period that may include reported months long after the employe was placed in furlough status as a result of the carrier's increase in subcontracting.

Second, in addition to allowing the measurement of subcontracting during a relevant period, the monthly reporting of the relevant budget data allows employes to determine if they were furloughed as a direct result of contracting. Clearly, if an employe is furloughed and a carrier contracts out work that he is capable of performing during that time, the employe is furloughed as a direct result of subcontracting. However, an employe may also be furloughed as a direct result of subcontracting if, during the twelve (12) months preceding a month in which he is furloughed, the carrier contracted out work that could have been rescheduled and performed by the employe instead of furloughing the employe. In other words, monthly reporting is essential both for determining if subcontracting has increased and for definitively determining if an employe is furloughed as a direct result of subcontracting.

New York Dock "Level"
Of Benefits Means All
Benefits Provided By New
York Dock Conditions

The Carrier Members are simply wrong when they assert that the word "level" in the phrase "New York Dock level of protection for a dismissed employee" is a "qualifier" meant to limit the benefits provided by Article XV. The *New York Dock* Conditions provide a specific level of benefits required by federal law in various "transactions" subject to the jurisdiction of the Surface Transportation Board and the use of the word "level" in Article XV simply conveys that precisely the same benefits are provided under Article XV by contract.

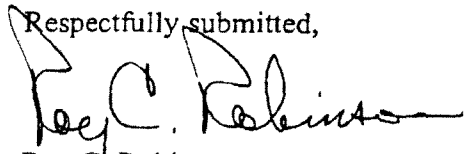
It is simply unreasonable to conclude that either PEB 229 or the parties somehow intended to limit the plain language of Article XV that "any employe covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection for a dismissed employe, subject to the responsibilities associated with such protection" to mean something other than full *New York Dock* dismissal allowance benefits for such an employe. The only reasonable interpretation is that Article XV means just what it says. Adversely affected employes are entitled to a dismissal allowance calculated pursuant to Article I, Section 6 of *New York Dock* and are contractually entitled to receive that allowance for the duration of their "protective period" as also defined in *New York Dock.* Additional benefits, such as conversion of the dismissal allowance to a displacement allowance as provided in Section 6 if the employe returns to service with the Carrier, may apply under specified circumstances and are defined by the various additional sections of New York Dock that, by their plain terms, apply to dismissed employes (see Employes' Exhibit "C" to Docket MW-36035).

The Board Did Not
Exceed Its Jurisdiction

Pursuant to Section 3 First (i) of the Railway Labor Act, the Board has jurisdiction over, 'the interpretation or application of agreements concerning rates of pay, rules, or working conditions ***" Article XV speaks in general terms about a method for measuring subcontracting and, in this case, the Board has done nothing more than to interpret Article XV and issue a procedural ruling to aid in its application and resolution of the parties' disputes over its meaning. Contrary to the Carrier Members' assertions, the Board's initial finding will not result in a protraction of disputes or place an unsustainable burden on National Mediation Board resources. Rather, the carefully crafted findings of the Majority, coupled with the jurisdiction retained by the Board, will result in a definitive interpretation and application of Article XV that should guide the parties nationally and result in a significant diminution in the number of disputes.

Award 36983 could hardly have been reasoned or written more clearly. If future readers accept the inexorable logic that the precedential value of an award is proportionate to the clarity of reasoning in the award, then Award 36983 will indeed carry powerful precedential value.

Respectfully submitted,



Roy C. Robinson
Labor Member

SERIAL NO. 401

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NOS. 36983 & 36984

DOCKET NOS. MW-36035 & MW-36053

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (BNSF Railway Company

On May 12, 2004, the Board issued the Awards in these cases. Third Division Award 36984 incorporated the holdings in Third Division Award 36983.

In pertinent part, Third Division Award 36983 found the following:

> "The above shows that for the ratios required by Article XV, the Carrier supplied the Organization with summary information on an annual basis taken from the R-1 Reports; refused to supply any documentation supporting those summaries; refused to supply information relative to the ratios computed on a monthly basis; and took the position the Organization had not met its burden of proof that the ratios specified in Article XV were exceeded because the Organization '. . . utterly failed to provide supporting evidence.' The Carrier cannot provide summaries, refuse to provide the Organization with access to the underlying documentation which formed those summaries, and then argue that the Organization failed to provide 'supporting evidence' that the ratios were exceeded. The Organization cannot provide that 'supporting evidence' because the Carrier is in possession of the 'supporting evidence' and the Carrier refused to allow the Organization to see that 'supporting evidence.'

* * *

. . . Although we have the discretion to do so, because we believe that the Carrier has acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information. . . . [W]here the Carrier takes the position that the Organization has not provided 'supporting evidence' for its claim as it did in this case and that 'supporting evidence' is totally within the Carrier's control and may well dispose of the entire dispute, basic concepts of fairness require that the Organization be allowed to examine that source information. We shall, therefore, require the Carrier to make available to the Organization the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim.

* * *

. . . We have only decided that because the Carrier relied upon its records as a defense to the claim, refused to allow the Organization to see the source documents for its summaries that it relied upon and then took the position that the Organization has not provided supporting evidence to substantiate the claim, that the Carrier is now obligated to allow the Organization to inspect the source documents used by the Carrier in formulating the summaries that the Carrier used in defending this claim.

We recognize that problems may arise concerning the method of disclosure of information, who is entitled to see the information, protections for the Carrier's business records and the like. We shall leave those questions to be resolved by the parties in the first instance as they implement the terms of this Award. The Board shall retain jurisdiction over disputes, if any, which may arise as a result of this Award."

By letter dated June 23, 2004, the Carrier requested interpretation of the Awards. In pertinent part, the Carrier stated:

". . . [T]he Awards appear to create new rights related to discovery and/or required production of carrier records.

. . . The purpose of this request for interpretation is to resolve any ambiguities that may have arisen due to the Board's lack of familiarity with BNSF's records and to ascertain definitive limits on the types of documents that should be made available on a going forward basis while avoiding the potential for 'fishing expeditions' by the Organization. An additional purpose is to give the Board an opportunity to interpret the Awards so as to limit the uses of this confidential information to proceedings involving Article XV.

* * *

Therefore, in order to resolve these types of ambiguities and to reach an understanding about exactly what showing would be necessary to comply with this Award, BNSF requests an interpretation to clarify that the following 'source documents' are what is required under the Awards. In particular, BNSF seeks a ruling as to whether these Awards directing discovery/document production would be satisfied if:

1. BNSF provides to BMWE the Article XV adjusted ratio data (R-1 report lines 1 through 151, columns D — purchased services as adjusted and F — total freight expense) within 60 days of the publication of the R-1 report.

2. BNSF provided a copy of the formula by the National Railway Labor Conference to extrapolate the ratio of adjusted engineering department purchased services from the R-1 data.

3. For annual periods from 1997 forward, BNSF provided a computer generated report that is based on cost codes and work reasons that contains all of the information that is summarized in the R-1 reports. BNSF would also provide a copy of the applicable chart of accounts (or the best available chart of accounts to the extent the actual year's chart is not available) so that persons looking at this computer generated report (which contains roughly 4,000 lines of information)

would have some understanding of what it is that they are looking at. For years prior to 2004 these annual reports would be made available within 60 days of the award interpretation and for 2004 forward, the report will be provided within 120 days of the close of the calendar year or within 60 days of the filing of the R-1 report, whichever is greater.

4. For years beginning in 2004, if BNSF provided the type of information described in item 1 above and the computer generated report described in item 3 above on a quarterly basis within 60 days of the close of a particular quarter (the data described on page 13 of Award 36983 is not available on a monthly basis).

5. If the Board were to rule that the foregoing did satisfy these Awards, BNSF would have an appropriate officer in its Finance Department certify that the information provided is true and accurate and to the best of their knowledge does not contain any untrue statement of a material fact or omit to state any material fact and fairly presents in all material respects the financial information described above. Also, if the above information were found to satisfy these awards, BNSF could also have a Finance Department employee sit down with BMWE or its designee and walk through a few examples of how information from the R-1 report can be traced through these various levels of source documents.

. . . BNSF respectfully requests an interpretation/clarification of these Awards and specifically requests that the Board state that if the information stated above is provided, such production will satisfy the requirements of the above-referenced awards.

. . . BNSF also requests that the Awards be interpreted to require that all data described above, other than the R-1 reports, be treated as confidential and that the Carrier may require the Organization to execute a written agreement to the effect that the Organization will not disclose the information or use the information for purposes other than the administration of Article XV."

* * *

The Carrier therefore seeks an advisory opinion from the Board - ". . . BNSF seeks a ruling as to whether these Awards directing discovery/document production would be satisfied if . . . [and] BNSF respectfully requests an interpretation/clarification of these Awards and specifically requests that the Board state that if the information stated above is provided, such production will satisfy the requirements of the above-referenced awards." (Emphasis added.) The Board does not give advisory opinions based on hypothetical situations.

We return to the holding in Third Division Award 36983. We simply held that because the Carrier took the position that the Organization did not provide "supporting evidence" to support its claim - which evidence was solely within the Carrier's control - and then refused the Organization's requests to see that supporting evidence - that the Carrier was obligated to permit the Organization to see that evidence. The Board also pointed out that "[a]lthough we have the discretion to do so, because we believe that the Carrier acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information."

The Board has no intention to give advisory opinions based on hypothetical situations or in any way to micromanage the disclosure of information in this case. The Carrier placed itself in this position because it made the argument that the claims should be denied because the Organization did not have "supporting evidence" which only the Carrier had, and then refused to allow the Organization to see that evidence. As pointed out above and as further discussed in Third Division Award 36983, because the Carrier took that position we had the discretion to sustain the claim. However, because of the ramifications of what this case means to the parties and to the industry, when we issued the Awards we chose not to do so. The obligation is on the Carrier to produce the required information. The obligation is on the parties - and not the Board - to set up procedures for the production of that information and to agree upon further procedures to protect the confidentiality of the Carrier's records. The parties are also free through the negotiation process to come up with something completely different that will resolve these particular disputes or contracting disputes in general. Should that not be accomplished, then these disputes can be returned to the Board. The Board will then decide whether the requirements specified in Third Division Award 36983 have been met and, if they are not met, whether to sustain the claims. If we are of the opinion that the Carrier met its obligations, we will then address the merits of the underlying claims. The Board will not, however, give an advisory opinion that if the

Carrier takes certain action then it will be in compliance with the requirements specified in Third Division Award 36983.

The Carrier's request for interpretation/clarification is denied. The parties shall have 60 days from the date of this Interpretation (or to a mutually agreed upon date) to advise the Board of the status of the Carrier's compliance with the requirements of these Awards.

Referee Edwin H. Benn sat with the Division as a Member when Awards 36983 and 36984 were rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of June 2005.

SERIAL NO. 404

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 2 TO AWARD NO. 36984

DOCKET NO. MW-36053

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (BNSF Railway Company

On May 12, 2004, the Board issued Third Division Award 36983. Third Division Award 36984 incorporated the holdings in Award 36983.

In pertinent part, Award 36983 found the following:

> "The above shows that for the ratios required by Article XV, the Carrier supplied the Organization with summary information on an annual basis taken from the R-1 Reports; refused to supply any documentation supporting those summaries; refused to supply information relative to the ratios computed on a monthly basis; and took the position the Organization had not met its burden of proof that the ratios specified in Article XV were exceeded because the Organization '. . . utterly failed to provide supporting evidence.' The Carrier cannot provide summaries, refuse to provide the Organization with access to the underlying documentation which formed those summaries, and then argue that the Organization failed to provide 'supporting evidence' that the ratios were exceeded. The Organization cannot provide that 'supporting evidence' because the Carrier is in possession of the 'supporting evidence' and the Carrier refused to allow the Organization to see that 'supporting evidence.'

* * *

> . . . Although we have the discretion to do so, because we believe that the Carrier acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information. . . . [W]here the Carrier takes the position that the Organization has not provided 'supporting evidence' for its claim as it did in this case and that 'supporting evidence' is totally within the Carrier's control and may well dispose of the entire dispute, basic concepts of fairness require that the Organization be allowed to examine that source information. We shall, therefore, require the Carrier to make available to the Organization the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim.
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> * * *
>
> . . . We have only decided that because the Carrier relied upon its records as a defense to the claim, refused to allow the Organization to see the source documents for its summaries that it relied upon and then took the position that the Organization had not provided supporting evidence to substantiate the claim, that the Carrier is now obligated to allow the Organization to inspect the source documents used by the Carrier in formulating the summaries that the Carrier used in defending this claim.
>
> We recognize that problems may arise concerning the method of disclosure of information, who is entitled to see the information, protections for the Carrier's business records and the like. We shall leave those questions to be resolved by the parties in the first instance as they implement the terms of this Award. The Board shall retain jurisdiction over disputes, if any, which may arise as a result of this Award."

By letter dated June 23, 2004, the Carrier requested interpretation of Awards 36983 and 36984 seeking ". . . a ruling as to whether these Awards directing discovery/document production would be satisfied if . . ." and then listed information,

documents, procedures and conditions to be met and followed before it was willing to produce documents to the Organization. On June 23, 2005, in Interpretation No. 1 to Awards 36983 and 36984, the Board denied the Carrier's request for interpretation/clarification. In pertinent part, the Board held:

> "The Carrier therefore seeks an advisory opinion from the Board '. . . BNSF seeks a ruling as to whether these Awards directing discovery/document production would be satisfied if . . . [and] BNSF respectfully requests an interpretation/clarification of these Awards and specifically requests that if the information stated above is provided, such production will satisfy the requirements of the above-referenced awards' (Emphasis added). The Board does not give advisory opinions based on hypothetical situations.
>
> We return to the holding in Third Division Award 36983. We simply held that because the Carrier took the position that the Organization did not provide 'supporting evidence' to support its claim - which evidence was solely within the Carrier's control - and then refused the Organization's requests to see that supporting evidence - that the Carrier was obligated to permit the Organization to see that evidence. The Board also pointed out that '[a]lthough we have the discretion to do so, because we believe that the Carrier acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information.'
>
> The Board has no intention to give advisory opinions based on hypothetical situations or in any way to micromanage the disclosure of information in this case. The Carrier placed itself in this position because it made the argument that the claims should be denied because the Organization did not have 'supporting evidence' which only the Carrier had, and then refused to allow the Organization to see that evidence. As pointed out above and as further discussed in Third Division Award 36983, because the Carrier took that position we had the discretion to sustain the claim. However, because of the ramifications of what this case means to the parties and to the industry, when we issued the Awards we chose not to do so. The obligation is on

> the Carrier to produce the required information. The obligation is on the parties - and not the Board - to set up procedures for the production of that information and to agree upon further procedures to protect the confidentiality of the Carrier's records. The parties are also free through the negotiation process to come up with something completely different that will resolve these particular disputes or contracting disputes in general. Should that not be accomplished, then these disputes can be returned to the Board. The Board will then decide whether the requirements specified in Third Division Award 36983 have been met and, if they are not met, whether to sustain the claims. If we are of the opinion that the Carrier met its obligations, we will then address the merits of the underlying claims. The Board will not, however, give an advisory opinion that if the Carrier takes certain action then it will be in compliance with the requirements specified in Third Division Award 36983.
>
> The Carrier's request for interpretation/clarification is denied. The parties shall have 60 days from the date of this Interpretation (or to a mutually agreed upon date) to advise the Board of the status of the Carrier's compliance with the requirements of these Awards."

These cases are again before the Board for further interpretation because the parties have been unable to agree upon the procedures for production of information. Specifically, in its Submission to the Board at page 2 and in seeking dismissal of the claims, the Carrier describes the present question as:

> "The Carrier offered its records relevant to the Board's Awards 36983 and 36984, subject to the requirement that the Organization sign a confidentiality agreement against disclosure of those proprietary documents. But the Organization refused to sign the agreement. Should the Board now dismiss these claims for the Organization's failure to cooperate with the discovery process ordered by the Board?"

The Organization did not agree to the Carrier's proffered confidentiality agreement, but instead proposed the signing of an alternative confidentiality agreement, which the Carrier rejected. The parties were unable to reach agreement upon the terms of a confidentiality agreement and, thus, upon ". . . the method of disclosure of

information. . . ." as directed in Third Division Award 36983. The Organization now asks the Board to sustain the claims.

In Interpretation No. 1 to Awards 36983 and 36984, we stated that "[t]his Board has no intention to . . . in any way to micromanage the disclosure of information in this case." That is what we are now being asked to do. We decline the invitation to decide which confidentiality agreement should be signed. That was up to the parties to work out, which they were unable to accomplish. The parties attempted in what we deem to be absolute good faith to reach agreement on the types of information to be provided and procedures for production of information in order for the Carrier to comply with the requirements of Awards 36983 and 36984. However, their efforts resulted in impasse and no information has been produced by the Carrier.

But the bottom line here is that in Award 36983, rather than immediately sustaining the claim because the Carrier took the position that the Organization did not provide the supporting evidence for the claim and then refused the Organization's requests for access to that information, which was solely in control of the Carrier, we gave the Carrier the opportunity to provide the information to the Organization. Nevertheless, the Board held:

> ". . . We shall, therefore, require the Carrier to make available to the Organization the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim."

That opportunity was given more than two years ago and, to this day, no information has been given by the Carrier to the Organization. Given the Carrier's original position in this dispute that the claims should be denied because the Organization did not provide the supporting evidence for the claims and then refused the Organization's requests for access to that information, which was solely in control of the Carrier, it is now appropriate to draw the negative inference that had the Carrier produced the information sought by the Organization, that information would have supported the Organization's position. See Third Division Awards 18447, 31879 and Public Law Board No. 4454, Award 27 (supplemental) quoted in Award 36983. Again, in Award 36983 we clearly held that "[s]hould the Carrier fail to make that source information available, we will sustain the claim." The Carrier has not done so. The

claim will therefore now be sustained. As a remedy, the Claimants shall be made whole in accord with the provisions of Article XV.

Referee Edwin H. Benn who sat with the Division as a neutral member when Award 36984 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 7th day of December 2006.

CARRIER MEMBERS' DISSENT
TO
INTERPRETATION NOS. 1 AND 2
(SERIAL NOS. 401, 403 AND 404)
TO
THIRD DIVISION AWARD 36983 (DOCKET MW-36035)
AND
THIRD DIVISION AWARD 36984 (DOCKET MW-36053)
(Referee Edwin H. Benn)

This is further dissent to Awards 36983 and 36984, as well as to the two Interpretations issued by the Board for each of those Awards. Our previous dissent to the original Awards is incorporated herein by reference.

Awards 36983 and 36984 constituted a discovery order; the Board acknowledged that it was not ruling on the merits of the claims. Interpretation No. 1 (Serial No. 401) amounts to a decision-avoidance tactic on the part of the Board, inasmuch as the Carrier was basically offering what records it had available, provided that the Organization signed an effective confidentiality agreement. But contrary to the Board's assertion in that decision, there was nothing "hypothetical" about the Carrier's offer of documents, because—as the Carrier pointed out in its Submission for Interpretation—the Carrier was offering all that could have been required under standards of law. Interpretation Nos. 2 (Serial Nos. 403 and 404) are the first true rulings on the merits of these cases.

Unfortunately, Serial Nos. 403 and 404 are more accurately termed a "catch 22," as opposed to rulings on the merits. We say that because, while in both the original Awards and in Serial No. 401 the Board recognized the Carrier's right to a means of protecting the confidentiality of those records from disclosure to third parties, the Board nevertheless in its Interpretation Nos. 2 effectively defeated that right. It is incomprehensible how the Board can on one hand recognize the legitimacy of the Carrier's requiring a confidentiality agreement from the Organization, and yet issue Awards that allow the Organization to argue that the Carrier will hereafter have to pay by default thousands of future Article XV claims, because the Organization refuses to sign a bona fide confidentiality agreement.

In the Board's own words, the premise for Serial No. 401 was to direct the parties ". . . to set up procedures for the production of that information and to agree upon further procedures to protect the confidentiality of the Carrier's records," and the Board also said that both parties had an "obligation" to satisfy that directive.[1] Yet although the Board was willing to claim authority to issue an unprecedented

[1] Serial No. 401, page 5, third paragraph.

discovery order, it is strangely unwilling to demonstrate comparable authority to fairly enforce that order so as to protect the Carrier's right to confidentiality of those proprietary records.

Serial Nos. 403 and 404 reflect that the Board has no reason to doubt the good faith of the Carrier as to the form of its confidentiality agreement, nor in its negotiations efforts with the Organization in attempting to procure the Organization's signature. And during the Referee Hearing on the request for Interpretation Nos. 2, the Carrier Member heard no persuasive reason why the Organization refused to sign the Carrier's confidentiality agreement. As the Board will recall, the Organization admitted both in its Submission for Interpretation No. 1 (Serial No. 401) and in its oral argument before the Board that it indeed intended to avoid financial liability for disclosures of the protected information.

During the Referee Hearing on Interpretation Nos. 2, the Organization spent most of its time on this subject arguing that it did not want its officers and agents personally liable for violations of the confidentiality agreement. But obviously damages liability is precisely what makes a confidentiality agreement effective; and individual liability is all the more necessary for effectiveness as to an association like the Organization. And certainly the Organization has shown a tendency to ignore confidentiality in the past—for example, referring, in Submissions to the Board, to claims settlements that the Organization had previously agreed would be nonreferable.

The confidentiality agreement that the Carrier proposed to the Organization contained rather standard language for such instruments. But the Organization's draft form was both non-standard and legally insufficient to protect the Carrier's confidentiality rights for several reasons, which the Carrier outlined in its Submission for Interpretation Nos. 2. For example, the Organization's version proposed to deprive the Carrier of money damages in the event the Organization or its agents breached the agreement. If one compares the Organization's unreasonable proposal with confidentiality forms commonly used in the transportation industry (e.g., the standard ALPA form for the airline industry, which is also governed by the Railway Labor Act) one does not see the labor organization exempted from money damages liability.

Such an illusory form as that counter-proposed by the Organization is particularly dangerous to the industry with respect to securities regulation issues, as

the Carrier argued in its Interpretation Submissions. (The standard ALPA confidentiality agreement form [a copy of which is attached] expressly acknowledges that danger.) If, in order to comply with the Awards, the Carrier were to accept an ineffective confidentiality agreement such as the Organization proposed, then the Carrier risks exposing itself to the consequences of a possible disclosure to third parties, contrary to the intent of securities regulations. In producing that legal dilemma, the Board stepped beyond its authority.

At the Referee Hearing, the Organization failed to prove that there is anything unreasonable about the language of the Carrier's proposed confidentiality agreement.[2] Indeed, there is no justification for the Organization's not signing it as a prerequisite to its access to this proprietary data. Appallingly, the Board rewarded the Organization for its bad faith intransigence by sustaining these claims, despite the fact that it was the Organization—not the Carrier—that thwarted the discovery process ordered in Awards 36983 and 36984. Clearly, the Board's decision to sustain these claims is arbitrary, capricious, and legally insupportable.

In its Submission and during its presentation at the Referee Hearing, the Carrier reminded the Board that there commonly are adverse consequences for a party's willful failure to cooperate in discovery proceedings. The Carrier cited, in its Submission for Interpretation Nos. 2, some Awards that provide precedent for the Board to dismiss the claim where the Organization fails to cooperate or refuses to sign an appropriate Carrier-provided agreement (e.g. Public Law Board No. 4768, Award 6 involving the parties to this dispute; and Third Division Award 36420).

Moreover, the Carrier noted that in court cases, a plaintiff's claims may be dismissed if the plaintiff fails to cooperate with the defendant in the discovery process. By way of illustration, we cite various court decisions in the Fifth Circuit, which is where the Carrier's headquarters are located, that require dismissal of claims by a non-cooperative plaintiff. See, e.g. Butler v. Cloud, 104 Fed. Appx. 373, 374 (5th Cir. 2004) (affirming dismissal of plaintiff's claims with prejudice for failure to comply with discovery obligations, quoting Griffin v. Aluminum Co. of America, 564 F.2d 1171, 1172 (5th Cir. 1977); Wright v. Robinson, 113 Fed. Appx.

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[2] The only unusual provision in the proposed agreement was that specifically barring use of these confidential records before a Presidential Emergency Board, which provision was necessitated by the Organization's early admission that it intended to use it for that purpose.

12, 16 (5th Cir. 2004); In re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation, etc., 580 F.2d 819, 823 (5th Cir. 1978); Smith v. Hertz Equip. Rental, 2002 U.S. Dist. LEXIS 131, *1 (N.D. Tex. Jan. 4, 2002); Gist v. Lugo, 165 F.R.D. 474, 478 (E.D. Tex. 1996); Wright v. Robinson, 113 Fed. Appx. 12, 16 (5th Cir. 2004) (affirming the dismissal of plaintiff's case with prejudice where plaintiff "failed to cooperate in the discovery process").

A few representative samples from other Circuits include: Technology Recycling Corp. v. City of Taylor, 186 Fed. Appx. 624, 640 (6th Cir. 2006); Everyday Learning Corp. v. Larson, 242 F.3d 815, 817 (8th Cir. 2001); Bobal v. Rensselaer Polytechnic Institute, 916 F.2d 759, 765 (2d Cir. 1990) (sustaining dismissal as sanction for plaintiff's unwillingness to cooperate with discovery as ordered by the court); Floyd v. Mount Sinai Medical Center Personnel Director, 2006 U.S. Dist. LEXIS 81715, *19 (S.D.N.Y. Nov. 8, 2006).

During arguments, the Carrier asked the Board to be even-handed, and hold the Organization accountable for its non-cooperation. In the absence of any good reason to question the form of the confidentiality agreement, it would have been fair that any sanctions should have fallen upon the Organization, not upon the Carrier. The Carrier made good faith efforts to comply with the Board's discovery order—yet it was the Carrier whom the Board unjustly punished. In that injustice, the Board is sending a signal that employers have no effective means of protecting confidential information; their only alternative is to pay the claims as blackmail.

Nobody asked the Board to "micromanage" the discovery process that it ordered. But with the order comes the responsibility to enforce its intent and integrity. By rewarding the Organization for its predictable refusal to sign any effective confidentiality agreement, the Board abdicated its responsibility, and consequently imperils the legitimate proprietary interests of every employer in this industry. As a practical matter, the effect of these Awards is to deprive the Carrier of its legal right to protect its confidential information. This is a substantive issue that resonates throughout the industry. Indeed, the Organization's evident objective is not only to open the books of every railroad company, but to establish a precedent for coercing every railroad into divulging its confidential financial information without the adequate protection of a fully effective non-disclosure agreement.

The fact that the Board's previous Awards ordered discovery with an acknowledgement of the need to protect the Carrier's confidential information, and then essentially condoned the Organization's violation of the intent of the previous Awards, unmasks these Awards as arbitrary and capricious. Furthermore, by interfering with the Carrier's lawful right to protect its confidential information, the Board clearly exceeded its authority.

Leading to the travesty of these Awards was the Board's fundamental error in refusing to recognize that the Organization's motive in demanding these records was to use the confidential documents in proceedings before a third party, a Presidential Emergency Board, in Section 6 proceedings, which are outside of the Board's jurisdiction. The Carrier emphasized that fact in its Submissions and in argument during the Referee Hearings—without any real dispute from the Organization. The Organization's real motive was underscored in its refusal to sign a confidentiality agreement that would have limited use of the information to resolution of these RLA Section 3 labor claims. The Board had authority only to consider the Section 3 claims, and should have rejected the Organization's excuse for not signing the confidentiality agreement for the reason that it also wanted to use the data for Section 6 purposes. By playing to the Organization's ulterior agenda, the Board consequently intruded into an RLA Section 6 area, which is outside of its authority.

Another serious error was for the Board to presume that it should write into Article XV language that the parties did not negotiate, such as what suffices for documentation of the calculation of the contracting ratio. If, as the Board already indicated in its initial Awards, Article XV is so poorly drafted that certain definitions and basic provisions are lacking, then the Board could offer no remedy beyond suggesting that the parties use the statutorily mandated Section 6 proceedings to produce a more enforceable Article XV. But it is not for the Board to re-write Article XV under the rubric of "interpreting" that agreement. Public Law Board No. 5191, Award 2 cogently explained the jurisdiction of boards of adjustment as follows:

> "These are certainly refreshing and cerebral approaches to this issue and could be considered if we were a board of equity and/or we had the power to remake the Agreement. The parties are aware the Board's jurisdiction is limited to the 'interpretation and application of Agreements,' not their formulation; consequently, our decision must be

> founded upon the intent of the contracting parties as manifested by the language used, coupled with applicable rules of contract construction.
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> * * *
>
> . . . If there are inequities in the system, as the Organization contends, or other exceptions to be added, it is a matter only the parties can remedy by amending or modifying the contract, for we are <u>not</u> empowered to do so."

Given the serious departures by the Board from its authority, as well as the manifest injustice imposed by these Awards, they lack precedent value. We strongly dissent.

A. Ken Gradia

Martin W. Fingerhut

Bjarne R. Henderson

John P. Lange

Michael C. Lesnik

Attachment

December 7, 2006

Re: Confidentiality Agreement Among Air Line Pilots Association ("ALPA"), _____ Airlines, Inc.

As you know, we have requested discussions ("Discussions") between representatives of ALPA and _____ to consider changes in the parties' current collective bargaining agreement. In connection with the Discussions, we understand that ALPA may wish to review certain non-public information concerning _____. This letter sets forth the parties' agreement concerning the confidential treatment of this information and any information derived there from (collectively referred to as the "Evaluation Material").

1. The Evaluation Material is being provided to ALPA solely for the purpose of assisting ALPA in analyzing and evaluating _____ financial condition in connection with the Discussion. Neither ALPA nor its Representatives will use the Evaluation Material for any other purpose. The term Evaluation Material does not include information which (i) is or becomes generally available to the public other than as a result of disclosure by ALPA or ALPA's Representatives in violation of this agreement; (ii) was available to ALPA for or its Representatives on a non-confidential basis prior to its disclosure to them by _____ or their representatives; or (iii) becomes available to ALPA or its Representatives on a non-confidential basis from a source other than _____ or their representatives unless such is non-public information which ALPA knows or should know was deliberately disclosed by _____.

2. Except with the prior consent of _____ or, subject to paragraph 7 below, as required by legal process, ALPA will not disclose the Evaluation Material to any person for any reason other than to ALPA's Representatives for the purpose of analyzing and evaluating the financial condition of _____ in connection with the Discussions. Prior to releasing the Evaluation Material to its Representatives, ALPA will inform each of them of the confidential nature of the Evaluation Material and obtain their agreement to treat the Evaluation Material confidentially under the terms of this agreement. For purposes of this agreement, ALPA's Representatives are the ALPA employees, attorneys, professional advisors and representatives (including ALPA accountants and financial advisors) who review the Evaluation Material in connection with the Discussions. ALPA will provide _____ with a list of all persons who are in possession or actually review the Evaluation Material.

3. ALPA acknowledges that the Evaluation Material is the property of _____ that regards such material as confidential and competitively sensitive, and that _____ regards disclosure of such material other than in accordance with this agreement to be detrimental to the interests, business and affairs of _____ and will cause _____ irreparable injury and damage.

4. ALPA agrees that _____ will not have any liability to ALPA or any of its Representatives resulting from the use of the Evaluation Material by ALPA or its Representatives.

5. Upon _____ request, ALPA will return the Evaluation Material and any copies thereof to _____ at any time. ALPA will return the Evaluation Material and all copies thereof at the conclusion of the Discussion.

6. ALPA acknowledges that it is aware, and that it will advise its Representatives, of the restrictions imposed by the United States securities law on persons who receive material, non-public information concerning a public company or a company issuing securities to the public.

7. In the event that ALPA or its Representatives are requested in any proceeding to disclose any Evaluation Material, ALPA will promptly notify _____ of the request so that _____ may seek an appropriate protective order. If, in the absence of a protective order, ALPA or its Representatives are nonetheless compelled by law to disclose Evaluation Material, ALPA will only disclose that portion of the Evaluation Material which, in the opinion of its legal counsel, ALPA is legally required to disclose and will make every reasonable effort to obtain a confidentiality agreement for the Evaluation Material so disclosed.

8. This agreement will be governed by and construed in accordance with the laws of the State of _____ without giving effect to choice of law doctrines.

9. This agreement may be waived, amended or modified only by an instrument in writing executed by all parties.

10. This agreement may be executed in all number of counterparts; each such counterpart shall be deemed an original, and all such counterparts shall together constitute one and the same instrument.

Sincerely,

By: _____

Accepted and Agreed:

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL

By: _____

SERIAL NOS. 407 and 408

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 3 TO AWARD NOS. 36983 and 36984

DOCKET NOS. MW-36035 and 36053

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes
(Division – IBT Rail Conference

NAME OF CARRIER: (BNSF Railway Company

This dispute is currently before the Board on remand from the Fifth Circuit Court of Appeals in BNSF Railway Company v. Brotherhood of Maintenance of Way Employes, 550 F.3d 418 (5th Cir. 2008).

A. Prior Proceedings Before The Board

The history behind this dispute is more fully set forth in Third Division Awards 36983 and 36984 and Interpretation Nos. 1 and 2 to those Awards. We will, however, summarize what has transpired in these cases.

On May 12, 2004, the Board issued the Awards in these cases. In pertinent part, the Board found the following [Emphasis in original]:

> "The above shows that for the ratios required by Article XV, the Carrier supplied the Organization with summary information on an annual basis taken from the R-1 Reports; refused to supply any documentation supporting those summaries; refused to supply information relative to the ratios computed on a monthly basis; and took the position the Organization had not met its burden of proof that the ratios specified in Article XV were exceeded because the Organization '. . . utterly failed to provide supporting evidence.' The Carrier cannot provide summaries, refuse to provide the Organization with access to the underlying documentation which formed those summaries, and then argue that the Organization failed

to provide 'supporting evidence' that the ratios were exceeded. The Organization cannot provide that 'supporting evidence' because the Carrier is in possession of the 'supporting evidence' and the Carrier refused to allow the Organization to see that 'supporting evidence.'

* * *

Although we have the discretion to do so, because we believe that the Carrier acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information. . . . [W]here the Carrier takes the position that the Organization has not provided 'supporting evidence' for its claim as it did in this case and that 'supporting evidence' is totally within the Carrier's control and may well dispose of the entire dispute, basic concepts of fairness require that the Organization be allowed to examine that source information. We shall, therefore, require the Carrier to make available to the Organization the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim.

* * *

We have only decided that because the Carrier relied upon its records as a defense to the claim, refused to allow the Organization to see the source documents for its summaries that it relied upon and then took the position that the Organization had not provided supporting evidence to substantiate the claim, that the Carrier is now obligated to allow the Organization to inspect the source documents used by the Carrier in formulating the summaries that the Carrier used in defending this claim.

We recognize that problems may arise concerning the method of disclosure of information, who is entitled to see the information, protections for the Carrier's business records and the like. We shall leave those questions to be resolved by the parties in the first instance as they implement the terms of this Award. The Board shall retain

jurisdiction over disputes, if any, which may arise as a result of this Award."

By letter dated June 23, 2004, the Carrier requested interpretation of the Awards seeking ". . . a ruling as to whether these Awards directing discovery/document production would be satisfied if . . ." and then listed information, documents, procedures and conditions to be met and followed before it was willing to produce documents to the Organization. On June 23, 2005, in Interpretation No. 1 to Award Nos. 36983 and 36984, the Board denied the Carrier's request for interpretation/clarification. In pertinent part, the Board held:

> "The Carrier therefore seeks an advisory opinion from the Board - '. . . BNSF seeks a ruling as to whether these Awards directing discovery/document production would be satisfied if . . . [and] BNSF respectfully requests an interpretation/clarification of these Awards and specifically requests that if the information stated above is provided, such production will satisfy the requirements of the above-referenced awards' (Emphasis added). The Board does not give advisory opinions based on hypothetical situations.
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> We return to the holding in Third Division Award 36983. We simply held that because the Carrier took the position that the Organization did not provide 'supporting evidence' to support its claim - which evidence was solely within the Carrier's control - and then refused the Organization's requests to see that supporting evidence - that the Carrier was obligated to permit the Organization to see that evidence. The Board also pointed out that '[a]lthough we have the discretion to do so, because we believe that the Carrier acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information.'
>
> The Board has no intention to give advisory opinions based on hypothetical situations or in any way to micromanage the disclosure of information in this case. The Carrier placed itself in this position because it made the argument that the claims should be denied because the Organization did not have 'supporting evidence' which

only the Carrier had, and then refused to allow the Organization to see that evidence. As pointed out above and as further discussed in Third Division Award 36983, because the Carrier took that position we had the discretion to sustain the claim. However, because of the ramifications of what this case means to the parties and to the industry, when we issued the Awards we chose not to do so. The obligation is on the Carrier to produce the required information. The obligation is on the parties - and not the Board - to set up procedures for the production of that information and to agree upon further procedures to protect the confidentiality of the Carrier's records. The parties are also free through the negotiation process to come up with something completely different that will resolve these particular disputes or contracting disputes in general. Should that not be accomplished, then these disputes can be returned to the Board. The Board will then decide whether the requirements specified in Third Division Award 36983 have been met and, if they are not met, whether to sustain the claims. If we are of the opinion that the Carrier met its obligations, we will then address the merits of the underlying claims. The Board will not, however, give an advisory opinion that if the Carrier takes certain action then it will be in compliance with the requirements specified in Third Division Award 36983.

The Carrier's request for interpretation/clarification is denied. The parties shall have 60 days from the date of this Interpretation (or to a mutually agreed upon date) to advise the Board of the status of the Carrier's compliance with the requirements of these Awards."

These cases returned to the Board for further interpretation because the parties were unable to agree upon the procedures for production of information. In seeking dismissal of the claims, the Carrier described the question as:

"The Carrier offered its records relevant to the Board's Awards 36983 and 36984, subject to the requirement that the Organization sign a confidentiality agreement against disclosure of those proprietary documents. But the Organization refused to sign the agreement. Should the Board now dismiss these claims for the

Organization's failure to cooperate with the discovery process ordered by the Board?"

The Organization did not agree to the Carrier's proffered confidentiality agreement, but instead proposed the signing of an alternative confidentiality agreement, which the Carrier rejected. The parties were unable to reach agreement upon the terms of a confidentiality agreement and, thus, upon ". . . the method of disclosure of information. . . ." as directed by Third Division Award 36983. The Organization therefore requested that the Board sustain the claims. In Interpretation No. 2 to Award Nos. 36983 and 36984, the Board did so:

> "In Interpretation No. 1 to Awards 36983 and 36984, we stated that '[t]his Board has no intention to . . . in any way to micromanage the disclosure of information in this case.' That is what we are now being asked to do. We decline the invitation to decide which confidentiality agreement should be signed. That was up to the parties to work out, which they were unable to accomplish. The parties attempted in what we deem to be absolute good faith to reach agreement on the types of information to be provided and procedures for production of information in order for the Carrier to comply with the requirements of Awards 36983 and 36984. However, their efforts resulted in impasse and no information has been produced by the Carrier.
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> But the bottom line here is that in Award 36983, rather than immediately sustaining the claim because the Carrier took the position that the Organization did not provide the supporting evidence for the claim and then refused the Organization's requests for access to that information which was solely in control of the Carrier, we gave the Carrier the opportunity to provide the information to the Organization. Nevertheless, the Board held:
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> '. . . We shall, therefore, require the Carrier to make available to the Organization the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim.'

> That opportunity was given more than two years ago and, to this day, no information has been given by the Carrier to the Organization. Given the Carrier's original position in this dispute that the claims should be denied because the Organization did not provide the supporting evidence for the claims and then refused the Organization's requests for access to that information which was solely in control of the Carrier, it is now appropriate to draw the negative inference that had the Carrier produced the information sought by the Organization, that information would have supported the Organization's position. See Third Division Awards 18447, 31879 and Public Law Board No. 4454, Award 27 (supplemental) quoted in Award 36983. Again, in Award 36983 we clearly held that '[s]hould the Carrier fail to make that source information available, we will sustain the claim.' The Carrier has not done so. The claims will therefore now be sustained. As a remedy, the Claimants shall be made whole in accord with the provisions of Article XV."

B. The Court Proceedings

1. The District Court's Decision

The Carrier sought judicial review of the Board's Awards. By Memorandum Opinion and Order dated November 16, 2007, Judge John McBryde of the United States District Court for the Northern District of Texas granted the Carrier's motion for summary judgment in BNSF Railway Company v. Brotherhood of Maintenance of Way Employes, 523 F.Supp.2d 498, vacating the Awards and finding, in pertinent part id. at 506 [citations omitted]:

> "The Board awards in question obviously are not what the RLA contemplates. The awards are not in conformity with the jurisdictional prerequisites of the Agreement. The Board chose not to decide the issues legitimately presented to it by the claimants but, instead, to go off on a procedural tangent by directing BNSF to provide undefined discovery for the benefit of Brotherhood and by punishing BNSF by awards on the merits in favor of the claimants simply because BNSF failed to comply with the improperly imposed undefined discovery obligation. The court cannot glean from the writings of the Board that they genuinely were interpreting or

applying the Agreement. If one were to treat what the Board did as an interpretation or application of the Agreement, their discovery mandate certainly did not draw its essence from the Agreement. The Board's directive to BNSF that it must comply with the undefined discovery directive at risk of a ruling against it on the merits of the claims simply reflected the Board's 'own notions of industrial justice.['] . . . '[T]he Board exceeded the scope of its jurisdiction in fashioning its award. . . .'"

2. The Fifth Circuit's Decision

The Organization appealed the District Court's vacating the Awards. In BNSF Railway Company v. Brotherhood of Maintenance of Way Employes, supra, 550 F.3d at 425-429 the Fifth Circuit disagreed with the District Court's conclusion that the Board exceeded its jurisdiction with respect to the Carrier's refusal to produce the source documents and our drawing an adverse inference from the Carrier's failure to do so [citations and footnotes omitted]:

"C. The NRAB acted within its jurisdiction in directing BNSF to produce the source documents.

* * *

The NRAB acts within its jurisdiction so long as its decision is drawn from the 'essence' of the CBA. . . . The essence of the CBA includes not just the express language contained within the four corners of the document, but also implied terms and the parties' practice, usage, and custom. . . . Under the district court's analysis, the NRAB lacked authority to direct the production of documents because there was no express provision in the CBA allowing it. Were this true, Article XV would be rendered nugatory. . . . If BNSF (i) could rely on its records as a defense to BMWE's claim that it had increased subcontracting levels, (ii) refuse to allow BMWE to see the source documents for the summaries that BNSF was relying upon, (iii) take the position that BMWE had not provided evidence to support its claim, and finally (iv) assert that the NRAB could not compel production of the source documents, then BNSF would be able to defeat any Article XV claim by refusing to turn over the relevant

documents which are in its sole possession. Again, that would render Article XV a dead letter.

Article XV represents a compromise in national collective bargaining negotiations. It attempted to solve the larger impasse in those negotiations regarding subcontracting, but did not address the practical disputes that would arise regarding the administration of claims. The NRAB has the duty to arbitrate claims under Article XV, but was given little guidance in the CBA on how to do so. Considering the Delphic language in Article XV, it was reasonable for the NRAB to conclude that implicit in Article XV was a requirement that BNSF produce documentation that would enable the NRAB to assess the validity of its defense to BMWE's claim. Otherwise, BNSF would be able to stonewall its way out of any liability under Article XV. We conclude that it was within the NRAB's jurisdiction to direct BNSF to produce documentation supporting BNSF's defense that it had not increased subcontracting when that documentation was in BNSF's sole possession.

* * *

D. The NRAB did not violate its obligation to interpret the Award. BNSF contends that the NRAB was statutorily obligated to provide an interpretation of the Award upon request and thereby break the parties' impasse on the confidentiality of the produced materials. Section 3 First (m) of the RLA states that '[i]n case a dispute arises involving an interpretation of the award, the division of the board upon request of either party shall interpret the award in the light of the dispute.' 45 U.S.C. § 153(m) (emphasis added). This language is mandatory and not permissive. . . . BNSF made two requests for an interpretation, but we are primarily concerned with the second request. In its second request for interpretation, BNSF submitted the parties' competing confidentiality agreements and asked the NRAB to determine which agreement should be signed. The NRAB did not select a confidentiality agreement, instead sustaining the claims based on BNSF's failure to turn over the source documents.

The NRAB consistently informed BNSF that it would draw an adverse inference if BNSF failed to comply with the Award. In the Award, the NRAB stated that '[s]hould the Carrier fail to make that source information available, we will sustain the claim.' This warning was explicit and unequivocal. In Interpretation No. 1, the NRAB stated:

'The obligation is on [BNSF] to produce the required information. The obligation is on the parties - and not the Board - to set up procedures for the production of that information and to agree upon further procedures to protect the confidentiality of [BNSF's] records. The parties are also free through the negotiation process to come up with something completely different that will resolve these particular disputes or contracting disputes in general. Should that not be accomplished, then these disputes can return to the Board. The Board will then decide whether the requirements specified in [the Award] have been met and, if they are not met, whether to sustain the claims.'

The NRAB again informed BNSF that the parties were obligated to settle any concerns over confidentiality and that it was not the role of the NRAB to assist in protecting BNSF's business records. In its second request for interpretation, BNSF did not ask the NRAB to give a detailed explanation of the phrase 'source documents.' Instead, it appears that BNSF understood what would constitute source documents for the 1992-1996 period because it was prepared to turn over these documents subject to a satisfactory confidentiality agreement. At this point, the primary dispute between the parties was the content of the confidentiality agreement and whether it would include money damages as a remedy, not which documents were 'source documents.'

In its second request for interpretation, BNSF asserted that if it is required to turn over the source documents, then it 'is entitled to require a non-disclosure agreement that will <u>effectively</u> protect its proprietary interest in this confidential financial information.' BNSF did not give a justification or citation for this generalization. Lost in the negotiations of the specific details of a confidentiality

> agreement was the question of whether the NRAB had the authority to require the parties to enter such an agreement. In fact, in its second request for interpretation, BNSF questioned the NRAB's authority to craft its own version of a confidentiality agreement because the matter 'is not covered by the Railway Labor Act.' The NRAB may have been hesitant to select one of the confidentiality agreements, or impose its own, because it may have lacked confidence in its jurisdiction to do so. Rather, it took the measured approach of allowing the parties to negotiate a compromise. Indeed, had the NRAB chosen one confidentiality agreement over the other, it is likely that this matter would have been on appeal on that issue instead. However, since this issue is not before us, we do not need to answer the question of whether the NRAB could have imposed a confidentiality agreement on the parties.
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> The NRAB did not fail to interpret the Award. It explained exactly what it was going to do from the Award through Interpretation No. 2. Being bound by the CBA, the NRAB did not want to force one party into a confidentiality agreement when the parties had not previously granted the NRAB such power in the CBA. Whereas the obligation to produce documents was implicit in order for Article XV to be effectuated under the particular circumstances of this dispute, we are not prepared to say the same about the details of a confidentiality agreement, e.g., whether a breach of the confidentiality agreement should result in damages. Accordingly, the NRAB did the most reasonable thing within its power: it directed the parties to negotiate the terms of a confidentiality agreement. When they failed to do so, the NRAB enforced the terms of the Award and drew an adverse inference against BNSF. . . ."

However, while agreeing that the Board acted properly and within its authority to draw an adverse inference due to the Carrier's failure to produce the source documents upon which it based its defense that the subcontracting complied with Article XV, the Fifth Circuit concluded that the Board erred by sustaining the claims without making a finding on whether the furloughs were a direct result of increased subcontracting (550 F.3d at 424-425, 429 [citations and footnotes omitted]):

"B. The NRAB ignored an element of Article XV by sustaining the claims without making a finding on whether the furloughs were a direct result of increased subcontracting.

After describing the base level of subcontracting, Article XV states that '[i]n the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection.' The plain meaning of Article XV requires a claimant to prove that the increased subcontracting was the cause of his furlough. As reflected in the district court's opinion, the Award discusses the need to make a finding on this second element:

'Specifically, we express no opinion on whether the Claimant was '. . . furloughed as a direct result of such subcontracting. . . .' Indeed, if there was no 'increased subcontracting' as contemplated by Article XV, because this claim seeks protective benefits for the Claimant, then the question of whether the Claimant is entitled to those benefits is moot.'

It follows from this quotation that if subcontracting had increased, then the NRAB would have to reach the causation element before determining whether the claims should be sustained. The Award later threatens that '[s]hould [BNSF] fail to make that source information available, we will sustain the claim.' cf17 The NRAB did precisely that in Interpretation No. 2: it drew an adverse inference from BNSF's failure to comply with the Award and sustained the claims without making any finding as to whether the employees' furloughs were 'a direct result' of the inferred increase in subcontracting.

The logic supporting the adverse inference rule is that a party fails to produce evidence in its control in order to conceal adverse facts. There is no necessary connection between the contents of the source documents (which relate only to subcontracting expenses) and the causal relationship with a claimant's furlough. . . .

> Thus, assuming that the NRAB was correct in drawing an adverse inference against BNSF, that inference only established that subcontracting had increased and not that the furloughs were a direct result of that increased subcontracting.
>
> We have previously held that an arbitration panel exceeds the scope of its jurisdiction if it ignores an explicit term in a CBA. . . . By not making any finding as to the necessary element of causation, the NRAB essentially ignored a term of the CBA. Accordingly, sustaining the claims without any finding as to the second element of Article XV was 'wholly baseless and without reason' and not an interpretation of the CBA. For this reason, the Award should be vacated and the claims remanded to the NRAB.
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> * * *
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> Thus, its error was not in drawing the adverse inference - that was permissible - but rather it was in sustaining the claims based solely on that adverse inference without making a finding as to the causation element."

3. The District's Court's Remand

By order dated December 30, 2008, the District Court remanded the Awards to the Board ". . . for further consideration consistent with the opinion of the Fifth Circuit." Further argument was held before the Board on May 8, 2009.

4. Discussion

By letter dated April 1, 2009, the Carrier advised the Organization that it ". . . will provide all relevant 'source documentation' for the relevant time periods, in accordance with the Board's previous directives" and concluded that ". . . there is no longer any basis for an 'adverse inference' against BNSF on that point." By letter dated April 30, 2009, the Organization responded that it ". . . believes that the recent document production is irrelevant to the issue remaining before the Board . . . the document production is too late . . . [t]he Board . . . decided the issue as to whether contracting-out had increased by drawing an adverse inference against BNSF on that issue, and the Court of Appeals approved that part of the Board's decision." By

letter dated May 4, 2009, the Carrier stated that "[b]ecause the Fifth Circuit affirmed the district court's order vacating the awards, there is no existing Board award in this case . . . [t]he old awards have been and remain vacated . . . BNSF's position is that the Board need not and should not reinstate its adverse inference finding . . . [r]ather, it now can and should decide - in light of the railroad's production of the 'source documents' - whether the subcontracting ratio has in fact been exceeded." The Organization responded by letter dated May 5, 2009 that it ". . . disagrees that the case is now a blank slate . . . [t]he only error found by the Court of Appeals was the sustaining of the claims in the absence of ruling on the causation issue . . . [t]hat does not mean that the entire cases are to be re-arbitrated . . . [and the] NRAB rules provide for arbitration based on the record developed on-the-property."

With respect to the scope of the present proceeding, the Organization is correct. Because the Carrier refused to produce the source documents for its defense to the claims, the Board - after giving the Carrier ample opportunity to produce those documents - drew an adverse inference. The Fifth Circuit clearly found that was proper - ". . . [t]hus, [the Board's] error was not in drawing the adverse inference - that was permissible - but rather it was in sustaining the claims based solely on that adverse inference without making a finding as to the causation element." 550 F.3d at 429. The Fifth Circuit then specifically remanded the case to the District Court ". . . with instructions to remand to the NRAB for further consideration consistent with this opinion" (id. at 430) which the District Court did in its December 30, 2008 order (". . . the awards . . . are . . . remanded to the National Railroad Adjustment Board, Third Division, for further consideration consistent with the opinion of the Fifth Circuit.").

We do not read the court opinions as a direction to the Board to start the proceedings anew. Indeed, if the Carrier's position is adopted to allow it to now produce the documents which it repeatedly refused to produce, then the court opinions will have effectively remanded this matter not to the Board, but to the parties on the property to assemble a new record - one which now contains the documents the Carrier initially refused to turn over. Clearly the courts did not do that. The Board drew an adverse inference from the record presented to it and developed on the property under the Board's rules and the Fifth Circuit affirmed our determination that an adverse inference could be drawn. As the Fifth Circuit clearly determined, the only question before the Board on remand is causation. The adverse inference remains.

Because of the ramifications of this Award on the parties and the industry with respect to subcontracting for pending and future similar disputes, we will, however, address one aspect of the document production question. In Third Division Award 36983, we held:

> "We find that the Organization is entitled to inspect the Carrier's records concerning the relevant information for periods of less than an annual reporting period. Article XV specifies the base period of 1992-1996 for determining the appropriate ratios. However, Article XV is silent with respect to the periods to be examined '[i]n the event that subcontracting increases beyond that level [of the base period]. Under the Carrier's interpretation that it need only disclose information on an annual basis, furloughed employees and the Organization may have to wait up to one year until the Carrier provides its annual information when it files the R-1 Report for the employees and the Organization to know whether the employees are entitled to benefits under Article XV. Yet, although not specifically required by Article XV, the New York Dock benefits 'for a [New York Dock] dismissed employee' referred to in Article XV are monthly benefits. Article I(6)(a) of New York Dock provides that '[a] dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period. . . .' We do not know if the Carrier keeps such records on a 'monthly' basis or on some other periodic basis of less than one year. However, if the Carrier does have such records relevant to determining the ratios on less than an annual basis, we find the Organization is entitled to inspect those records as well."

Should this kind of dispute arise again between these parties, we now see no need for production to occur on less than an annual basis. That is because the Carrier represented to the Board at the argument on May 8, 2009 that it does not maintain less than annual records. We accept that representation. Further, as stated in Award 36983, our concern included the fact that ". . . furloughed employees and the Organization may have to wait up to one year until the Carrier provides its annual information when it files the R-1 Report for the employees and the Organization to know whether the employees are entitled to benefits under Article XV." Aside from postponing payment of benefits to those employees entitled to receive compensation called for in Article XV, that delay raised another potential

concern. That type of delay would have permitted an argument to be made by the Carrier that, depending on the passage of time from when employees are furloughed until the ratio information becomes available under Article XV, claims filed contesting the denial of benefits could be argued by the Carrier as being untimely filed under the Agreement because, after gaining access to the annual information, the actual furlough began at a time beyond the designated period for filing timely claims. For these parties, that is no longer an issue. The Carrier assured the Board at the argument on May 8, 2009 that it would not make such timeliness arguments. Again, we accept that representation. Barring any changes to those representations, less than production on annual basis will not be required for similar pending or future disputes between the parties.

We now turn to the remaining causation issue as directed by the Fifth Circuit.

There were four named Claimants in the original claims - R. D. Parkarinen covered by Third Division Award 36983 and B. A. Graves, G. G. Skogen and P. D. Anderson covered by Third Division Award 36984. As noted in Award 36984, on November 27, 2000, Graves and the Carrier entered into a resolution in another dispute and Graves signed a settlement releasing the Carrier, which also covered this matter. As we found in Award 36984, "[t]he claim with respect to Claimant Graves is therefore dismissed." At the argument on May 8, 2009, the parties advised us that Parkarinen has now signed a similar settlement. Parkarinen's claim to entitlements is now dismissed from these proceedings. That leaves Skogen and Anderson as the Claimants.

The record shows that Skogen and Anderson were furloughed on November 8 and 18, 1998, respectively. There is no dispute to the Organization's position that Skogen and Anderson were qualified Welders.

The record also shows that the welding subcontractor, Chemetron, was performing welding for the Carrier prior to the date Skogen and Anderson were furloughed. In response to the individually filed claims on behalf of Skogen and Anderson, the Carrier stated in separate letters dated March 3, 1999, in pertinent part:

> "Reference is made to your letter dated January 5, 1999 . . . received January 7, 1999, filing claim on behalf of G. G. Skogen . . . [and P. D. Anderson], for alleged violation when the Carrier subcontracted

> Chemetron Welding to perform work of operating a welding device to flash butt weld rail ends together on District 11, near Elk Point and Watertown South Dakota, and failed to afford furloughed Claimant[s] the level of protection provided by New York Dock conditions for a dismissed employee, starting November 8 [and 18], 1998.
>
> The BMWE was notified of the work to be performed by Chemetron, and was ongoing prior to Mr. Skogen [and Anderson] being furloughed. Mr. Skogen [and Anderson] were not furloughed as a direct result of Contractors working on this project."

In similar letters dated April 23, 1999 in response to appeals filed by the Organization, the Carrier asserted, in pertinent part:

> "Your assertion that the Claimant[s were] . . . furloughed directly as a result of work contracted out after November 8 [and 18], 1998 is without merit. The two actions clearly are not related, let alone directly related. It is clear that the two actions are not related because Chemetron was on the property as a contractor long before the Claimant[s were] . . . furloughed. Attached to this letter is the Carrier's notice that Chemetron would be used on the Carrier's property during 1998."

Article XV provides, in pertinent part:

> "ARTICLE XV – SUBCONTRACTING
>
> Section 1
>
> The amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock

> level protection for a dismissed employee, subject to the responsibilities associated with such protection."

We return to the adverse inference found permissible by the Fifth Circuit. Again, according to the Court (550 F.3d at 424 [citation omitted]):

> "The logic supporting the adverse inference rule is that a party fails to produce evidence in its control in order to conceal adverse facts. There is no necessary connection between the contents of the source documents (which relate only to subcontracting expenses) and the causal relationship with a claimant's furlough. . . . Thus, assuming that the NRAB was correct in drawing an adverse inference against BNSF, that inference only established that subcontracting had increased and not that the furloughs were a direct result of that increased subcontracting."

Under that rationale, the permissible adverse inference drawn as a result of the Carrier's refusal to produce the documents discussed in the prior Awards, Interpretations and court decisions is ". . . that subcontracting had increased. . . ." 550 F.3d at 424. In terms of Article XV, that specific adverse inference is that had the Carrier produced the documents requested of it, those documents would have shown that under Article XV, "[t]he amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996 . . ." increased beyond the specified levels in Article XV. The Claimants performed welding work and were furloughed on November 8 and 18, 1998. The subcontracting increased (pursuant to the adverse inference) and, as conceded by the Carrier in its letters quoted above, the Claimants were furloughed after the subcontractor (Chemetron) began working. Given the increase in subcontracting beyond the specified levels in Article XV found pursuant to the adverse inference, we therefore find that had the Carrier not brought in an outside contractor to perform the welding work, Skogen and Anderson would have been available to perform the work and would not have been subject to furlough while the subcontractor was performing that work. Simply put, had the Carrier not brought in the subcontractor, there would have been more welding work to be performed by the Carrier's employees - here, Skogen and Anderson. Because of the adverse inference which shows that the amount of subcontracting increased beyond the levels specified in Article XV and because the Carrier brought in Chemetron as a

subcontractor to perform the work prior to the Claimants being furloughed, we find that the furloughs of Skogen and Anderson were ". . . a direct result of such increased subcontracting . . ." which entitles them to the ". . . New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection" as specified in Article XV.

Causation has been shown. We shall again partially sustain the claims. The remaining Claimants Skogen and Anderson shall be made whole in accord with the provisions of Article XV.

Referee Edwin Benn who sat with the Division as a neutral member when Awards 36983 and 36984 as well as Interpretation Nos. 1 and 2 were adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of July 2009.