Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33996
Docket No. CL-33931
00-3-97-3-339

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of Transportation Communications Union (GL-11741) that:

1) Carrier violated the Schedule Agreement effective December 1, 1980, when on February 16, 1996, it abolished Intermodal Clerk Position No. 001 at Amarillo, Texas, and arbitrarily transferred all the work performed by the incumbent of that position to other than railroad employes (contractors) at Amarillo.

2) Carrier shall be required to pay eight hours pay at the straight time rate ($128.75 per day) to the First Out GERB Employe at Amarillo, Texas, beginning February 18, 1996, and continuing each and every workday thereafter until the work removed from the scope of the Agreement in violation of Rule 1 is returned to the employe.

If there are no GERB employes available, claim is on behalf of the Senior Available Extra List Employe at Amarillo for eight hours pay at the straight time rate.

If there are no GERB or Extra List employes available, claim is on behalf of the Senior Available Qualified Employe at Amarillo at the time and one half rate."

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.

On April 16, 1995, under Finance Docket 32549, the Interstate Commerce Commission approved the Burlington Northern Santa Fe merger and imposed the protections provided in New York Dock. On December 19, 1995, the Organization, the Burlington Northern, and the Atchison, Topeka and Santa Fe reached Agreement that met the requirements of New York Dock and various protective Agreements among the parties.

BN and ATSF each had an intermodal facility in Amarillo, Texas. An Organization represented employee served as an Intermodal Clerk at the BN facility. An outside contractor handled those responsibilities at the ATSF facility. On January 12, 1996, the Carrier gave the Organization notice that, effective February 10, 1996, it would consolidate its intermodal operations in Amarillo at the ATSF facility and close the BN facility. When the Carrier closed the BN facility, it abolished Position No. 001, the Intermodal Clerk position at the BN facility.

The Organization contends that the Carrier violated the Scope Rule in that Intermodal Clerk duties formerly performed by the Clerk at the BN Amarillo facility are now performed by the outside contractor. The Organization urges that the Carrier may not effect an organizational change that has the result of contracting out Scope covered work. It maintains that the consolidation of the two facilities was a subterfuge to divert Scope covered work to strangers to the Agreement. The Organization further contends that the Carrier violated the Master Implementing Agreement.

The Carrier argues that it properly closed the BN Amarillo facility. When it did so, it abolished the Intermodal Clerk job. The SF Amarillo facility, in the Carrier's view, is not subject to the BN Agreement. Consequently, according to the Carrier, it merely continued to use a contractor to perform the clerks' duties at the SF facility. The Carrier disputes the Organization's contention that it violated the Master Implementing Agreement and also protests that the Organization's specific arguments were not raised on the property.

The parties agree that the Scope Rule, Rule 1, is a position and work rule. In Appendix K Board Award 116 the Board listed four elements to establish a violation: 1) the amount and type of disputed work performed by Agreement covered employees at the location on December 1, 1980; 2) the amount and type of disputed work performed by Agreement covered employees at the location after the alleged violation; 3) the amount and type of disputed work performed by strangers to the Agreement at the location on December 1, 1980; and 4) the amount and type of disputed work performed by strangers to the Agreement at the location after the alleged violation.

In the instant case, there is no dispute that a BN Agreement covered employee was performing all of the disputed work at the BN Amarillo facility as of December 1, 1980 and up until the closure of that facility. However, after the alleged violation, an Agreement covered employee no longer performed the disputed work at the BN facility because there was no work to be performed there. The facility was closed. Furthermore, there is no dispute in the record that the contractor performed the disputed work at the SF Amarillo facility prior to the alleged violation. There is no evidence in the record that after the alleged violation the contractor did anything other than continuing to perform the work it had performed before the alleged violation.

The Organization has cited a number of Awards that it maintains support its position. We have reviewed all of the Awards and find that none of them are on point, because they do not involve the closure of a facility and an argument that the Carrier was obligated to use Agreement covered employees from the closed facility at another facility which had not previously been governed by the Agreement.

During handling on the property, the Organization relied heavily on Appendix K Board Awards 113 and 173. Both Awards dealt with cases where the Carrier had Crew Callers personally contact crew members staying in local hotels to call or awaken them. In Award 113, the Crew Caller knocked on each crew member's hotel room door.

In Award 173, the Crew Caller telephoned each crew member's room individually. In both cases, the Carrier changed the procedure and had the Crew Caller advise a hotel employee of the time the crew members were to go on duty and the hotel employee contacted each crew member individually. In both cases, the Board held that the Carrier had improperly removed work from the Scope of the Agreement.

The situations facing the Board in Awards 113 and 173 are markedly different from the situation presented in the instant case. In Awards 113 and 173, the Carrier took work performed by Agreement covered employees, i.e., communicating the time crew members were to go on duty, and gave it to hotel employees. Both before and after the alleged violation, the work involved communicating at the same hotels the same type of information to members of the Carrier's crews. In contrast, in the instant case, the Carrier closed the BN Agreement covered facility. Intermodal clerical duties were performed by a contractor at a facility not subject to the BN Agreement both before and after the BN Agreement covered facility was closed. There is no evidence in the record that the contractor performed work previously performed by the Clerk at the closed facility, as opposed to having continued to perform the work the contractor had previously performed.

During panel discussion, the Organization member of the Board referred to the initial denial of the claim issued by the General Superintendent, Crew Management & Payroll Services. The Organization member suggested that the denial constituted an admission that the contractor was performing work previously performed by BN Agreement covered employees. Specifically, the denial stated, in relevant part:

> "My investigation reveals that a CL notice was issued to your Organization advising of the Carrier intentions to consolidate the former Burlington Northern and Santa Fe Intermodal facilities at Amarillo, Texas on or after February 10, 1996. All of the work was transferred to the former Santa Fe hub center and is being performed at that location in compliance with agreement rules on that former property."

The above quoted ambiguous statement does not constitute the proof necessary to sustain the claim. Indeed, our review of the record reveals that it was not considered as such by either party during handling on the property. In appealing the initial denial, the Organization characterized the declination of the claim as based on the ground that "a CL notice was issued to consolidate the BN and ATSF Intermodal facilities at

Amarillo." The Organization advised that the "position is without merit and is rejected accordingly." The Organization asserted, "Carrier has made an operational change which resulted in a reassignment of eight hours of clerical work per day to strangers to our agreement." However, the Organization offered no evidence to support its assertion and did not claim that the declination of the claim had admitted the accuracy of the assertion.

The Carrier's Director, Labor Relations denied the appeal. Among other bases for denying the appeal, he wrote that there was no proof that any work previously performed by the abolished clerical position was being performed at the ATSF facility. He also argued that even if such work was being performed at the facility, it would not violate the BN Agreement and that the Organization had acquiesced to similar transactions transferring work from Seattle, Washington, to Topeka, Kansas, and from St. Paul, Minnesota, to Chicago, Illinois.

The Organization's response to the appeal denial did not provide specific evidence of BN Agreement covered work being performed by the contractor; nor did it cite to the initial claim denial as an admission that BN Agreement covered work was being performed by the contractor. This was in marked contrast to the Organization's very specific response to the Carrier's acquiescence argument. Our review of the record has failed to uncover any evidence of work previously performed by BN Agreement covered employees being performed by the contractor.

We also have considered recent Third Division Award 33225. That case concerned the Carrier's actions in 1993, two years before the BN - ATSF merger. The Carrier entered into a haulage agreement giving ATSF haulage rights over certain BN lines. Traffic generated by the agreement moved in designated SF trains operated by BN crews. Clerical work connected to the SF designated trains was performed by an outside contractor. The Board held that the Carrier improperly removed Scope covered work.

Crucial to the decision in Award 33225 was the fact that BN was operating the trains. This led the Board to conclude that the trains were no different from any other BN operated trains and that the clerical work connected to the trains had to be treated no differently. We made this clear, writing as follows:

"Because the clerical work being performed by strangers may have been generated by a haulage agreement with another carrier, instead of coming to the BN through traditional methods, is not a significant difference. In the circumstances of this particular haulage agreement the Board has no basis to conclude that the Santa Fe would be different from any other large customer of Carrier, a coal provider, power utility, grain shipper, etc., for example, one that utilizes BN tracks to move its shipments. Many of these enterprises enter into multi-year agreements with Carrier to haul their shipments from one location to another. The existence of these arrangements does not remove the clerical work associated with that traffic from coverage of the Clerical Agreement BN has with TCU.

How then should the situation be different if the other party to the haulage agreement happens to be a rail carrier that is in essentially the same status as other large shippers? Any explanation of any distinctive differences is missing in this record. . . .

In this matter it has not been argued that Santa Fe is operating under trackage rights over BN. Santa Fe is not providing its personnel to operate any equipment over BN tracks. Santa Fe is not operating under a joint facility agreement or some other inter-carrier arrangement that would make the situation unique. What the Board is being told is that Santa Fe is paying a fee to BN to haul a train dedicated as Santa Fe traffic over BN tracks. This appears to be nothing more than a mild refinement of the movement of Santa Fe traffic over BN tracks in non-dedicated trains. Historically, the movement of Santa Fe traffic over BN tracks, or for that matter the movement of traffic of any other carrier over BN tracks, would be under the control of BN and work associated with such movements would be BN work."

The instant case is not comparable to Third Division Award 33225. In the instant case, the Carrier closed the facility that was subject to the BN Agreement. The facility that remained open was not subject to that Agreement. At the facility that remained open, it is undisputed that a contractor had performed the intermodal clerical duties that an Agreement covered employee had performed at the now closed facility. As discussed above, the record contains no evidence that would enable this Board to conclude that the contractor is now performing work performed by the BN Agreement covered Clerk at

the now closed facility, rather than merely continuing to perform work that the contractor had previously performed at the facility that remained open.

In its Submission, the Organization has argued that the Carrier violated the Master Implementing Agreement. The Organization cites numerous provisions of the Agreement and Side Letter No. 6, from which it implies an obligation on the Carrier's part to transfer the Intermodal Clerk position from the BN Amarillo facility that was closed to the SF facility that remained open. We need not address the merits of this argument. During handling on the property, the Organization asserted broadly:

> "This [Master Implementing] Agreement only allows technological or operational changes pursuant to the terms and conditions set forth therein. No where therein are there provisions that allow technological or operations changes which serve as a subterfuge for removing work from the scope of the Agreement."

The Carrier replied:

> "Your position that the Carrier is barred from making changes such as those in dispute by the December 19, 1995, Master Implementing Agreement is rejected. Please advise in what portion of the Agreement the parties agreed that the BN/TCU Working Agreement would be the sole agreement on the combined properties."

The Organization failed to respond. In its Submission, the Organization has argued that Side Letter No. 6 restricted subcontracting to crew hauling and janitor work. It also has argued that implicit in Articles II, IV, VI and VIII is an obligation on the Carrier to transfer work only from Clerks to Clerks. These specific arguments were raised for the first time before the Board. We may not consider arguments that were not raised during handling on the property.

Accordingly, based on the record presented to us, we are unable to find that an Agreement violation has been established. Therefore, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of April, 2000.