Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34031
Docket No. CL-34437
00-3-98-3-48

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11921) that:

Carrier violated the Agreement, beginning April 5, 1994, and continuing every day thereafter, when it allowed or required strangers to the Agreement to perform the duties of hauling crews within the Terminal at Superior, Wisconsin. As a result, Carrier shall now be required to:

1. Return all work to employees covered by the Scope of the BN-TCU Agreement.

2. Compensate the first-out qualified and available terminal GREB employee at Superior, Wisconsin, for eight (8) hours pay for each day the Carrier violated the Agreement as described herein.

3. If no GREB employees are available on any given date of violation, claim shall be for the first-out qualified and available Extra List employe on the Superior, Wisconsin Extra List for eight (8) hours pay at the pro-rata rate of Crew Hauler, per day. If neither GREB or Extra List employees are available on any given date, claim shall be for eight (8) hours pay at the punitive rate of Crew Hauler in accordance with Rule 37, Assignment of Overtime, for each day Carrier violates the Agreement as described herein."

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.

As Third Party in Interest, the United Transportation Union/Yardmasters Department was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

This dispute concerns Crew Hauling within the Superior, Wisconsin Terminal. A similar dispute concerning Crew Hauling outside that Terminal is decided in Third Division Award 34033.

On May 18, 1987, and as part of resolving a Crew Hauling claim filed by the Organization (Carrier file CCLA 85-2-11, Organization file C-5639(2-85)H), the parties entered into a Memorandum of Agreement concerning Crew Hauling at Superior, Wisconsin. The Memorandum provided the Carrier with a flexible source of employees to perform Crew Hauling and provided a better utilization of Utility employees.

Relevant to this dispute, Paragraph 3 of the May 18, 1987 Memorandum further provided:

> "3. These understandings apply only at Superior, Wisconsin, and are made without prejudice to either party's contentions concerning the application of schedule rules and agreements and shall not be referred to as a precedent in any other case under any circumstances.

4. This Agreement shall be effective June 1, 1987 and may be terminated by either party upon ten (10) days' written notice served upon the other party.

It is agreed and understood that should this Agreement be terminated, the Crew Hauling function assigned to these positions may revert to the method of handling prior to the assignment of this work to clerical employees. It is further agreed and understood that the method of handling Crew Hauling will be as defined by the letter dated May 18, 1987 settling the claim covered by Carrier's File CCLA 85-2-11 and Organization's file C-5639(2-85)H."

The May 18, 1987 letter also signed by the parties settling the then-existing claim provided as follows:

"This will conform the several conferences including the conference of May 18, 1987, between Messrs. R. A. Arndt and F. E. Hawn of the claim covered by [Organization] ... file c-5639(2-85)H.

At the conclusion of such conferences, it was agreed to settle this claim effective June 1, 1987, on a compromise basis as follows:

The parties agree the monetary portion of this claim is withdrawn.

The parties further agree the issue of the quantum of work (Crew Hauling) as determined by the joint check conducted on May 1, 1986, revealed nine (9) hours of away from terminal Crew Hauling per day with six (6) hours per day reserved to employees subject to the BN/BRAC Working Agreement dated May 6, 1980 and three (3) hours per day reserved for contract haulers. The decision rendered in Appendix K Board 141 will be applicable should away from terminal Crew Hauling increase or decrease from the nine (9) hours per day.

It is understood the foregoing refers solely to away from terminal Crew Hauling at Superior, Wisconsin and has no bearing whatsoever regarding Crew Hauling within the Superior, Wisconsin Terminal as it is recognized

that all within terminal Crew Hauling at Superior is subject to Rule 1 Scope of the BN/BRAC Working Agreement."

On June 4, 1987, the Carrier and the Organization officials met with affected employees. A transcript of the meeting showed the following was stated, without objection:

". . . Clerks, we have agreed with the Carrier, and the Carrier has agreed with us, that Clerks are entitled to all of the Crew Hauling within the terminal of Duluth/Superior; that does not belong to the contractors; that belongs to the Clerks.

* * *

We shouldn't have any problem with in terminal Crew Hauling, because it belongs to the clerks.

* * *

Now, two points have been specifically designated and agreed upon in a meeting this afternoon between the Organization and the Carrier; Mr. Liggett [for the Carrier] will write a confirming letter to Mr. Nutt [for the Organization] on this, but Pokegama and Boylston are going to be considered as within the Superior Terminal. Those points are not out of terminal locations for hauling crews.

* * *

[Question from audience] . . . Is my understanding correct that all the Crew Hauling within the terminal belongs to the clerks first and foremost and any hauling outside the terminal would belong to the clerks and the outside carrier's or the outside transportation.

[A] Right now, as long as this agreement is in effect, work in and out of the terminal belongs to clerical employes working these jobs. If this agreement was not into effect, what you said is correct, the work within the terminal

belongs exclusively to clerks. The work outside of the terminal belongs on a ratio of 6:3 within a twenty-four hour period to clerks and contractors."

The letter referred to at the June 4, 1987 meeting was signed on June 8, 1997 and provided:

"This will confirm the understanding reached in our meeting on June 4, 1987, between the Burlington Northern Railroad Company and its Employees represented by the Brotherhood of Railway and Airline Clerks providing for the utilization of BN/BRAC Utility Employees to perform Crew Hauling functions at the Superior, Wisconsin Terminal.

It was agreed that Pokegama Yard and Boylston would be considered as being within the Terminal in the application of the above agreement."

On February 3, 1994, the Carrier wrote the Organization exercising its option to cancel the May 18, 1997 Memorandum:

"In accord with Paragraph 4 of said agreement you may consider this to be Carrier's 10 day written notice of cancellation."

This claim followed asserting that beginning April 5, 1994 and continuing, the Carrier allowed strangers to the Agreement to perform Crew Hauling work within the Superior Terminal.

With respect to the merits, two questions must be answered. First, after the Carrier canceled the May 19, 1987 Memorandum, can the Carrier use strangers to the Agreement to perform Crew Hauling "within" the Superior Terminal? Second, after the Carrier canceled the May 18, 1987 Memorandum, are Pokegama Yard and Boylston "within" the Superior Terminal?

With respect to the first question, we find that Scope covered employees are entitled to perform Crew Hauling within the Superior Terminal on an exclusive basis, i.e., all Crew Hauling within the Superior Terminal is Clerks' work.

It is not disputed that the parties provided for such a result in their resolution. See the May 18, 1987 letter which became part of the May 18, 1987 Memorandum ("it

is recognized that all within terminal Crew Hauling at Superior is subject to Rule 1 Scope of the BN/BRAC Working Agreement.") However, because the Carrier exercised its option to cancel the May 18, 1987 Memorandum, the continued viability of that commitment has been called into question. For the sake of discussion, we will give the Carrier the benefit of the doubt at this point that when it canceled the May 18, 1987 Memorandum, it also canceled the written commitment in the May 18, 1987 letter that all Crew Hauling within the Superior Terminal would be performed by Scope covered employees.

But that benefit of the doubt does not avoid the conclusion that after the Carrier canceled the May 18, 1987 Memorandum, Crew Hauling within the Superior Terminal remained on an exclusive basis with Scope covered employees. First, at the June 4, 1987 meeting, a question was asked about the extent of the Crew Hauling work. The following response was given, without contradiction from the Carrier: "If this agreement was not into effect, what you said is correct, the work within the terminal belongs exclusively to clerks" [Emphasis added]. Thus, an intent was expressed that if the May 18, 1987 Memorandum no longer existed, Crew Hauling within the Superior Terminal was going to be exclusively Clerks' work. Consistent with that intent is a statement made by the Carrier found in the handling of the original claim which resulted in the May 18, 1987 resolution. In a November 20, 1985 letter, the Carrier stated that "BRAC-represented employees perform the Crew Hauling within the terminal exclusively" [Emphasis in original and added].

Thus, to answer the question of whether Crew Hauling was to be performed by Scope covered employees after the Carrier canceled the May 1987 Memorandum, we need not even consider the terms of the May 1987 resolution. In 1987 the Carrier did not object to the statement that without the resolution Crew Hauling within the Superior Terminal would be exclusively performed by Scope covered employees and the Carrier said so in 1985 during the handling of the original claim which resulted in the May 18, 1987 Memorandum. The Carrier effectively admitted that when its obligations under the May 18, 1987 Memorandum extinguished, the within terminal Crew Hauling work at Superior was exclusively Clerks' work.

With respect to the second question concerning whether Pokegama Yard and Boylston are "within" the Superior Terminal after the Carrier canceled the May 18, 1987 Memorandum, we must look to the 1987 resolution and the effect of the Carrier's cancellation of the May 18, 1987 Memorandum. On February 3, 1994, the Carrier

exercised its option to cancel the May 18, 1987 Memorandum. The parties did not agree that Pokegama Yard and Boylston should be considered "within" the Superior Terminal until June 4, 1987 (which was referred to at the June 4, 1987 meeting with the employees, i.e., "Mr. Liggett [for the Carrier] will write a confirming letter to Mr. Nutt [for the Organization] on this, but Pokegama and Boylston are going to be considered as within the Superior Terminal.") That understanding was not reduced to writing until June 8, 1987 ("It was agreed that Pokegama Yard and Boylston would be considered as being within the Terminal in the application of the above agreement").

In the May 18, 1987 Memorandum the parties specifically agreed " . . . that should this Agreement be terminated, the Crew Hauling function assigned to these positions may revert to the method of handling prior to the assignment of this work to clerical employees." When the Carrier exercised its option to cancel the May 18, 1987 Memorandum, all obligations and commitments set forth in that Memorandum and the accompanying letters were extinguished. The commitment to consider Pokegama and Boylston as "within" the Superior Terminal which came about as part of the 1987 package therefore no longer existed. The burden in this case is on the Organization to demonstrate that the commitment to consider Pokegama and Boylston as within the Superior Terminal survived the termination of the May 18, 1987 Memorandum or existed prior to that time. The Organization has not made that showing. After the Carrier canceled the May 18, 1987 Memorandum, Pokegama and Boylston were no longer "within" the Superior Terminal for exclusive Crew Hauling by Clerks.

In sum, on the merits we find that after the Carrier exercised its option to cancel the May 18, 1987 Memorandum, all Crew Hauling "within" the Superior Terminal must be performed by Scope covered employees and Pokegama and Boylston are not "within" the Superior Terminal.

The Carrier's argument that the Organization allowed strangers to the Agreement to perform Crew Hauling work within the Superior Terminal after the May 18, 1987 resolution does not alter that conclusion. The operative point in time is February 3, 1994, when the Carrier exercised its option and terminated the May 18, 1987 Memorandum. That action effectively restored the status quo ante back to June 1, 1987 (the effective date of the May 18, 1987 Memorandum). The record is clear that as of June 1, 1987, "all" Crew Hauling within the Superior Terminal was to be performed by Scope covered employees on an "exclusive" basis. The Carrier did not object to that statement at the June 4, 1987 meeting and affirmatively said so in its

November 10, 1985 handling. When on February 3, 1994, the Carrier opted to cancel the May 18, 1987 Memorandum, the parties' rights and obligations were restructured and returned back to June 1, 1987. What occurred between the June 1, 1987 effective date and February 3, 1994, when the Carrier gave its 10-day notice of its election to cancel the May 18, 1987 Memorandum is therefore immaterial to the parties' rights and obligations as of February 3, 1994.

In terms of a remedy, henceforth all Crew Hauling within the Superior Terminal shall be performed exclusively by Scope covered employees. In terms of compensation, the parties are directed to conduct a joint check of the Carrier's records within 60 days (unless the parties mutually agree to extend that time) to determine the amount of Crew Hauling performed by strangers to the Agreement after the Carrier terminated the May 18, 1987 Memorandum as a result of its February 3, 1994 notice. The affected employees shall be accordingly made whole.

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 25th day of May, 2000.

SERIAL NO. 396

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 34031

DOCKET NO. CL-34437

NAME OF ORGANIZATION: (Transportation Communications International Union

NAME OF CARRIER: (The Burlington Northern and Santa Fe
(Railway Company

On May 25, 2000, the Board issued a partially sustaining Award which addressed the following two questions:

> "... [First], after the Carrier canceled the May 18, 1987 Memorandum, can the Carrier use strangers to the Agreement to perform Crew Hauling 'within' the Superior Terminal? Second, after the Carrier canceled the May 18, 1987 Memorandum, are Pokegama Yard and Boylston 'within' the Superior Terminal?"

Those questions were answered as follows:

> "... [w]e find that after the Carrier exercised its option to cancel the May 18, 1987 Memorandum, all Crew Hauling 'within' the Superior Terminal must be performed by Scope covered employees and Pokegama and Boylston are not 'within' the Superior Terminal."

With respect to a remedy, the Board found:

> "In terms of a remedy, henceforth all Crew Hauling within the Superior Terminal shall be performed exclusively by Scope covered employees. In terms of compensation, the parties are directed to conduct a joint check of the Carrier's records within 60 days (unless the parties mutually agree to extend that time) to determine the amount

of Crew Hauling performed by strangers to the Agreement after the Carrier terminated the May 18, 1987 Memorandum as a result of its February 3, 1994 notice. The affected employees shall be accordingly made whole."

The Organization advises us that the parties met for the purpose of conducting a joint check of the Carrier's records and reached a settlement on the monetary portion of the claim through and including August 1, 2000 (totaling $34,800 for this Award and $65,250 for companion Third Division Award 34033, for which the Organization has also sought an Interpretation).

The Organization asserts that after the parties came to terms on the monetary portion of the remedy, the following occurred, which caused the Organization to seek an Interpretation of this Award:

"Subsequently, the Carrier has refused to comply with the clear and unambiguous opinion of the Board when it allows or permits strangers to the Agreement to transport crews within the Superior Terminal - specifically, when crews are transported to and from the Radisson Hotel and the Yard Office. Carrier has stated that it considers this particular crew hauling as 'new' work. It is [the Organization's] understanding the Carrier believes this work to be 'new' work as a result of a run through agreement reached with the operating crafts causing train crews to now tie up at the Superior Terminal when they previously did not.

As an example, the Organization has documented one hundred and six (106) incidents between June 1 and November 2001 when strangers have been used to haul train crews in-terminal to the Radisson Hotel.

In addition, it is apparently Carrier's position that strangers are allowed to perform in-terminal hauling when there is an insufficient supply of clerical employees to haul crews, as exists in Superior, account clerical crew haulers are already on duty but transporting other crews, or are off-duty and decline overtime calls due to fatigue or personal commitments, or are not rested due to excessive hours, the

> Carrier believes they have the arbitrary right to ignore the Award's mandate in this regard.
>
> As example of the Carrier's complete disregard for the award mandated is supported by the two hundred and seventeen (217) incidents documented by the Organization between June 1 and November 2001 where the Carrier used strangers to perform in-terminal crew hauling account of an insufficient clerical work force."

The Carrier argues that following issuance of this Award, it entered into a run-through Agreement with the operating crafts at Staples, Minnesota, and that prior to that run-through Agreement there were no away-from-home crews arriving or departing Superior. Further, according to the Carrier, Dilworth train crews operated from Dilworth, North Dakota, to Staples and back and Superior crews operated from Superior to Staples and back. Further, according to the Carrier, subsequent to implementation of the run-through Agreement, Dilworth train crews operated from Dilworth through Staples to Superior and, upon arriving at Superior, it is now necessary to transport the Dilworth crews to a motel for lodging and back to the terminal for their next trip.

The Carrier also states that subsequent to the filing of the underlying claim (in 1994) and as a result of the merger of the Burlington Northern and the Santa Fe Railroads, the parties entered into a Master Implementing Agreement ("MIA") dated September 19, 1995, which contains Side Letter No. 6, which, the Carrier asserts, is "[o]f greater importance" in this particular dispute because that letter provides for elimination of crew hauling through attrition. The Carrier argues that the disputed work is "new" work and "was never performed by the clerical employees at Superior, as the work never existed until April, 2000." According to the Carrier, "... Side Letter No. 6 support[s] Carrier's right to use contractors," and:

> ". . . [t]herefore, this was not work being performed by clerical employees at the time of the merger with Frisco in 1980 nor was this work being performed by clerical employees when Side Letter No. 6 was agreed upon. Therefore, Carrier could properly contract out this 'new' work without violating any Agreement rule."

The Organization disputes the applicability of Side Letter No. 6 to this matter and further disagrees with the notion that "new" work affects scope covered employees' entitlements under the Award.

Side Letter No. 6 provides:

> "At location where a position(s) that performs crew hauling or janitor work becomes open, it may be offered in seniority order to the employees at that location only and not to the entire seniority district. If a position goes unfilled, the crew hauling or janitor work may be contracted out. If this results in both contractors and covered employees performing the work, covered employees will have a preference to assignments (hours and rest days) on a seniority basis as opposed to contractor employees.
>
> Carrier may accelerate the contracting out process by offering employees no less than the Separation, Reserve or Wage continuation options contained in this agreement.
>
> It is understood the Carrier may not move crew hauling and janitor work to a location where no clerks are headquartered for the purpose of contracting out said duties."

Thus, after the Board issued the Award in this matter, the Carrier entered into a run-through Agreement which resulted in the performance of crew hauling work by non-scope covered individuals, which work the Organization asserts is governed by the remedy in this Award. The Carrier defends against the Organization's position by arguing that the work in dispute is "new" and that Side Letter No. 6 of the September 19, 1995 MIA allows it to use non-scope covered individuals to perform that work.

The threshold question is whether this dispute is appropriate for an Interpretation of this Award by the Board, or whether a new claim should have been filed? We find that an Interpretation is appropriate.

The remedy in this Award specifically held that "... henceforth all Crew Hauling within the Superior Terminal shall be performed exclusively by scope covered employees." The question of whether the work performed after the run-through

Agreement was reached, as alleged by the Organization, "specifically, when crews are transported to and from the Radisson Hotel and the Yard Office" is "Crew Hauling within the Superior Terminal" is one that falls squarely within the remedy ordered by the Board in this case. The real question here is did the Board intend that the remedy we formulated ("henceforth all Crew Hauling within the Superior Terminal shall be performed exclusively by Scope covered employees") cover the type of work now in dispute? That is an appropriate question for an Interpretation and not necessarily for a new claim.

The second question is what effect, if any, does Side Letter No. 6 have on the remedy the Board imposed? The extent of the remedy the Board formulated may be limited because of the terms of Side Letter No. 6. That letter was negotiated while the underlying continuing claim was being progressed on the property; it was not made a part of the record of the claim that made its way to the Board; and therefore the implication of Side Letter No. 6 was not argued to the Board. But nevertheless, if the Carrier is correct, Side Letter No. 6 may well limit or even cut off the Organization's requested relief under the remedy the Board formulated.

The third question is if, based on what is before us, we can resolve the questions of whether the disputed work falls within the scope of the remedy we ordered and what effect, if any, Side Letter No. 6 has on the remedy? We carefully examined the parties' presentations for this requested Interpretation. Due to the fact that this is a request for an Interpretation, those presentations are sparse on facts and arguments developed on the property. We find that based upon what is presently before us, we cannot fairly determine whether the disputed work is governed by the remedy and what effect, if any, Side Letter No. 6 has on that remedy. Given that the disputed work was not performed until after the Award issued; that Side Letter No. 6 was implemented while the underlying claim was being progressed and was not presented to the Board; and particularly because of the heavy reliance that the Carrier places on Side Letter No. 6 concerning the disputed work, we find that without better written responses and development of a complete record concerning the disputed work and the meaning and effect of Side Letter No. 6, it would be manifestly unfair to <u>both</u> sides for the Board to pass upon the important questions raised in this request for an Interpretation without a fuller development of the record and the parties' arguments concerning that record.

We shall therefore remand this matter to the parties and direct that they develop a complete record and written positions concerning the disputed work; whether such

work falls within the scope of the remedy we imposed; and what effect, if any, Side Letter No. 6 has on the remedy. The parties shall have 60 days from the date of this Interpretation to exchange in writing their respective positions. The parties shall then have an additional 60 days to exchange rebuttals. If at the end of that period the parties have still been unable to resolve their differences, the Organization has 60 days to make a request for a second Interpretation and the Carrier will be afforded an opportunity to respond, after which the Board will then take the matter under consideration.

Referee Edwin H. Benn who sat with the Board as a neutral member when Award 34031 was adopted, also participated with the Board in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of October 2004.