Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32754
Docket No. CL-32946
98-3-96-3-276

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

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11217) that:

1. Carrier violated the BN/TCU Working Agreement at Alliance, Nebraska, on dates listed below when material delivery work previously assigned to clerical employes was removed and performed by strangers.

2. Carrier shall now be required to pay the senior available qualified employe, on dates listed below, the amount indicated for delivery from Alliance Material Department to stated location:

(1) One (1) day's pay for May 15, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Guernsey, Wyoming, by Nebraska Trucking Company.

(2) Two (2) days' pay for May 21, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Denver, Colorado, by Nebraska Trucking Company.

(3) Two (2) days' pay for May 23, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Denver, Colorado, by Nebraska Trucking Company.

(4) One (1) day's pay for May 23, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Trinidad, Colorado, by Nebraska Trucking Company.

(5) Two (2) days' pay for May 30, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Denver, Colorado, by Nebraska Trucking Company.

(6) Three (3) days' pay for May 31, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Lincoln, Nebraska, by Burlington Motor Carriers.

(7) Two (2) days' pay for June 5, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Denver, Colorado, by Nebraska Trucking Company.

(8) Three (3) days' pay for June 7, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Lincoln, Nebraska, by Burlington Motor Carriers.

(9) Two (2) days' pay for June 10, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Denver, Colorado, by Nebraska Trucking Company.

(10) One (1) day's pay for June 14, 1991, account material delivered from BN Material Department at Alliance, Nebraska, to Guernsey, Wyoming, by Nebraska Trucking Company.

(11) One (1) day's pay for June 27, 1991, account material delivered from BN Material Department

at Alliance, Nebraska to Donkey Creek, Wyoming,
by Nebraska Trucking Company."

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.

Senior qualified Truck Drivers covered by the Agreement at Alliance, Nebraska, allege here that the Carrier's use of certain outside Trucking Operators to move material between Alliance and various locations on the above dates constituted Scope Rule violations. The initial claims, filed in June and July 1991, were denied by Carrier on grounds that TCU-represented employees have never enjoyed exclusive rights to haul materials within the area in dispute, but that traditionally it has handled material distribution at Alliance on the most economical basis possible.

Carrier established Highway Vehicle Operator (HVO) positions at its Material Department at Alliance in 1976 to haul inventory between that site and various outlying points in the region. Thereafter, both before December 1, 1980 when the current Agreement became effective and over the ensuing years, there were intermittent increases and decreases in the number of Drivers providing such services, as well as various changes in the manner in which such trucking operations were accomplished.

Beginning in the early 1980's, the Carrier developed what came to be known as "Roadrunner Service," part of a massive service overhaul program designed to eliminate stock at field locations and consolidate material stores functions at large, well-equipped regional centers with sufficient trucking capacity to serve job sites quickly. Dependence on rail service was reduced accordingly. Insofar as this claim is concerned,

Roadrunner Service was the work of picking up and delivering material within a triangular area bounded by a line running southeasterly from Billings, Montana, to Lincoln, Nebraska; southwesterly from there to Raton, New Mexico; and then north-northwesterly back to Billings, with Alliance at its center. By merging Material Department Stores at sites such as Alliance, duplicate material inventories at field locations were eliminated. From its inception, Roadrunner Service appears to have been accomplished principally by covered Drivers, although it is apparent from the record that outside truckers were used as well.

By late 1990, the Carrier had a fleet of eight Roadrunner trucks operating out of Alliance. In April 1991, shortly before these claims were filed, there were eight regularly assigned employees and one relief HVO employee dedicated to Roadrunner Service there. In May 1991, the Organization asserts those Drivers were advised by their Assistant Material Manager that the railroad was "taking away 2 trucks and [was] going to start shipping as much as possible on commercial trucks because. . . Roadrunner budget was over and commercial budget was way under." Two HVO positions were eliminated that month, and claims were filed thereafter for each incident in which BN contracted with an outside trucking company to haul material in the Roadrunner area throughout May, June and July. On April 5, 1994, the Organization sought a joint check of relevant Carrier records to determine the volume of disputed work being accomplished by covered and non-covered personnel at Alliance. On May 10, 1994, Carrier rejected that request.

The Organization contends that Carrier's abolishment of HVO positions and the assignment of work reserved for covered employees to non-employees violates Rule 1 of the Agreement and is in conflict with numerous Awards holding that the Scope Rule of the Agreement bars unilateral removal of work. That Rule reads as follows:

"Rule 1. SCOPE

These rules shall govern the hours of service and working conditions of employes engaged in the work of the craft or class or clerical, office, station, tower and telegraph service and storehouse employes as such craft or class is or may be defined by the National Mediation Board.

A. Work now covered by the scope of this Agreement shall not be removed except by agreement between the parties."

Because Rule 1 is a "position and work" Scope Rule, the Organization contends it has no obligation to prove that its members exclusively performed the pick up and delivery work at issue here. Rather, pursuant to numerous Awards construing the Rule, the Claimants can lay valid claim to that proportion of trucking services performed by them prior to the Carrier's abolishment of two Truck Driver positions in May 1991. It asserts that the Carrier's use of outside contractors to perform an increasing proportion of such work after that date was a transfer of work from HVO Operators to non-employees in violation of the Agreement.

As a procedural matter, the Organization further maintains that by refusing to participate in a joint record review, Carrier demonstrated a failure to exert every reasonable effort to resolve this dispute as mandated by the Act, and that adverse inferences are warranted as a result.

Carrier does not dispute that the application and interpretation of the Scope Rule over a 15 year period establishes it as a "position and work" Rule not requiring a system-wide exclusivity test. It maintains, however, that a practice of sharing the disputed work existed at Alliance; that there has been no showing of any diminution in the amount of over-the-road trucking by covered employees as a result of additional hauling work performed by others; and that, in any event, case law establishes that such work can be reduced or even eliminated so long as the quantum performed by contractors does not increase.

Carrier also raises a preliminary procedural issue. From its perspective, the issue before this Board was not presented within 60 days of the "date of the occurrence on which the claim . . . is based" as required by Rule 60 A of the Agreement. Carrier argues that its decision to park two Roadrunner trucks was made in January 1991, and this claim therefore should have been filed within 60 days of that event, and not within 60 days from the date the two Roadrunner positions were abolished in May 1991.

Both the Carrier's contentions regarding timeliness and the Organization's motion for adverse inferences can be and are dismissed without extended discussion. First, in the judgment of this Board, that the Carrier openly pulled in two trucks while outside contractors continued to haul material to and from Alliance is not the gravamen of the Organization's claim. Carrier's right to match the number of trucks to the needs of its service is not circumscribed by the Agreement nor is it challenged here. What is contested is the reduction of covered work with a corresponding increase in the use of

commercial truckers for hauling within the area serviced by Roadrunners. That fact defangs the Carrier's argument that failure to file claims when trucks were parked was a fatal delay. The Board concludes these claims are not based upon the parking of trucks but upon loss of covered work, as prominently flagged by the abolishment of two HVO positions. The claims were thus timely filed.

Secondly, this Board rejects the Organization's contention that adverse inferences should be drawn from Carrier's refusal to participate in a joint document review. The Organization did not seek such a review until almost three years after these claims were initiated. If potentially relevant documents were destroyed in the interim, it appears from this record to have been pursuant to the Carrier's normal document destruction program, and not out of any intent to "avoid justice." While it is undeniable, as the Organization argues, that participation in such a review would have been consistent with the goals of the Act, a joint review was not contractually required, and its absence has little probative value in either direction. Nothing in this record supports the view that Carrier's failure to assist those asserting claims against it was a product of bad faith or that it justifies adverse inferences.

The merits of this conflict unavoidably plunge this Board at the outset into consideration of how the parties' Scope Rule has been interpreted in the past. The cases have produced a broad range of decisions. From them, we attempt below to summarize the principal relevant standards on the issue before us.

As initially seen and understood, the parties' Scope Rule reserved in Section A to those positions listed in Section C "that amount and type of work which employes in those positions actually were performing as of December 1, 1980. In other words . . . the language of Rule 1, Sections A and C . . . constitute a 'freeze-frame' with respect to work reservation in positions listed in the Agreement." Appendix K Board Award No. 88. Thus, work then performed by covered employees was work protected by the Scope Rule. Subsequent Awards made it clear that new or additional work added after December 1, 1980 was also covered by the Rule. Appendix K Board Award No. 99, for instance, purports to identify "an adhesive quality [by] which work once assigned to employes clearly covered thereby becomes vested in those employes and may not thereafter be removed unilaterally from them and given to other employes. Thus . . . Paragraph C is not merely backward looking to December 1, 1981 [sic] but can, under the described circumstances, bring within the work reservation effect of Rule 1 'new

work' or work not actually being performed by Agreement-covered employes as of December 1980." *See also*, Appendix K Board Award No. 162.

The standards for determining when work is brought within the Scope Rule were further elaborated upon in Public Law Board No. 3085, Award 1: "Paragraph C may bring such work within the reservation reach of Rule 1 under the following circumstances: 1) if the work is assigned to and regularly performed by employes in Sections 1 through 8 of Paragraph C, or 2) if the work at issue is work described and reserved by the specific language of Paragraph C, Section 5." Award No. 162 defines "regular performance:" "The regular performance of work means that employes identified in Rule 1C must steadily and usually perform the work over a reasonable period of time."

Neither party disputes that Roadrunner work was "assigned to and regularly performed by employees in Sections 1 through 8 of Paragraph C" over a reasonable period of time. The parties agree that the new work assigned after 1980 was the same work in kind as that performed by HVOs prior to that date. Nor is there any question but that the work of HVO positions falls within Paragraph C. "'Truckers' . . . under any reasonable definition, includes Highway Vehicle Operators." Award No. 162. Accordingly, the positions and the work in dispute meet the standards set forth in prior decisions of the Appendix K Board. HVO work cannot be unilaterally removed from covered employees. The parties have entered into no agreement to remove this work for assignment to non-employees.

Where, as here, covered employees share covered work with outsiders, the question of how much of such work is scope-protected can arise and complicate an already confounding exegetical exercise. That is the crux of this dispute.

The parties agree that Special Board of Adjustment Appendix K Award 116 is authoritative on the subject. The test for determining the protected "quantum" of work when violations of the Scope Rule such as the Alliance claims are considered requires Claimants to prove: 1) the amount and type of the disputed work performed by Agreement-covered employees at the location as of December 1, 1980; 2) the amount and type of such work which covered employees performed after the alleged violation; 3) the amount and type of such work performed by strangers to the Agreement as of December 1, 1980; and 4) the amount and type of such work performed by strangers after the alleged violation. In context with subsequent Awards extending scope

protection to work acquired after 1980, we read the above Award as extending the 1980 references to such later dates.

The Organization says it is entitled to no less work than it had on the day these claims were filed. It has shown a reduction in overall covered positions; a reduction in straight time hours; a reduction in average miles driven; a reduction in overtime hours. The Carrier's reply is that there is nothing in the record to define the "quantum" of work being performed by Claimants at the time these claims were presented. Carrier says this is not a question of lost overtime. And it means nothing, Carrier contends, to say that trucks were parked. It surely does not mechanically establish that covered work was taken away. Carrier must have the right to set the size of its fleet. The argument made by the Organization here is that they suffered reductions in hours and positions, and from that we are asked to conclude that they are not getting their quantum. But Carrier urges that Claimants need to demonstrate on this record what their proportion of work was relative to outsiders in 1991 when they filed their claims. And there is nothing here upon which to base a quantum determination. Indeed, about four months before this claim was filed, the Organization had only six drivers. That number has varied up and down. Carrier says its data demonstrates that the amount of work performed by Claimants actually increased after these claims were filed. The Organization has not met any of the four prongs of Award No. 116.

There are two problems with Carrier's position. First, claiming that baseline figures for 1991 were not available to it, the Organization relies on the annual reports from the Material Department at Alliance to Carrier's Vice President Material Management to demonstrate that "Loads In" and "Loads Out" work by covered employees for the three year period following the abolishment of covered positions did in fact decline steadily. That data, not contested by Carrier, showed the following:

"1992 - 662 Loads Out
655 Loads In

1993 - 585 Loads Out
526 Loads In

1994 - 517 Loads Out
462 Loads In"

The second difficulty with Carrier's argument is that even the numbers it depends on demonstrate that the proportion of covered work done by the Organization's members went down after two HVO positions were eliminated. First, in responding to the above data, Carrier supplied the missing 1991 figures, stressing, correctly, that its recaps showed an actual increase in overall activity between 1991 and 1992. The 1991 data was as follows:

	"Roadrunners	Commercial
1991	574 loaded	703 loaded
	562 unloaded	954 unloaded"

While numbers, like scripture, may be teased and tortured to make a variety of points—and Carrier persuasively argues that all of this data is suspect for various reasons—both parties bank on it. Frail or not, it does appear to confirm that, as a percentage of total work performed, Roadrunner services from 1991 to 1992 declined from 44.9% of trucks loaded to 39.2%, and from 37.1% of trucks unloaded to 29.9%. Based upon Carrier's own numbers, on an overall basis, Roadrunners performed 40.7% of all loading and unloading in 1991, and 34.0% of that work in 1992.

The yearly recaps Carrier provided for 1991 through 1993 provide a consistent and more fully developed picture. As indicated, in 1991, employees did 40.7% of the total commercial trailer loading and unloading at Alliance. In 1992, that percentage dropped to 34.0%, and in 1993 it went down again, to 31.1%. Volume in both 1992 and 1993 was above 1991 levels. What these data reveal about the proportion of work performed by Roadrunner employees in a higher degree of detail is also telling. Broken down by unloaded trailers only, Roadrunners share of total likewise decreased each year, from a high of 37.1% in 1991, to 29.9% in 1992 to 25.6% in 1993. Loaded trailers dropped from 44.9% in 1991 to 39.2% in 92, then bounced back slightly in 1993 to 41.3% as a total of the whole. That minor spike was on a number of trailers 19.6% lower than had been unloaded at Alliance the previous year. This data, contrary to Carrier's reading of it, forces the same conclusion as arrived at by the Organization - work was being removed from the Scope of the Agreement over time.

In this case, the elimination of covered positions was roughly coincident with increased activity by outside contractors. On the very sizable record before us, including hundreds of company business records, we are satisfied that Carrier's

increased utilization of outside contractors and the abolishment of covered jobs were not unrelated events. Despite voluminous record evidence verifying extensive use of trucking contractors during the prior months and years—much of which reflects services by UPS, Federal Express, Yellow Freight, Burlington Motor Carrier, Inc. and others for shipment of overnight packages or to points outside the assigned Roadrunner routes, none of which was challenged—Carrier did not convincingly rebut the Organization's assertion that the quantum of its work within that territory substantially decreased and that performed by contract carriers increased after two of its positions were eliminated.

We find the claims are supported by the record evidence.

Nothing in this opinion should be read as suggesting that covered work can never be eliminated or diminished at a location through technological advances, more efficient procedures such as use of "direct shipments," or other permissible causes. The Carrier obviously has the right to run its business in the most efficient manner it can, consistent with its contractual commitments. But, as noted in Appendix K Board Award 141, Rule 1 still prevents the Carrier from "augmenting the past practice to the detriment of the clerical craft." We merely decide that in this specific situation the Organization has borne its burden of proof. Our rationale appears to be perfectly in line with the views set forth in Public Law Board No. 4848, Award 22, on which the Carrier relies. There the Board found that the Organization had failed to show that the quantum of work performed by the outside contractor increased simultaneously with the abolition of positions, precisely the evidence present in this case.

The sole remaining question involves remedy. We rely on that line of prior authority of this Board holding that assessment of a penalty on the Carrier for infractions such as this is appropriate to discourage further violations of the working Agreement. That said, it is undeniable that Claimants' production of hard data and supporting documents was hardly sufficient to quantify their losses definitively. This is not the first time that problem has been encountered. In Award 141, the Board held:

> "As the Carrier points out, there are not any documents showing the exact quantum of work reserved to Clerks on December 1, 1980. However, lack of such documentary evidence does not defeat a Scope Rule claim because other evidence provides a reasonably accurate estimate of the December 1, 1980 quantum. If the Organization was forced to produce non-existent

documents showing the work that each and every covered employe was performing on December 1, 1980, the Scope Rule would be ineffective and unenforceable."

For the reasons stated above, Claimants shall be made whole for the lost work opportunities brought about by Carrier's violation of the Agreement. The Carrier is directed to reimburse Claimants at the appropriate Agreement rate (punitive or pro rata) commensurate with the number of hours covered by their claims.

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 23rd day of September 1998.

Carrier Members' Dissent
to Award 32754 (Docket CL-32946)
(Referee Conway)

Since this Award has been issued, representatives of the Transportation Communications International Union have been going around flaunting this Award contending it has changed the previous practice in that "quantum" now means a "proportion" or "percentage" versus the previous practice of being a "fixed amount." On this basis we must Dissent to this Award for the following reasons:

The majority in rendering this decision has completely overlooked the facts presented in the record.

First, at no time did Organization ever present the argument on the property that quantum meant "proportion" or "percentage." This argument was raised for the first time in the executive session-it was NEVER raised on the property. There are numerous awards of all the Divisions which hold that matters not raised on the property are not properly before the Board and cannot be considered.

Second, there is a past practice of over 17 years of the parties following a "fixed quantum" vs. "proportion" or "percentage." The Award on this property (K Board Award 88) which first found the scope rule to be a "positions and work" scope rule held the scope rule was a defensive shield and NOT a rule to reach out and acquire new or similar work.

Third, the Board used facts from the years 1992 and 1993 to sustain a claim for May/June 1991.

All Divisions of the National Railroad Adjustment Board have held that matters not raised on the property cannot be raised before the Adjustment Board. This issue is a long standing principle followed by all parties; see Third Division Award 16733 wherein Referee Brown stated in part:

> **"In its submission before this Board, the Brotherhood offers assertion of fact and grounds of recovery which were at no time argued on the property. We must ignore them and decide the issue as it was there handled. Awards 5469, 6657, 13741, and many others."**
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> **Also Third Division Award 17955, stated in part:**
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> **"It is well settled that the Board will not consider evidence or issues not brought forward on the property."**

In Third Division Award 31582 involving this same Majority we find:

> "The Organization appears for the first time to have introduced within its Submission a bulletin and a new argument regarding the nature of the reports completed between 12:00-4:00 P.M. on the date in question. Both shed some degree of light on the issues here presented. The Carrier has however, properly objected to the presentation of material not discussed on the property, and Carrier's position is well-founded." (Emphasis added)
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> Third Division Award 30460 noted in this regard:
>
> "It is a fundamental principle that the parties to a dispute cannot prevail before the Board on the basis of allegations or issues that were not discussed during and made part of the handling of the claim on the property. Section 3, First (I) of the Railway Labor Act requires that all disputes must be 'handled in the usual manner' on the property before they may be submitted to the Board... The Board cannot, and will not in this case, consider issues, defenses and Rule citations not raised and made a part of the case record during the handling of the dispute on the property."

In reviewing the Organization's Ex Parte Submission, nowhere can there be found any argument regarding "Proportion" or "Percentage" If it was the Organization's argument that "proportion" or "percentage" was applicable, then they would have had to show some comparisons between the contractors and the carrier, i.e., where there was a reduction based upon "percentage." However, there is no such argument in the Organization's Submission. In its Ex Parte Submission, the Organization stated many times it was their burden to show a reduction in their quantum of work. For instance at the bottom of page 31 of its Ex Parte Submission the Organization states:

"...the bottom line of this dispute is: Has the Carrier reduce the amount of work, or quantum, which is reserved to the scheduled employees?" (Underscoring added)

There was no argument or discussion by Organization regarding "proportion" or "percentage." On pages 34, 35 and 36, the Organization presented arguments based upon the number of positions, overtime hours and mileage as support there had been a reduction in their quantum of work - yet the Organization only compared the number of positions, hours or mileage against the same number of positions, hours or mileage *previously performed by petitioner.* At no time did the Organization argued that its proportion or percentage, in comparison to the "contractors," has been reduced. The Organization simply did not present a "proportion" or "percentage" argument in its Ex Parte Submission.

Since this issue has never been raised on the property, it should not have been the basis upon which the Award was sustained. The ultimate insult is that the carrier never

had an opportunity to respond to this "new argument" by the Organization. For this reason alone, the Award should be set aside.

As to our Second position, the parties have followed the "fixed quantum" for over 17 years before this Award. It is still the carrier's position that "quantum" means a fixed amount and not a "proportion" or "percentage" amount.

Clear back to the first Award on this property that found carrier's Scope Rule to be a "positions and work" scope rule, i.e., Special K Board Award No. 88, the parties have followed the principle that "quantum" meant a fixed amount. Thus, there is over 17 years of past practice on this property.

Special K Board Award No. 88:

> "We reiterate that we find the *obvious intent* of the new Rule is to protect B-N/BRAC Agreement-covered employees from having that quantum of work performed by their positions as of December 1, 1980 taken from them and given to others outside their contract. *It is not an offensive weapon with which to reach out and take work not performed* as of December 1, 1980 by positions listed in Rule 1. *Nor do we find persuasive the Organization's argument that Rule 1, Section A by its terms grant entitlement to those employees to add any new but similar work which might arise after December 1, 1980 to the quantum of work* performed by the listed positions as of December 1, 1980. As we indicated, supra, Rule 1 *is a defensive shield* to protect against unilateral distribution to others of the type and amount of work performed as of December 1, 1980 by Argreement-covered employees whose positions are listed in the Rule. As we read the Rule, *it is time-specific as of December 1, 1980 and by its own terms vess in those employees no entitlement to add to their quantum of reserved work by taking work from others or by claiming new work which might arise in the future." (Italics Added)*

From the above Award, the Referee made it clear that 1) the "obvious intent" of the Scope Rule was for the rule to "protect" clerical employees from having work they perform be performed by others; 2) the Scope Rule is NOT an "offensive weapon" for them to reach out and take work not performed by them; 3) the Referee stated he did not agree with the Organization that the Scope Rule granted employees an "entitlement... to add any new but similar work which might arise after" the date; and 4) the Referee stressed the Scope Rule was a "defensive shield" against unilateral distribution to others.

In the instant case, the Organization is attempting to "reach out and take work not performed" by them contrary to Award 88 supra.

Third, the Referee herein established the Organization's quantum of work as that amount of work performed in 1991, the base year. The Referee then used the years of 1992 and 1993 to find a violation of the Agreement for 1991. To sustain the claim, there must have been a violation of the Agreement for the eleven (11) specific dates listed in the claim for 1991. It is not proper to sustain the claim for an alleged violation that might have occurred in 1992 and 1993. The Referee was only asked to rule on whether there was a violation of the labor agreement for specific dates in May and June 1991. That is all the Organization's Notice to the Board claimed.

When using the "fixed amount," as has been the practice for the last 17 years between the parties, the records showed there had been an actual "increase" in the fixed quantum of work performed by the clerical employees for the years 1992 and 1993; however, since there was a larger increase in the amount of work performed by the contractors, the referee sustained the claim, contrary to the practice on the property. Special K Board Award 88, supra, held the Scope Rule provides "no entitlement to add to their quantum of reserved work."

Lastly, it must be noted that in this claim Lincoln, NE., was not within the Alliance Roadrunner territory in 1991, yet that erroneous destination was included as two of the eleven instances listed in this claim. Also, the record clearly supported the fact that the number of Roadrunner trucks and, therefore, the number of assigned drivers varied over time and changing conditions. Clearly, the "quantum" was not the status quo and it should have been the Organization's burden to define what that "quantum" was; a burden that they never met in the record.

We Dissent

P. V. Varga

M. C. Lesnik

M. W. Fingerhut

LABOR MEMBER'S RESPONSE TO CARRIER MEMBER'S DISSENT TO THIRD DIVISION AWARD NO. 32754 (DOCKET CL-32946) (REFEREE JAMES E. CONWAY)

Five months after Award 32754 was issued the Minority Members have belatedly filed what purports to be a Dissent. It is probably unfair to criticize the NRAB Carrier Members in this instance for its lack of accuracy or logic because in the first paragraph there is a strong inference that it was written by the BNSF Labor Relations Department. The untimeliness of the Dissent is also not consistent with the historical practice of NRAB Carrier Members in filing Dissents. Nonetheless, those who signed the Dissent get its full credit whether deserved or not.

Under the guise of a Dissent the Minority continues to reargue that the Carrier's unilateral interpretation of the parties "position and work" Scope Rule as it relates to "quantum" of work rises to the level of a practice of the parties. Contrary to that argument assertions do not make a practice.

In disjointed fashion the Minority attempts to make three arguments as to why Award 32754 is incorrect. I will address each of its arguments.

It begins by stating that the first time the issue of whether quantum of work is a fixed number or a "proportion" of work actually being addressed by the parties was during the Executive Session. That statement contradicts the record. For example on page four, second paragraph of the Carrier's letter of November 28, 1994, the Carrier discusses the subject. The Minority's first argument is without merit.

The Minority's second argument is two parted in that it first suggests that there is a past practice of over 17 years wherein the parties have agreed that quantum is a fixed number rather than a living percentage. The argument is incredulous as it flies in the very face of the subject claim.

Obviously, if TCU agreed with the Carrier's interpretation there would have been no need to file the claim. TCU did not agree with the Carrier's interpretation and because of such it filed an appropriate claim. TCU does not and never has agreed with the Carrier's twisted interpretation of Rule 1 that suggests that "quantum" is a fixed number rather than a "living percentage."

After defying logic the Minority then asserts in the latter half of its second argument that the parties "position and work" Scope Rule was defined by K Board, Award 88 to act only as a defensive shield that could not reach out and acquire new or similar work inferring that the decision at bar is in opposition. Contrary to the Minority assertion Award 32754 is consistent with prior Awards on the property including Award 88. On page three of its Dissent the Minority quoting in part from Award 88 attempts to read into that Award something which is not there, namely that "quantum" means a fixed amount. A careful reading of that quotation reveals that the arbitrator never said that "quantum" means a fixed amount, but instead what he did state is that the Union is entitled to have its "quantum" of work preserved. Following the principles

and dictates of Award 88 Referee Conway logically concluded and defined "quantum" of work as a "living percentage." That definition fits with the record developed on the property.

Close review of this dispute reveals that the parties acknowledge throughout it's handling that the Scope Rule has been found to be a "position and work" rule. Both cite from several on the property prcecedential Awards which further point out that the "quantum" of work is protected to the craft. Quantum of work has been defined by various tribunals to be synonymous with proportionate share of work. In fact, in the Director of Labor Relations' letter of November 28, 1994, (Carrier Exhibit No. 16) addressed to the General Chairman, on page four of the first full paragraph after explaining his interpretation of Award 22 of Public Law Board No. 4848 he felt it necessary to emphasize and underline his cogent thought as follows:

> "...quantum of work performed by the outside contractor increased simultaneously with the abolition of the clerical positions..."

He then went on to quote from the Award itself wherein Referee LaRocco stated the following:

> "...The Organization has not shown that either the quantum or proportionate share of the work performed by the outside contractor increased simultaneously with the abolition of the Messenger-Clerk positions." (Underlining our emphasis)

Webster's Third New International Dictionary defines quantum as "portion" and proportionate as "the equality of two ratios." Webster's definitions fit with those enunciated by the Carrier's highest designated officer to handle grievances and Referee LaRocco.

The Referee in the instant dispute agreed with the Carrier that the aforementioned Award was on point and is precedential. In agreeing with the Carrier he followed arbitral precedence that the parties "position and work" Scope Rule defines "quantum" of work as being a "living percentage/proportion" rather than a fixed number which preserved and protected the disputed work to the craft.

Contrary to the Minority opinion Award 32754 is not an anomaly, but instead is a reasoned decision that follows precedential awards. Nonetheless, give the Minority credit for consistency its second argument is equally in error as was its first.

Last, but not least, the third argument raised by the Minority in opposition to the validity of the Award is the Referee incorrectly used data that he should not have used to justify the decision. The Minority argument fails to recognize that the data furnished the Board regarding the years of 1992 and 1993 helping to prove the violation in 1991 was supplied by the Carrier. This Board has consistently ruled that parties cannot furnish evidence or take a position stating one thing and then turn around and attempt to refute or impeach its own evidence/position as being in error. Proof is proof and the fact that the Carrier helped to supply some of the proof to its own demise does not change the fact that the Carrier violated the Scope Rule when it farmed

out TCU's percentage of protected work. The third argument raised by the Minority is incorrect and equtes to "strike three."

The Minority Opinion does not detract from the soundness of Award 32754, but instead smacks of "sour grapes."

Respectfully submitted,

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