Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35514
Docket No. CL-34920
01-3-98-3-641

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 the Organization (GL-12149) that:

1. Carrier violated the Scope of our Agreement when it directed or allowed strangers to the Agreement to perform clerical (crew hauling) work on February 1, 3, 14, 29, 1996.

2. Carrier will be required to compensate Claimants at Great Falls, Montana, for eight (8) hours pro rata pay, per violation, to the first-out, qualified GREB or Extra List employee; if none available, eight (8) hours pay at the applicable overtime rate, per violation, to the appropriate regularly assigned employee."

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 February 1, 3, 14 and 29, 1996, the Carrier used an outside contractor rather than covered employees to haul crews from Cut Bank, Shelby or Laurel, Montana, to Great Falls, Montana. Four claims for the respective dates followed. Those claims have been consolidated in this proceeding.

The Scope Rule provides:

"Rule 1. SCOPE

These rules shall govern the hours of service and working conditions of employees engaged in the work of the craft or class of clerical, office, station, tower and telegraph service and storehouse employees 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."

On May 6, 1980, the parties entered into a Side Letter providing:

"This will confirm understanding reached in conference with respect to Rule 1, as adopted in the BN-BRAC Clerks' Working Agreement dated May 6, 1980 concerning transporting crews (Crew Hauling).

At points where employees of other crafts, commercial vehicles or Carrier Officers have been utilized for the purpose of transporting crews, the Carrier may continue to utilize such practice after the effective date of the above-mentioned agreement."

The Organization has demonstrated a Scope violation.

First, Rule 1 is clear. In order for the Carrier to remove work from the Scope of the Agreement, the Organization must first agree to that removal. See Third Division Award 33044:

"The parties Scope Rule has been the center piece of a number of Awards of this and other Boards. In some of these Awards the parties Scope Rule has been discussed at great length. At least one of these Awards traced the

development of the current Scope Rule through several series of negotiations. Since the adoption of its latest revision, certain 'buzz words' such as 'freeze-frame,' 'adhesive quality,' 'quantum,' etc., have been 'coined' in the Awards to describe certain aspects and standards of application applicable on review. And while review of these Awards discloses that on occasion the Organization has prevailed and on occasion the Carrier has prevailed, it may well be that some of the 'standards' announced, while well intended, may actually result in a misapplication of the parties Agreement. These decisions will not be revisited in any great detail by this Board as, notwithstanding what some other Boards may have stated the meaning and application of Rule 1, to be, in very simple terms, it states that:

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

There has been no agreement to remove the crew hauling work at Great Falls from the Scope of the Agreement.

Second, because of the terms of the May 6, 1980 Side Letter which provides that "[a]t points where employees of other crafts, commercial vehicles or Carrier Officers have been utilized for the purpose of transporting crews, the Carrier may continue to utilize such practice after the effective date of the above-mentioned agreement," it is critical to determine to what extent crew hauling was performed by covered employees and strangers to the Agreement on December 1, 1980 (the effective date of the 1980 Agreement). See Appendix K Board Award No. 116 which looks to consideration of the following factors for this type of case:

"1) the amount and type of the disputed work performed by Agreement-covered employees at the location on [December 1, 1980];

2) the amount and type of disputed work, if any, which Agreement-covered employees were performing at the location after the alleged violation;

3) the amount and type of the disputed work, if any, performed by strangers to the Agreement as of [December 1, 1980]; and

4) the amount and type of work, if any, performed by strangers to the Agreement after the alleged violation."

See also, Appendix K Board Award No. 88.

The record before us sufficiently supports the Organization's position that as of December 1, 1980, crew hauling at Great Falls was exclusively performed by Clerks. That conclusion comes from numerous statements provided by employees who worked at Great Falls (some who called Clerical employees to transport crews) prior to and after December 1, 1980. The conclusion that Clerks exclusively performed crew hauling at Great Falls also comes from the further showing by the Organization that on August, 26, 1982, the Carrier announced that "[e]ffective immediately, all crew hauling will be performed by Pixley Transportation . . . [and a]bsolutley no clerks will be called to haul crews" which was rescinded on September 30, 1982 by the Carrier after claims were filed with the Carrier's subsequent announcement that "[e]ffective 12:01 AM 10/1/82 we will discontinue calling Pixley for crew hauling - Notify the clerk on duty in Great Falls when a driver is needed, advising train and location for deadhead or dog catch." Taken together, the employees' statements and the demonstrated removal and return of the crew hauling work to the covered employees show that as of December 1, 1980, Clerks exclusively performed crew hauling at Great Falls.

Third, there is no question that, as the Carrier asserts, after September 30, 1982, strangers to the Agreement hauled crews at Great Falls. According to the Carrier's March 17, 1998 letter, the Carrier's documentation:

> ". . . shows that Pixley Transportation Company transported train crews from Great Falls, Montana, on November 26, 29, and 30, 1986 . . . from Laurel to Great Falls, on November 23, 24, 25, 26, 27, 29, and 30, 1986 . . . from Great Falls on September 2, 1987 . . . from Laurel to Great Falls, on September 2, and 15, 1987 . . . from Great Falls, October 2, 1987 . . . from Laurel to Great Falls on October 4, 8, and 15, 1987 . . . from Great Falls, on November 23, 1987 . . . from Laurel to Great Falls on November 16, 18, 20, 23, 23, 25, 27, 28, and 30, 1987 . . . from Great Falls on December 6, 1987 . . . from Laurel to Great Falls on December 4 and

11, 1987 . . . from Great Falls on July 24, 1990 . . . from Great Falls on September 20, 1991."

The Carrier also proffered the March 11, 1998 letter from A. Pixley, Secretary Treasurer of Pixley Transportation, asserting that she provided invoices from Pixley showing crew hauling by the company and "I can assure you that we did haul crews into and out of Great Falls, Montana, during the year 1986 and have done so on numerous occasions up to and including the present time" and that Pixley has ". . . the authority and ability to haul train crews into and out of Great Falls Mt. and have had since our contracts for these areas were awarded to us by B.N. in the early 1980's"; the January 28, 1998 general statement of Victor Lukenbach that "I hauled crews from Laurel to Great Falls starting on 10-11-95 to 11-6-97 for Pixley Transportation"; statements dated January 29 and March 12, 1998 from Gordon Lubbers of Pixley asserting that during the winter of 1988-1989 he was aware of a crew transported by Pixley from Laurel to Great Falls, "prior to April 15, 1993 . . . I personally hauled a crew from Laurel to Great Falls . . . [but] I can not relate the exact date," and the general statement that "I made numerous additional trips transporting crews between Laurel and Great Falls"; savings analysis reports purporting to show that crew hauls were made by Pixley mostly at Laurel at various times during August 1993 through June 1995; Carrier trip tickets showing crew hauling by Pixley on November 23, 1995 and other dates in December 1995; invoices from Outsource Administrators showing that Pixley transported train crews from Laurel to Great Falls on November 23, December 5 and 8, 1995; a statement from Manager Cliff Welvey of Powder River Transportation (Pixley's successor) stating that Pixley transported train crews from Great Falls to Shelby and from Cut Bank and Shelby to Great Falls since at least July 2, 1995 with further trip tickets from Mr. Welvey showing that Pixley transported train crews from Great Falls to Shelby on July 2, 16, August 6, 13, 27, September 24 and October 1, 1995.

Notwithstanding the Carrier's demonstration, however, the record only shows that after the Carrier returned the crew hauling work to the covered employees in 1982 (after the Organization filed claims protesting that removal of scope covered work) and prior to the filing of these individual claims, Pixley hauled crews on what amounts to sporadic dates between 1986 and 1995. However, in comparison to the amount of crew hauling work performed by covered employees, the few dozen specific times crews were hauled by Pixley during the approximately 14 year period from 1982 until the filing of the claims in 1996 is relatively insignificant. The record reveals (see the Organization's November 21, 1997 correspondence and attachments) that during the first seven months

in 1996 alone, Clerks performed crew hauling at straight time during 317 shifts; regularly assigned Clerks performed crew hauling at overtime on 89 shifts; and on weekends when GREB or Extra List employees were available, 46 shifts were used to haul crews. See also, Manager Field Support K. A. Bauer's statement that with respect to crew hauling, as of September 1995 "[t]here were three positions, 021 with assigned hours of 0700 to 1500, 022 with assigned hours of 1500 to 2300, and 020 with assigned hours of 2300 to 0700 . . . Monday through Friday . . ." which positions utilized two of the Carrier's vans. In other words, the demonstrated number of crew hauls performed by Pixley during the period 1982 through the filing of the claims in 1996 was relatively insignificant when compared to the amount of such work performed by covered employees. Moreover, there is no evidence that the Organization was aware of those isolated instances where Pixley was used to haul crews and acquiesced to an extent that it can be found that the Organization is now somehow estopped from raising the instant protest.

But, in any event, the critical date is December 1, 1980. There is simply no evidence offered by the Carrier to refute the Organization's showing that as of that critical date crews at Great Falls were exclusively hauled by covered employees. The Carrier argues in its March 17, 1998 correspondence that "Pixley . . . has regularly transported train crews to and from Great Falls, Montana, since at least 1986." [Emphasis added.] But the crucial date is December 1, 1980. The most telling evidence against the Carrier's position in this regard is its attempt on August 26, 1982 to assign "all crew hauling" to Pixley and its announcement one month later after claims were filed that "we will discontinue calling Pixley for crew hauling." [Emphasis added.] That action - i.e., that it will "discontinue calling Pixley" - can only be read as an effective admission by the Carrier that it recognized that as of December 1, 1980 (the critical date) and into the fall of 1982, crew hauling was not to be performed by strangers to the Agreement - i.e., Pixley. Further, we cannot ignore the fact that the Carrier was able to produce various documentation dating back to the 1980's to show that Pixley was performing some - albeit comparatively sporadic - crew hauling. The obvious inference that we must draw is that the lack of production of similar documentation which supports its position for periods on or before the critical date of December 1, 1980 leads to the conclusion that those documents do not exist to support the Carrier's position and therefore, as the Organization asserts, crew hauling as of December 1, 1980 was not performed by Pixley or other strangers to the Agreement, but was exclusively performed by covered employees.

Fourth, the Carrier's arguments that the claims are untimely and barred - both by Rule (Rules 59 and 60's filing requirement of "60 days from the date of the occurrence on which the grievance [claim] is based") and by laches - are not persuasive. There is no evidence that after the crew hauling work was returned to the covered employees in 1982 that the Organization was aware of strangers to the Agreement performing crew hauling and failed to protest that action. In any event, the four individual claims in this matter were filed on March 14, 1996 and protested actions occurring in February 1996. They were timely filed within the 60 day period.

Fifth, the Carrier's argument that no jobs were abolished as a result of the Carrier's use of a contractor to haul crews on the dates in the claim (see Manager Field Support Bauer's statement), even if accurate, does not change the result. This is not a case which examines comparative increases to determine if a disproportionate amount of arguable scope covered work was given to a contractor where strangers to the Agreement performed the work on the critical date. In terms of the analysis in this specific case, the only relevant consideration is that it has been shown that on December 1, 1980 crew hauling at Great Falls was exclusively performed by Clerks and there was no agreement by the Organization allowing the Carrier to remove that work.

The function of a remedy is to make whole those employees who have been adversely affected by a demonstrated contract violation. The Carrier is therefore directed to compensate the adversely affected employees at the appropriate contract rate for the amount of hours of crew hauling performed by strangers to the Agreement on the dates specified in the consolidated claim. The matter is now remanded to the parties to determine the appropriate compensation for the affected employees.

In sum then, the record shows that on December 1, 1980, crew hauling at Great Falls was exclusively performed by Clerks and there was no agreement by the Organization for the Carrier to remove that work from the covered employees. The Carrier therefore violated Rule 1 and the May 6, 1980 side letter. The claim for the four dates set forth in the consolidated statement of claim is therefore sustained. The adversely affected employees shall be 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 24th day of July, 2001.