Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33044
Docket No. CL-33705
99-3-97-3-110

The Third Division consisted of the regular members and in addition Referee John C. Fletcher 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-11685) that:

1. Carrier violated the Schedule Agreement effective December 1, 1980, at Springfield, Missouri, beginning on January 15, 1995, and continuing every day thereafter that Carrier allows and or/requires anyone other than employes covered by the Scope Rule of the above Agreement to perform any duties previously performed by Scope-covered employes in the Purchasing and Material Management Department at Springfield, Missouri, including, but not limited to: locating and ordering materials; handling material requisitions and purchase orders; receipt of materials from vendors; accepting material from vendors; loading and unloading materials; storing materials until needed by using departments; all related record keeping, tracing, correspondence; related data entry work; inventorying; disbursing; supervision, and any other handling as related to Carrier's direct shipment process.

2. Carrier shall now be required to:

   (a) Return all work to the employes covered by the scope of the BN-TCU Agreement.

   (b) Compensate the incumbent to Store Foreman Position No. 68021 at the Springfield Material

Department an additional eight (8) hours pay at the pro rata rate of $125.33 per day.

(c) Compensate the incumbent to Assistant Store Foreman Position No. 68028 at the Springfield Material Department an additional eight (8) hours pay at the pro rata rate of $121.59 per day.

(d) Compensate the incumbent to Crane Operator (Storehelper) Position No. 68460 at the Springfield Material Department an additional eight (8) hours pay at the pro rata rate of $114.62 per day.

(e) Compensate the incumbents to Section Stockman No. 68053 and No. 68052 at the Springfield Material Department an additional (8) hours pay at the pro rata rate of $116.76 per day.

(f) Compensate the incumbents of Storehelper Position No. 68031 and No. 68442 at the Springfield Material Department an additional eight (8) hours pay at the pro rata rate of $113.02 per day.

(g) Compensate the incumbent to Chief Clerk Position No. 68452 at the Springfield Material Department an additional eight (8) hours pay at the pro rata rate of $125.33 per day.

(h) Compensate the incumbent to Stock Clerk Position No. 68044 at the Springfield Material Department an additional eight (8) hours pay at the pro rata rate of $116.76 per day.

The amount claimed is for each day Carrier violates the Agreement as described herein and shall be in addition to all other earnings received by Claimants on these dates and subject to future wage increases.

In the event any of the above referenced positions are abolished, Carrier shall be required to compensate the First Out Qualified and Available GREB employe at the Springfield Material Department eight (8) hours pay at the pro rata rate of the position(s) abolished for each day Carrier violates the Agreement as described herein. If no GREB employes are available on any given date of the violation, claim shall be for the Senior Available Extra List employe on the Springfield Extra List for eight (8) hours pay at the pro rata rate of the abolished position(s) per day. If neither GREB nor Extra List employes are available on any given date, claim shall be for eight (8) hours pay at the punitive rate of the abolished positions(s) 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.

All material facts in this case are, for the most part, undisputed. At Springfield, Missouri, Carrier, for many years, maintained a Purchasing and Material Management Department ("P&MM Department") that supplied bridge timbers and provided bridge hardware to maintenance crews systemwide. The Springfield P&MM Department was staffed by employees subject to the TCU Agreement. After a bridge project was approved, Engineering Department personnel would submit a material requisition to Springfield, where Clerks would generate appropriate purchase orders. Treated wood products and timbers for a particular bridge project would be ordered from single vendor, Kerr-McGee's Columbus, Mississippi, plant. (Each project requires different design and structural components, requiring different treated wood material.) Kerr-McGee would load a

gondola car with the structural wood ordered, and then ship the car to the Springfield P&MM Department, where it was held until released for the start of the project.

Other hardware needed for the project would be ordered from a variety of different vendors. For example, timber spikes would be ordered from Lewis Bolt and Nut Company; tie pads from Clim-A-Tech Industries; walkway brackets from Acme Structural; bridge signs from Lyle Sign Co.; bridge poles from Paper Calmenson & Co.; Nuts, bolts and washers from Service Supply Co.; Spikes from Birmingham Rail and Locomotive or Industry Railway Supply; and, grip struts were furnished by GS Metals. All of the vendors would ship their product directly to the Springfield P&MM Department, usually by truck, where it was processed by Carrier's employees subject to the TCU Agreement.

Shortly before a particular bridge project was to start the hardware received from the other vendors was collected by Storehouse employees and loaded into the gondola with the treated timbers received from Kerr-McGee, and then shipped to the work site.

On December 14, 1994, Carrier notified the Organization of its intent to transfer certain data entry work from Springfield, Missouri, to the Fort Worth Customer Service Center. Shortly thereafter it changed procedures for securing, storing, and distributing bridge timbers and bridge hardware. Instead of ordering material from several vendors, Carrier began sending one purchase order to GS Metals for all the material needed for a project, except the treated wood which it continued to order from Kerr-McGee. GS Metals would then order necessary items from various vendors, have it shipped to its facility, where it provided the same accounting and handling the P&MM Department previously performed, and then re-shipped the material to Kerr-McGee at Columbus, Mississippi, where it was placed in a gondola with the bridge timbers for the project, and from there, re-shipped to the job site.

The Organization contends that GS Metals and Kerr-McGee took over certain duties and responsibilities of the Springfield P&MM Department, and are now doing the same work that Clerks and Material Handlers at that facility previously performed. This is a violation of its Scope Rule, it is argued. Specifically the Organization says that Carrier entered into a contract with GS Metals that resulted in that vendor acting as a distribution point to order and supply bridge hardware

from other vendors and replace Carrier employees in the performance of that work. Also, Carrier entered into an agreement with Kerr-McGee whereby this vendor's employees would receive and load bridge hardware into a gondola that contained bridge timbers, thus replacing Carrier employees that previously did this work.

Carrier responds that the change in procedures involved in this matter is merely a "direct shipment" situation which now eliminates a "middleman" function previously performed at its Springfield P&MM Department. It argues that Awards rendered on this property have concluded that direct shipments from vendors and elimination of middleman functions are not at odds with the requirements of the parties Scope Rule.

This Board is not persuaded that Carrier's use of GS Metals to acquire supplies from other vendors and then ship such material along with its own material to a third vendor, Kerr-McGee, is an actual "direct shipment" situation, as argued. A direct shipment situation is one where a user of the item, a locomotive or car shop, a maintenance of way department, a bridge or building department, an office, etc., some department or officer with purchasing authority, orders an item from a vendor and has the item or items shipped directly to the site where it is to be used. Direct shipment involves the elimination, altogether, of the storehouse step. Replacement of an existing storehouse step with a vendor operated storehouse step is not a direct shipment situation.

It is manifest that the storehouse step has not been eliminated in the procedures under review in this claim. GS Metals now functions in the same manner as the Springfield P&MM Department functioned previously. It receives a "material list" for a bridge project, just like Springfield used to receive, and goes about securing the items needed for the project from the same vendors that the P&MM Department previously ordered from. When the items on the "shopping list" are received by GS Metals they are prepared for shipment and eventually loaded into the gondola with the bridge timbers supplied by Kerr-McGee. The middleman function was not eliminated, as argued by Carrier. It was only shifted off the property to GS Metals. "Direct shipment" is not involved, as GS Metals ships to a third party, Kerr-McGee, not the final user. GS Metals is now Carriers Material Department for bridge projects.

Carrier has argued that this case should be viewed in the same light as the "White Envelope" case, Award 102, Appendix K Board. It says that under the

"White Envelope" case users went to a local vendor and purchased sledge hammers, flashlights, welding rods, cleaning supplies, paper products, and office supplies, which they formerly ordered from the Stores Department. These vendors, like GS Metals did not manufacture their own stock. They ordered and purchased from someone else the items they resold to Carrier.

Carrier's arguments would carry some persuasion if all that GS Metals was doing was stocking items for resale to Carrier, and then shipping these items to the end user. However, the record is conclusive, GS Metals is doing more, much more. It is doing the very "middleman" function that was eliminated in the case that resulted in Award 102. GS Metals does not simply receive a Carrier purchase order and pull an item off it shelf and ship it to the user. It does the very work that was previously done in Springfield. It receives the purchase order and material list for a particular bridge project. Then it contacts other vendors and orders that material that they previously furnished directly to Carrier. The material is shipped to GS Metals, where it is given the identical handling that it would have been given if it had been shipped to Springfield. GS Metals is now doing work that previously was work performed by employees subject to the Agreement. GS Metals is now a de facto Carrier Stores Department.

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."

In this case it cannot be disputed that work covered by the Scope of the Agreement at the time the Rule was adopted was removed, without agreement between the parties. Work covered by the Scope of the Agreement was given to GS Metals and also to Kerr-McGee, without agreement of the parties. This work was not eliminated, it was transferred, pure and simple, to strangers to the Agreement. Elimination of a middleman did not occur and direct shipment to the user is not involved. Moreover, the work did not disappear, it continued to be performed by employees of GS Material and employees of Kerr-McGee, after it was no longer performed by employees subject to Scope of the Agreement. The claim has merit. It will be sustained.

With respect to remedy, Carrier has argued that the claim was improperly submitted, it is excessive and that Claimants suffered no monetary damages. Carrier's arguments on this point are not persuasive. This Board has frequently held that no useful purpose would be served if we were to find that the Agreement was violated and no remedy was offered. In this matter substantial elements of work covered by the Agreement was removed and given to strangers, even though Rule 1, fairly read, states that this cannot be done except by agreement. Accordingly, we will award the penalty asked for in the Organization's Statement of Claim.

AWARD

Claim sustained.

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 January 1999.

SERIAL NO. 380

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 33044

DOCKET NO. CL-33705

NAME OF ORGANIZATION: (Transportation Communications International
(Union

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

By letter dated August 5, 1999, the Board was advised as follows by the General Chairman:

> "I am writing you in reference to Third Division Award 33044, Docket No. CL-33705, 99-3-97-3-110, which was sustained by Referee John C. Fletcher on January 25, 1999.
>
> The aforementioned claim involved a Scope Rule violation at Springfield, Missouri. After issuance of the Award the Parties met several times and a joint check of the facility was made. The parties are in agreement that the violation has ceased and have further agreed to a monetary settlement.
>
> A question has now arisen in regards to the monetary portion of the settlement as to whether or not Claimant Carl R. Woods who signed the attached release for (Attachment 1), is a viable Claimant and should be included in the distribution of monies. Therefore, in order to answer this question, please accept this as a formal request for an Interpretation of Third Division Award 33044. Please arrange for expeditious handling.

The Claimant is represented by counsel. In the event counsel desires to appear before the Board, by copy of this letter, counsel is instructed to advise you accordingly."

By letter dated September 23, 1999, the Board advised the parties to submit Submissions in this matter.

The evidence shows that alleged Claimant C. R. Woods was, in fact, employed by Carrier in its P&MM Department at Springfield on the date the original time claim was submitted by the Organization. It is that foundation upon which his assertions rest. The unchallenged record indicates, however, that on March 14, 1997, (while the dispute was pending resolution), Mr. Woods signed a Resignation and Release Agreement, and in so doing, agreed to accept ongoing Reserve Board payments under the following pertinent conditions:

"I hereby elect to be placed on a "Reserve Board" under the terms and conditions set forth in the Agreement between the Burlington Northern Railroad Company (BN) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and their respective employees represented by the Transportation Communications International Union (TCU) dated December 19, 1995. (BN, Santa Fe and their successors and assigns shall hereinafter be collectively referred to as the "Company"). I understand this election is irrevocable.

'I understand that, unless recalled by the Company, I shall remain on the Reserve Board either for six years; until I become eligible for an unreduced annuity under the Railroad Retirement Act; or until my death, whichever occurs first . . . I further understand during this time I shall not be entitled to any benefits under any labor agreements, including protective benefits under such agreements or regulatory orders, but I will continue to receive health and welfare benefits. . . .

'Effective upon the issuance by the Company of the last monthly payment due me as a Reserve Board participant, I hereby knowingly and voluntarily resign from the service of the Company. This resignation shall constitute a complete relinquishment and surrender unto the Company of any and all my employment rights, including seniority, health and welfare, and other rights and benefits which may have accrued to me as an employee of the Company.

'For and in consideration of the above, I hereby release the Company from any and all claims of any nature, known or unknown, which I have or might have against the Company, including, but not limited to, claims which derive from or are based on any aspect of my employment relationship with the Company or my resignation of such employment. Claims which I relinquish under this Agreement include, but are not limited to, personal injury claims, contract claims, labor claims, employment claims, claims arising under any federal, state or local common law or statute. . . .

'I understand this release does not apply to any labor claims pertinent to the proper monthly amount of my reserve board payments.

'I acknowledge and affirm that I have carefully read this Resignation and Release Agreement, that I have been afforded the opportunity to seek independent advice concerning the meaning of its language, that I fully understand its terms and conditions, and that I am acting of my own free will in executing this Agreement."

/s/ Carl R. Woods
March 14, 1997

This Board is now asked to rule upon the intended result of the Claimant's resignation and release as it pertains specifically to the "labor claims" stipulation

contained the Agreement. We need not travel far from the clear and unambiguous language in the document itself for guidance in answering the following question:

> "What, exactly, did alleged Claimant Woods release the Carrier from when he voluntarily, and without coercion, signed the above resignation agreement?"

The intent of the release is readily apparent on this point. Claimant released Carrier from all claims, "known or unknown" not pertaining to Reserve Board payments. The rule of covenant language known as expressio unius est exclusio alterius is manifestly at work in the portion of Mr. Wood's Resignation Agreement germane to release from claims; the centerpiece of the issue at bar. Simply put, this principle, when fairly applied, means that expressly stating certain exceptions in a written instrument, indicates that there are no other exceptions. In the instant case, upon application of this long-accepted standard of interpretation, it becomes palpably obvious to this Board, that by signing this particular Resignation and Release Agreement, Mr. Woods relinquished any and all claims against Carrier (specified and non-specified), excepting only those labor claims pertaining to disbursement of Reserve Board payments. There simply are no other exceptions permissible under the structure of this contract, and Mr. Woods, as a consequence, signed away any potential entitlement he may have had to a portion of the penalty awarded in Third Division Award 33044 when he affixed his signature to the March 14, 1997 Release Agreement.

This Board further gives necessary authoritative force to prior Awards which address the issue raised herein. Due weight is given to the substantial and dependable decrees already in place regarding the viability of pending labor claims when held in tension with Resignation and Release Agreements such as the one signed by Mr. Woods.

In Third Division Award 32571, the Board stated:

> "After reviewing the full record on this claim the Board concludes that the claim has no viability in view of the March 21, 1997 Settlement Agreement signed by the Claimant.

This Board has ruled on numerous occasions that a claim is moot in the face of such a waiver. See Third Division Awards 20832, 26470, 26694, and 29480. Also First Division Award 24045 and Second Division Award 13034."

This Referee held in Second Division Award 12093 that:

"Both parties to the dispute have raised numerous issues, procedural and substantive, in support of their positions. The Board finds that it need consider only one. On December 14, 1990, Petitioner executed a resignation and release from the Carrier, which included the following provision:

> 'I release and forever discharge the company from any and all claims, causes of action, and liabilities of any kind or actions currently pending in any stage of appeal including those actions pending before the National Railroad Adjustment Board, arising out of my employment at, or termination of my employment from, the Company.'

It is clear that such resignation and release covers the dispute before this Board in this docket. The Claim, therefore, having become moot, must be dismissed." (See also Second Division Award 12199.)

In Third Division Award 31915, the Board further stated:

"This Board has reviewed the record in this case and we find that on November 1, 1994 the Claimant executed a release of all claims releasing and discharging the Carrier from all claims and liabilities of every kind and nature. Because this claim arose before the execution of that release by the Claimant, this Board must find that the claim must be dismissed."

The Board concluded in Third Division Award No 19527 that:

> "This Board has consistently recognized that an employee is bound by such a settlement and release, and that in the face of such a settlement and release the disputes coming thereunder are deemed to be adjusted and this Board has no jurisdiction. It is not necessary for the Board to deal with the substantive issue raised in these dockets as the issue has been made moot."

Awards 474 and 475 of Special Board of Adjustment No. 605 supply further guidance. In Award 474 the Board held:

> "On December 23, 1986, Claimant voluntarily resigned from service in exchange for a lump sum payment. Claimant signed a release stating:
>
> > 'For and in consideration of the sum of $38,070.00, subject to the usual deductions, the receipt of which is hereby acknowledged, I hereby knowingly and voluntarily resign from the service of the Atchison, Topeka and Santa Fe Railway Company and expressly release and relinquish unto said Railway Company all my rights as an employee, including any claims, seniority Health and Welfare, and other rights and benefits which may heretofore have accrued to me as an employee of said Railway Company.'
>
> Upon executing the release, Claimant waived any right she had against the Carrier as of December 23, 1986, which would include the claim herein."

Special Board of Adjustment Award No. 475 held under similar circumstances that:

"On December 14, 1987, Claimant voluntarily resigned from service in exchange for a lump sum payment. Claimant signed a document stating:

> 'I further understand that this voluntary resignation constitutes full settlement and release of any and all claims of any nature, known or unknown, which I have or might have against said Railway Company, including, but not limited to, claims which derive from or are based on any aspect of my preceding employment relationship with said Railway Company or my resignation of such employment.'

In consideration for a lump sum separation allowance, Claimant relinquished all rights she held against the Carrier as of December 14, 1987, which includes this claim. For the reasons more fully set forth in Award No. 474, we must dismiss this claim."

The Board further encourages review the relevant findings contained in Third Division Awards 20832 and 26206, and Award No. 680 of Special Board of Adjustment 570.

A review of Counsel's arguments to this Board do not change our disposition. While assertions are made there is no evidence that Claimant did not know what was involved in the RELEASE. In fact it was the Claimant, according to Counsel, who first sought the availability of participation. Asserted entitlements under other statues and other circumstances simply does not provide a basis, given the precedent in this industry, noted above, for a finding that Claimant's release does not apply in this matter.

Based upon the whole of the record, this Board finds that by virtue of the Resignation and Release Agreement signed by Mr. Carl R. Woods on March 14, 1997, all claims made by him concerning the disposition of Third Division Award 33044 are dismissed for lack of merit as discussed above.

Accordingly, an Award favorable to Mr. Carl R. Woods will not be made.

Referee John C. Fletcher who sat with the Division as a neutral member when Award 33044 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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