Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33225
Docket No. CL-33757
99-3-97-3-201

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11717) that:

1. Carrier violated the Clerks Agreement effective December 1, 1980, when work that had been previously performed by clerical employes at the Hub Center at Memphis, Tennessee, was unilaterally removed from those employes and given to strangers to the Agreement.

2. Carrier shall now be required to compensate:

(a) the incumbents of Positions 62, 63 and 64 an additional eight (8) hours compensation at the pro rata rate of these assignments beginning June 15, 1993, and continuing until the work of filing bills of lading, obtaining hard copy waybills, filing ATSF lease papers, deramping trailers and containers in the computer, faxing bills of lading on traffic routed BN-AVARD-ATSF, calculating storage charges and receiving and submitting payments, performing load list in the computer, and receiving and handling hazardous material bills of lading and shipping papers is returned to and performed by clerical employes at the Memphis Intermodel Hub Center at Memphis, Tennessee;

(b) the incumbent of Chief Clerk Position 017 for an additional eight (8) hours compensation at the pro rata rate of this assignment beginning July 15, 1993, and continuing on

each and every day thereafter until the work of calculating storage charges and receiving payments is returned to and performed by clerical employes at the Memphis Intermodel Hub Center at Memphis, Tennessee;

(c) the incumbent of Chief Clerk Position 017 for an additional eight (8) hours compensation at the pro rata rate of this assignment beginning July 1, 1993, and continuing on each and every day thereafter until the work involving OS&D inspection reports is returned to and performed by clerical employes at the Intermodel Hub Center at Memphis, Tennessee;

(d) the incumbents of Positions 62, 63, 64 and Relief Position No. 1 an additional eight (8) hours compensation at the pro rata rate of these assignments beginning July 15, 1993, and continuing on each and every day thereafter until the work involving the reporting of information concerning transloading into the computer is returned to and performed by clerical employes at the Intermodel Hub Center at Memphis, Tennessee;

(e) the incumbents of Positions 62, 63, and 64 and Relief 1 for an additional eight (8) hours at the pro rata rate of these assignments beginning July 15, 1993, and continuing on each and every day thereafter until the work of handling with a foreign line for waybills and/or corrections is returned to and performed by clerical employes at the Intermodel Hub Center at Memphis, Tennessee."

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. Carrier has had clerical employees in Memphis, Tennessee, for many years, and at least since the merger of the Burlington Northern with the St. Louis - San Francisco Railway Company, these employees have been covered by a Collective Bargaining Agreement effective December 1, 1980. Between that date and June 15, 1993, employees subject to the terms and conditions of the Clerks Agreement were responsible for, and completed all of the "clerical work" connected with the movement of rail traffic between Birmingham, Alabama, and Avard, Oklahoma, that was routed through Memphis. This included clerical work pertaining to business that might have originated on a different carrier or would eventually become traffic on another carrier through a subsequent interchange. This clerical work, which involved filing bills of lading, calculating payments, entering load lists into a computer, receiving and handling hazardous material bills of lading and shipping papers, calculating storage charges and receiving payments, OS&D inspection reports, reporting information concerning transloading into computers, as well as foreign line waybills, was done "exclusively" by Clerks initially at the old rail yard, then after December 23, 1983, at the new Intermodel Hub at 2440 Dunn Cove, Memphis, and now at its present location, 5286 Shelby Drive, Memphis, where the work was moved to on February 1, 1986.

On June 7, 1993, Carrier announced that on June 3 it had entered into what it termed a "Haulage Agreement" with the Atchison, Topeka and Santa Fe Railway Company, that was to go into effect on June 15. Under that multi-year agreement the Santa Fe was "given" haulage rights over BN lines between Avard, Oklahoma, and Birmingham, Alabama. Traffic generated by the haulage agreement would move in dedicated "Santa Fe trains" that would be operated by BN crews.

Shortly after traffic began moving under this haulage agreement, the Organization filed a series of claims contending that certain of its clerical work was now being taken over and performed by employees of Brimhall Piggyback Service ("Brimhall"). The first of these claims, BN-311 filed on August 2, 1993, noted that "filing of bills of lading . . . was unilaterally removed from TCU clerical employees" and given to individuals not subject to the Agreement. That claim also noted that Brimhall,

which previously only had one employee in the facility, had hired five new employees to handle the additional workload it was taking on.

Thirty-six additional claims were filed on subsequent dates on other elements of work (as described in paragraphs (b), (c), (d), and (e) of Part 2 of the Statement of Claim) that the Organization contended was work that it had performed in the past, but was now being done by Brimhall employees. All 37 claims were denied in a single letter dated September 24, 1993. In that denial Carrier stated that the "aggrieved work belongs to the ATSF Railroad and was not covered by the BN/TCU Agreement." The denial did not support this allegation with a single explanation, nor did it demonstrate how the work was considered as Santa Fe work. The denial also contended that the quantum of work being performed by BN Clerks at Memphis had not been reduced, that the claims were procedurally improper under the Railway Labor Act, and that they were also considered to be excessive.

Further handling on the property, in which the Organization submitted approximately 2000 pages of material in support of its contentions that strangers to its Agreement were now performing work subject to the Agreement, did not result in settlement. All of the claims were consolidated into one Submission for docketing with this Board.

Before this Board the Organization argues that Carrier did not secure an agreement to allow the removal of work, that the evidence convincingly reveals was work subject to its Agreement. It notes that at no time has Carrier rebutted the Organizations claim that the work involved in this dispute had been performed by Clerical employees prior to, on, and after December 1, 1980. Furthermore, the Organization says, the work was performed by Clerical employees until Carrier entered into the haulage agreement with the Santa Fe. Finally, the Organization says, the work was removed from Clerical employees and given to strangers to the Agreement with the implementation of the haulage agreement.

The Organization contends that Carrier's defenses are not sound. It says that Carrier's contention that the work is ATSF and is not covered by the BN/TCU Agreement, is misplaced because, inter alia, the work is occurring on BN property, therefore it is BN work. BN Clerks all over the system perform work on traffic that could be considered as traffic belonging to another carrier, but that doesn't remove the work from coverage of the Agreement, the Organization says. Carrier's argument that the quantum of work was not reduced, is also in error, according to the Organization,

because "strangers to the agreement are performing the aggrieved work on all traffic moving between BN and ATSF [and] that work would have been performed by [BN] clerical personnel prior to the haulage agreement." Carrier's contention that the "four pronged test established by the Appendix K Board" has not been satisfied, is also disputed by the Organization.

With regard to Carrier's two procedural defenses, the Organization contends that one seems to have been dropped while this matter was being handled on the property, and the other was raised for the first time before this Board, therefore it cannot be considered.

As to the additional compensation being claimed because of the violation as being excessive, the Organization suggests that the record easily demonstrates how Clerical employees lost work opportunities and compensation and that no useful purpose is served when the Board finds that an Agreement violation occurred, but fails to award compensation. In such cases a Carrier is free to violate the Agreement with impunity.

Carrier first notes that it is the Santa Fe that is providing service for its shippers and it is that Carrier that has the responsibility and control for all of the waybilling, collection charges, and other functions in connection with its business. In this regard, Carrier stresses, the Santa Fe has the right to perform the work with whom it chooses, since said work is under its direction and control. Carrier acknowledges that while BN receives a fee for the use of its tracks and provides the physical means for handling certain business belonging to the Santa Fe, it has no control over the performance of work in connection therewith. It insists that merely because it is providing the physical means of handling certain business for the Santa Fe, this in and of itself does not give the Organization the right to perform any work not under the direction and control of BN.

Carrier also argues that the claims were filed in violation of its Time Limits Rules and that the Organization engaged in pyramiding and piece-mealing, a tactic at odds with the Railway Labor Act. Also, Carrier insists that the quantum of clerical work available to TCU employees at Memphis has not been reduced, and that the Organization has failed to satisfy the four-prong test established by Award 116, Appendix K Board, necessary to demonstrate a Scope Rule violation.

The Board finds Carrier's procedural and timeliness defenses unpersuasive. Contentions in support of both defenses are inaccurate, clearly circuitous, and were belatedly developed. This Board has consistently stated in scores of Awards of all

Divisions, too numerous to require citation, that procedural defenses, as opposed to jurisdictional defenses, need to be perfected on the property, or they cannot be considered. Accordingly, except as Carrier's arguments may apply to excessiveness and remedy, which will be discussed in more detail below, its procedural defenses are rejected. This matter will be decided on the merits.

On the merits, the Board finds that Carrier did indeed reduce the quantum of work available to its employees at Memphis, and did indeed allow strangers to the Agreement to perform work that is subject to the Agreement. It has not been refuted in this record that before Brimhall increased its staff at Memphis, employees subject to the BN/TCU Agreement performed all of the clerical work involved in these claims. Now they do not.

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. All that Carrier has stated is that it has a haulage agreement with Santa Fe and the work is no longer BN/TCU covered work. It must be presumed that all clerical work occurring on BN is work subject to the Scope Rule. If a special circumstance exists where this work is not to be considered subject to the Agreement, then that special circumstances must be developed with adequate supporting evidence. That evidence 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. BN simply is not privileged to declare that work associated with such traffic is not under its control, thus it need not be performed by employees subject to the BN/TCU Agreement.

Nonetheless, isn't Santa Fe's haulage agreement the same situation as other large shippers that own their own rolling stock, having a dedicated train? Other large shippers pay a "fee" to BN to move their loaded equipment from one location to another over BN tracks, and return empty equipment to its point of origin. In such situations, the clerical work associated with such moves accommodating these shippers is subject to the BN/TCU Clerical Agreement, and it has not been argued otherwise. The only real difference between some other large shipper that has its own rolling stock and the ATSF moving traffic it may have solicited under a haulage agreement between Birmingham and Avard is that the power moving the equipment was ATSF power. This is not a significant difference, as existing inter-carrier run through agreements and power swapping arrangements frequently find locomotives from different carriers operating all over North America off their home roads.

In the haulage arrangement Carrier has with ATSF, the Santa Fe was provided an opportunity to penetrate a geographic area that its lines did not run into. The traffic it secured as a result of this penetration was delivered to the BN for movement over BN lines. For BN/TCU Scope Rule purposes, it can not be treated differently from other traffic moving over these same lines, regardless of the source, merely because it is called Santa Fe traffic and is moving under a haulage agreement, in a dedicated train. If it were to be considered as something different, and the work considered under the control of the ATSF and not the BN, then Carrier would be free to make similar arrangements with every other railroad, and perhaps shippers too, and then say that the ensuing clerical work was not under its control, and could be done by strangers to the Agreement. This would produce an absurd result, and would be contrary to the explicit language and intent of the Agreement it made with the Organization that:

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

Allowing such work to be exempt simply because of the existence of haulage agreement would in effect be providing Carrier with a means to remove work now covered by the Scope of the Agreement without an agreement between the parties. This is clearly proscribed by the Scope Rule of the Agreement.

As noted above, the claims presented the Board in this docket have merit and they will be sustained for eight hours pay at pro rata rates for each position for each day that the Agreement was violated subsequent to June 15, 1993, and ending when the violations cease. Carrier, though, is not required make more than one payment for each position, for each shift, for a particular day.

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 21st day of April 1999.

CARRIER MEMBERS' DISSENT
to THIRD DIVISION AWARD 33225
(DOCKET CL-33757)
(REFEREE FLETCHER)

Dissent to this Award is required because, unlike the facts of record that were known to the parties, this decision ignores many of these facts in order to create a rationale for its decision.

Initially, it must be pointed out that there are and were TWO SEPARATE and DISTINCT contracts on this Carrier concerning the Clerical craft. The BN/TCU agreement (Blue Book) covered the former BN clerical employees. On the ATSF, clerical employees continued to be covered under their own contract (Gold Book). Such was the situation prior to this claim and continues to this day. NOTHING IN THE ON PROPERTY HANDLING NOR IN THE SUBMISSIONS FILED WITH THIS BOARD EVER SUBSTANTIATED THAT THE ATSF CLERICAL CONTRACT HAD CEASED TO EXIST FOR THE ATSF CLERICAL EMPLOYEES.

The facts of record are that the Burlington Northern Railroad and the Atchison, Topeka and Santa Fe Railway Company did enter into a Haulage Agreement, effective June 15, 1993 that provided access by the ATSF to traffic that it was not able to secure on its own. It was all NEW work. The operation ran a single train in each direction between Birmingham, Alabama and Avard, Oklahoma that was dedicated to NEW ATSF traffic. Further, BN clerical forces were supplemented by ATSF clerks to handle this ATSF clerical work. This was clearly stated on the property as follows:

> "Under the agreement, signed June 3 with service commencing June 15, Santa Fe receives haulage rights between Avard, Okla., and Birmingham Ala., allowing it to provide service to Tulsa, Springfield, Mo.; Memphis and Birmingham. As a result, Santa Fe will have access to southeastern U.S. markets, and BN will receive haulage-related revenues from Santa Fe. . . .Santa Fe's traffic over this route will move in dedicated trains operated by BN crews. One train in each direction, six days per week,. . . .Santa Fe will perform marketing functions for this service, and will maintain personnel at BN's intermodal facilities at Tulsa, Memphis and Birmingham. . . ." (Emphasis added)

The logical conclusion that must be made is that there was NO BN/TCU work at Memphis that was diverted away from them. The NEW work developed accrued to the

ATSF and was handled by ATSF clerks. There was no evidence at all by the Organization of any diminution or shifting of ANY BN/TCU reserved work away from BN clerical forces. Carrier noted in its initial denial:

> "The facts in this case are that the aggrieved work belongs to the ATSF Railroad and therefore is not covered under the BN/TCU Agreement, and you have failed to show otherwise." (Emphasis added)

Further, it was unrefuted on the property that:

> "The facts of this dispute are that Burlington Northern Railroad entered into an Agreement with the Santa Fe Railway for certain Santa Fe intermodal traffic to move from Avard to Memphis on BN tracks. The movement of this traffic was not and is not being reported into any BN computer systems. Santa Fe bills the traffic on their property, traffic movements are recorded in their operating computer system, as if the train were operating on Santa Fe trackage. In exchange BN charges Santa Fe a user fee to operate over its lines."

However, on August 2, 1993, the Organization filed 3 claims contending that BN /TCU work had been removed and given to an outside contractor(Brimhall). Under the dates of August 4, 6, 9, 10, 1993 the Organization filed 24 additional claims all asserting that, ". . . .beginning June 15, 1993. . . ." that Scope covered work was removed from BN/TCU employees at Memphis. On August 17, the Organization filed an additional claim asserting a violation but that the violation was "beginning July 1, 1993" and on August 24, 27, and 28, 1993 a third batch of claims (9) were filed again asserting a violation because of the Haulage Agreement but, ". . . beginning July 15, 1993. . . ." The Organization filed a total of 37 SEPARATE CLAIMS on each separate aspect of the work allegedly removed from positions #62, 63, 64 and 17. On the face of it the Organization was seeking some 37 days pay for each day of asserted violation. There are two compelling conclusions that are evident here. First, if as the Organization asserts, that, ". . .beginning June 15, 1993 and continuing. . ." the Carrier assigned BN/TCU work to outsiders, then all of the claims filed AFTER AUGUST 16, 1993 were NOT timely filed using the June 15, 1993 date. Since all of the claims asserted a violation because of the Haulage Agreement they were more than 60 days AFTER THE "OCCURRENCE" which should have invalidated 10 of the claims. Such was not, ". . .inaccurate clearly circuitous, and were belated developed" as the Majority concludes at the bottom of page 5 of the Award. As a FACTUAL matter, there was a contract failure by the Organization. Further, the Organization never identified what was meant by the

different dates, except to avoid the appearance of a time limit violation. What is significant is that ALL OF THE CLAIMS were based on the Haulage Agreement and that had a specific date of occurrence.

The record is a clear rebuttal to the Majority's contention that the Carrier, ". . .did not support this allegation with a single explanation" (Award page 4, first full paragraph). Both the Notice and the description of the work done under the Haulage Agreement substantiates whose work it was and who was doing it. That the work was assigned to ATSF clerks and was performed by them is a simple and a valid explanation why this work did not accrue under the BN/TCU contract. IT WAS NEVER THEIRS TO DO!!

At page 4 of the Award, the Majority indicated the volume of material provided by the Organization in this case. However, as is noted in item 2(a) of the Organization's statement of claim the Organization was seeking ONLY that routed BN-AVARD-ATSF. It was argued on the property and before this Board that none of the paperwork provided was found to have that specific designation. Again in the on property handling we find the following from the Carrier:

> ". . .the documentation furnished by the Organization has been reviewed and we are compelled to comment on most of the points raised. . . .
>
> Exhibit 1 relates to filing bills of lading. I am not aware of how Santa Fe handles this. . .the Claimant's are still filing bills of lading.
>
> Exhibit 2 is a memo dated May 15, 1990, obviously deals with procurement of waybills via Carrier's computer system. I am not sure what the accompanying waybills are to signify. They are undoubtedly Sante Fe waybills, and as such would not be available to the Claimant's on Carrier's computer system.
>
> Exhibit 3 is a six year old memo to the incumbent of position 64 and pertains to filing of lease papers. There is, however, nothing else to show what the lease papers involve, what they were for, is it still done, why did it take an hour and not 10 minutes etc.
>
> Exhibit 4 contains 53 pages that are a combination of train lists generated from an F4 inquiry, BL inquires which provide basic waybill information, and waybill entry confirmations, which of course would no longer be performed at Memphis (intermodal waybilling moved to Fort Worth

around1991). . . . The remainder of Exhibit 4 consist of several pages related to 20 to 30 instances of deramping activities that occurred in 1987. Inasmuch as all of this documentation was from 1987 it really has no probative value to the instant case which did not develop until 1993. . .

Exhibit 5 involves alleged faxing of bills of lading on shipments routed BN-AVARD-ATSF. To whom are these bills being faxed, why are they faxed. . . . There is not longer a requirement for Hubs to call and verify that the Fort Worth Billing Center received the billing. . . .

Exhibit 6 also relates to several memos outlining instructions on where to fax waybills. Were Santa Fe representatives faxing to the Forth Worth CSC?

Exhibit 7 evidently relates to calculation of storage charges (Claimants are doing this)

Exhibit 8 is 782 pages of paper work ranging from train lists and lists containing car and trailer numbers, what relevance do these unidentifiable list bring to this case?. . .

Exhibit 9 is suppose to represent receiving hazardous material bills, in running through this exhibit it is essentially the same as the unidentifiable train lists of trailers and containers. . . .

Exhibit 10 concerns OS&D inspection reports. Well as correctly pointed out . . . the Carrier has had in place for several years a toll-free number in St. Paul, Minnesota for handling OS&D shipments. . . .

Exhibit 11 and 12 are said to be associated with reporting transload information, and handling with foreign lines for waybill corrections. These exhibits are just documents without explanation. . ." (Emphasis added)

None of the questions raised by the Carrier were ever addressed by the Organization. What was clear that the Organization was simply heaping irrelevant volumes of paper on the record in the hope that it would not be reviewed. It is obvious that they DID NOT SUCCEED on the property but they have succeeded before this Board even though the Carrier had pointed out on the property that such volumes of paper did not support their claim. The Organization never responded specifically to any of the Carrier's points. Instead the Organization simply asserted:

> "The evidence means just what it represents and that is work now being done by strangers to our agreement that was previously performed by clerical employees."

It is not DISPUTED that BN clerks are still handling BN bills of lading; that BN clerks never had access to ATSF computer systems; that BN intermodal waybilling had not been done at Memphis for at least two years PRIOR to this asserted claim; there was no faxing of waybills to Forth Worth by ATSF clerks; OS&D had been handled for some time via a toll-free phone number at St. Paul - NOT Memphis. How this Majority got to its decision when this material was part of the ON PROPERTY RECORD simply is unknown. It can only be assumed that it was ignored!

Despite the foregoing, the Majority, at the top of page 6 of the Award quotes from the Organization's EXPANSION of their claim to, "...all traffic moving between BN and ATSF [and] that work would have been performed by {BN} clerical personnel prior to the haulage agreement." Again, when we look at the facts of record, the Organization's INITIAL CLAIM was ONLY for the work allegedly diverted to the TWO TRAINS operating under the Haulage Agreement. Now this Majority has given credence to the blatant expansion of the matter in dispute to now include "ALL TRAFFIC...MOVING BETWEEN BN AND ATSF. . . ." Further, it would seem to be a fact of record that, prior to the Haulage Agreement BN clerical forces performed none of this work because it did not exist!

At page 4 of the Award we find, "...Organizations claim that the work involved in this dispute had been performed by Clerical employees prior to, on, and after December 1, 1980." And at the bottom of page 5 of the Award, the Majority notes that Carrier's position that the Organization, ". . .failed to satisfy the four-prong test established by Award 116, Appendix K Board, necessary to demonstrate a Scope Rule violation." As has already been stated above and must appear to be an obvious fact to this record, NONE OF THE WORK FROM THE HAULAGE AGREEMENT WAS DONE BY ANY BN/TCU CLERK ON DECEMBER 1, 1980 BECAUSE IT DID NOT EXIST. It is a fact of record that the Organization did not meet the FIRST condition established between these same parties in Award 116 and the Majority is clearly inaccurate when it states that such pre-condition was met in this case. It further compounds its error at page 6 of the Award when it concludes that, "...the quantum of work available to its employees at Memphis" was reduced. Reduced from what? The BN/TCU clerks were still doing ALL of the clerical work in connection with the movement of freight on all but the two trains operated under the Haulage Agreement and that work was assigned to ATSF clerical employees.

Also, at page 6 of the Award, the Majority states, "it is not been refuted in this record that before Brimhall increased its staff at Memphis, employees subject to the BN/TCU Agreement performed all of the clerical work involved in these claims." The telling fact is that there is no connection between the initiation of the Haulage Agreement and any work performed by Brimhall. Except for the citation of Brimhall in the multiple claims filed, there was no argument on the property or evidence produced that would have connected Brimhall with work resulting from the Haulage Agreement. Further there never was any rebuttal to the FACT that the clerical work resulting from the Haulage Agreement was performed by ATSF clerks.

From the middle of page 6 through the bottom of page 7, the Majority presents several "what if" situations concluding that the Haulage Agreement was merely a sham to remove work from the BN/TCU Agreement. Without repeating all that has been noted above, such is simply the speculation of the Majority, has no basis in fact and has no connection to any of the arguments raised by the parties on the property. It is a creation of fiction and, to those who have reviewed the record, such is as transparent as the Emperor's New Clothes.

We have confined our comments here to what was raised and handled or NOT handled on the property. It is regrettable that material and arguments that were raised on the property were not given the weight they should have been given in a Scope Rule case. We would not have expected such from an experienced Majority. This Award sustains assertions over facts of record. It cannot be considered a precedent either of the issue (Scope rule) nor a means of issuing a decision based on the facts of record.

We Vigorously Dissent.

P V Varga

Paul V. Varga

M W Fingerhut

Martin W. Fingerhut

Michael C. Lesnik

Michael C. Lesnik

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 33225, DOCKET CL-33757

The right of Dissent remains valuable only when it is exercised with due regard for the facts and constructive criticism of opinion. The Dissent here has neither of these redeeming features, and is, therefore, valueless.

The Minority continues to extol unsupported arguments concerning the merits as well as alleged time limit violations. Directing our attention first to the time limit issue the Minority writes at the bottom of page two of its Dissent the following:

". . . the Carrier assigned BN/TCU work to outsiders, then all of the claims filed AFTER AUGUST 16, 1993 were NOT timely filed using the June 15, 1993 date. Since all of the claims asserted a violation because of the Haulage Agreement they were more than 60 days AFTER THE "OCCURRENCE" which should have invalidated 10 of the claims. Such was not, ". . . inaccurate clearly circuitous, and were belated developed" as the Majority concludes at the bottom of page 5 of the Award. As a FACTUAL matter, there was a contract failure by the Organization. Further, the Organization never identified what was meant by the different dates, except to avoid the appearance of a time limit violation. What is significant is that ALL OF THE CLAIMS were based on the Haulage Agreement and that had a specific date of occurrence."

If the Minority Opinion had quoted the full paragraph beginning at the bottom of page five of the Award and contemplated its meaning before it took pen in hand, it might better have understood that its quotation of seven words taken out of context insults the intelligence of the Neutral. The full paragraph stated:

"The Board finds Carrier's procedural and timeliness defenses, unpersuasive. Contentions in support of both defenses are inaccurate, clearly circuitous, and were belatedly developed. This Board has consistently stated in scores of Awards of all Divisions, too numerous to require citation, that procedural defenses, as opposed to jurisdictional defenses, need to be perfected on the property, or they cannot be considered. Accordingly, except as Carrier's arguments may apply to excessiveness and remedy, which will be discussed in more detail below, its procedural defenses are rejected. This matter will be decided on the merits." (Underlining our emphasis)

Aside from the fact there is no merit to the Minority's time limit assertion, it was **"de novo"** or inadmissable because it was never presented on the property.

Turning to the merits, the Minority Opinion regurgitates its inaccurate and unproven assertions wherein it simply repeats the identical arguments rejected by the Neutral. A review of

the record indicates these arguments were found to be inconsistent with the facts and repeating them in a Dissent does not make them valid. The record is clear the Carrier removed covered TCU work and gave it to outside contractors in violation of the parties "position and work" Scope Rule. The Minority Opinion does not detract from the Award as it is clear the Union has proven to the Board that the Scope Rule was violated when the Carrier removed protected work and transferred it to an employees outside the Scope of the Agreement without mutual concurrence.

In its conclusionary paragraph the Minority states: **"It is regrettable that material and arguments that were raised on the property were not given the weight they should have been given in a Scope Rule case. We would not have expected such from an experienced Majority."** Contrary to the Minority Opinion the Neutral in Third Division Award 33225 properly and correctly analyzed the parties' positions as it relates to the facts and the Scope Rule and found the Carrier's actions were improper and contrary to the Agreement. **The Award is correct and precedential for any future disputes involving Rule 1,** and all the sour grapes complaining does not change the fact that the Agreement was violated.

The Dissent, therefore, registers only the disagreement of the experienced Minority who should recognize and understand that verbiage without substance serves no other useful purpose.

Respectfully submitted,

William R. Miller

William R. Miller
TCU Labor Member, NRAB
September 2, 1999