Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35515
Docket No. CL-35485
01-3-99-3-386

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12366) that:

1. Carrier violated the Schedule Agreement dated May 6, 1980, specifically Rule 1, when on August 29, 31, September 3, 4, 6, 7, 8, 9, and 10, 1996, (22 separate violations) it directed or allowed strangers to the Agreement to perform clerical work of crew hauling to and from Great Falls, Montana.

2. Carrier will be required to pay eight hours pay at the straight time rate to the first-out, qualified GREB employee at Great Falls, Montana. If there were no GREB employees available, claim is then on behalf of the first out qualified Extra List employee at Great Falls, Montana for eight hours pay at the straight time rate. If there is no GREB or Extra List employees available, claim is then on behalf of the appropriate regular assigned employee at Great Falls, Montana at the appropriate overtime rate of pay."

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.

The basic merits of the dispute in this case have been fully addressed in Third Division Award 35514. In that Award, we found that on December 1, 1980, crew hauling at Great Falls, Montana, was exclusively performed by Clerks and there was no agreement by the Organization for the Carrier to remove that work from the covered employees. We therefore found that the Carrier violated Rule 1 ("Work now covered by the scope of this Agreement shall not be removed except by agreement between the parties") and the May 6, 1980 Side Letter ("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").

In this case, the parties address what the Carrier has characterized as "new work never performed by Clerks at Great Falls. . . ." Specifically, that work is crew hauling work resulting from the Carrier's decision to reroute train traffic formerly routed via Laurel, Montana, across the Montana Rail Link ("MRL"), to Spokane, Washington, over the line between Laurel (through Great Falls) and Shelby. The Carrier argues that outside contractors can perform this "new work" without running afoul of the Scope Rule or the May 6, 1980 Side Letter. We disagree.

Again, as in Third Division Award 35514, supra, the analysis must examine the parties' plain language and the demonstrated facts. It was found in that Award that as of the critical date, 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. Rule 1 is clear and unambiguous - "Work now covered by the scope of this Agreement shall <u>not</u> be removed <u>except</u> by agreement between the parties." [Emphasis added.] Crew hauling work at Great Falls was Scope covered work and the Organization did not agree to remove that work from the performance by covered employees.

The May 6, 1980 Side Letter provides the exception. There, the parties agreed 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" [Emphasis added.] But, the evidence demonstrates that as of the December 1, 1980 critical effective date, no one other than Clerks performed crew hauling work at Great Falls. Therefore, there was no exception regarding crew hauling work for other than covered employees at Great Falls for the Carrier to "continue" after the December 1, 1980 effective date.

The Carrier's characterization of the crew hauling work resulting from the rerouting of trains over the MRL as "new work" sidesteps the real issue. The Organization's characterization of this work as "more work" does the same. The simple facts are that crew hauling work is Scope covered; crew hauling was exclusively performed by Clerks at Great Falls as of December 1, 1980; and there was no agreement by the Organization to remove that work from the covered employees. Given those facts, the language of Rule 1 and the May 6, 1980 Side Letter leave nothing to imagination or discretion. As a matter of contract, we have no choice. To rule otherwise would cause the Board to amend or ignore the parties' negotiated language. We do not have that authority.

Awards such as Appendix K Board Award 141 cited by the Carrier do not change the result. While the Board in that case held that "while the amount of crew hauling performed by strangers on December 1, 1980 is absolutely preserved and the Carrier may assign any new crew hauling work to other than Clerks . . ." that was not a case where, as here, Clerks performed crew hauling work on an exclusive basis on December 1, 1980. Rather, in that case, "Carrier records conclusively show that WVS [the contractor Worthen Van Service] was transporting crews, within the Edgemont Yard area, before, on and after December 1, 1980." Here, as demonstrated by the facts, no contractor performed crew hauling work as of the critical December 1, 1980 date - Clerks did that work on an exclusive basis. Similarly, Public Law Board No. 3051, Award 8 also cited by the Carrier is not persuasive. That Award (which did not arise between the parties) must defer to the definitive statement of the Board in 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.'"

The conclusions that (1) clear and unambiguous language of Rule 1 requires the result; and (2) the result that exclusive performance of crew hauling work by Clerks as of December 1, 1980 deprives the Carrier of the ability to utilize the exception in the May 6, 1980 Side Letter so as to permit the Carrier to "continue" to use outside contractors for crew hauling at Great Falls, simply cannot be avoided. Those conclusions are dictated by clear contract language. We are cognizant that the result of this and other similar cases flowing from the Carrier's use of strangers to the Agreement to perform crew hauling work at Great Falls may well be substantial. However, a fundamental rule of contract construction is that clear language must be enforced even if harsh or against the expectations of one of the parties. This is such a case. The language is clear. The result is unavoidable.

The claim for the dates covered in the consolidated Statement of Claim is therefore sustained. The adversely affected employees shall be made whole at the appropriate contract rate for the amount of hours of crew hauling performed by strangers to the Agreement on those dates. The matter is now remanded to the parties to determine the appropriate compensation for the affected employees.

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.