

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41187
Docket No. MS-38477
11-3-NRAB-00003-040446**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Phoebe M. Hudspeth
(
(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. The timely rescinded misrepresented ‘Resignation and Release’ agreement
2. The ineffective, invalid, defective, and coerced ‘Resignation and Release’ agreement
3. The document be rescinded, totally made whole, and seniority reinstated”

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 Petitioner’s September 1, 2004 Notice of Intent set forth the official Statement of Claim before the Board as noted hereinabove. Nevertheless, the Board notes that the Petitioner’s Ex Parte Submission contains the following:

“STATEMENT OF CLAIM

1. WHETHER THE CONTRACT IS KNOWING AND VOLUNTARY, DECEPTION, FRAUD, MISSTATEMENT, MISREPRESENTATION, MATERIAL MISTAKE, OMISSION, AND DUE PROCESS DENIED

REMEDY SOUGHT

PETITIONER SEEKS SENIORITY REINSTATED, OTHER BENEFITS UNIMPAIRED AND TOTALLY MADE WHOLE, INCLUDING, BUT NOT LIMITED TO LOST WAGES AND RETIREMENT BENEFITS FOR DAMAGES KNOWN AND UNKNOWN”

According to the Submissions, the Petitioner was employed by the Carrier in 1996 in the clerical craft. Shortly thereafter, she transferred to a partially exempt position. This was followed in 1998 with a temporary exempt position as well as a permanent exempt position as Human Resources Generalist. Differences between the Petitioner and the Carrier arose thereafter and culminated in the Carrier’s notice to her dated August 18, 2000 that announced her immediate termination for unsatisfactory performance but went on to offer two options to that termination: (1) she could accept the terms of a Resignation and Release Agreement that was attached, or (2) she could exercise her seniority back to the union ranks. The Petitioner’s employment was terminated as of August 18, 2000, but she and the Carrier continued communication.

On March 8, 2001, the Petitioner signed a revised Resignation and Release Agreement and it was mailed to the Carrier. The Resignation and Release Agreement reads, in pertinent part, as follows:

“RESIGNATION AND RELEASE AGREEMENT

This Resignation and Release Agreement (‘Agreement’) is entered into this ____ day of _____, 2000 between Phoebe M. Hudspeth (‘Employee’) and The Burlington Northern and Santa Fe Railway Company.

WHEREAS, Employee desires to settle fully and finally any differences that may have arisen or might arise out of her employment and resignation of service with The Burlington Northern and Santa Fe Railway Company, its predecessors, or any of its affiliated companies (hereinafter collectively referred to as 'Company') and her separation therefrom, including her entitlement to severance benefits.

NOW, THEREFORE, in consideration for the mutual benefits described below, the Company and Employee agree as follows:

- 1. Employee resigns from active employment with the Company effective August 18, 2000. This resignation is irrevocable. Furthermore, after August 18, 2000, Employee shall not be entitled to any compensation from the Company or benefits under any benefit plans except as expressly provided in paragraph 2 herein. As further consideration, Employee specifically waives and releases any eligibility under any Company sponsored disability plan, and Employee promises that following execution of this agreement she shall not make any such claim or application for benefits under any Company sponsored disability plan.**
- 2. The Company and Employee agree that Employee shall be entitled to the following benefits:**
 - (a) Employee will receive a severance payment of \$60,000.00, less applicable legal deductions.**
 - (b) Employee is eligible to participate in the BNSF Incentive Compensation Program for active employment in 2000 for the period January 1, 2000, through August 18, 2000, to the extent such a payment is earned by company performance.**
 - (c) Employee understands that execution of this Agreement will not deprive her of any existing vested benefits under the Company's Investment and Retirement Plan (401(k)) and the Burlington Northern Santa Fe Retirement Plan (Pension Plan), where applicable.**

- (d) Employee understands that all Incentive Stock Options granted to her in 2000 under the Burlington Northern Santa Fe 1999 Stock Incentive Plan will vest pro-rata on her termination date of August 18, 2000. Employee understands that she will not receive a Stock Option grant in 2001 or any year thereafter.
- (e) Upon execution of this Agreement, Employee will have three (3) months from August 18, 2000, to exercise all vested Incentive Stock Options in accordance with the applicable plans. Any options not exercised by the end of this three (3) month period shall be forfeited.
- (f) Employee will receive payment for all earned unused vacation.

3. Except as specifically provided in Section 2 above, Employee hereby expressly releases and relinquishes unto the Company, all her rights as an employee, effective close of business on August 18, 2000. This relinquishment of all employment rights includes, but is not limited to, seniority in any scheduled employee craft or class, and, except as explicitly provided herein, coverage under any and all employee benefit plans which Employee was eligible to participate in heretofore. Employee hereby releases and discharges the Company, its affiliated corporations, their successors and assigns, and these companies' directors, officers, agents, servants, and their successors and assigns, from any and all liability, causes of action, claims or rights, known or unknown, arising from her employment or her separation from employment with the Company, which Employee, her heirs or assigns, might otherwise claim or assert. Claims which Employee relinquishes under this Resignation and Release Agreement, include but are not limited to personal injury claims, contract claims, employment claims, labor and labor protection claims, claims arising under federal, state or local common law or statute, including without limitation Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq., the Worker Adjustment and Retraining Notification Act or any collective bargaining agreement, the

Americans with Disabilities Act, 42 U.S.C. §12101 et seq., the Family and Medical Leave Act, 29 U.S.C. §2601 et seq., The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., and claims arising out of any legal restrictions on the Company's right to terminate its employees. Employee expressly releases any and all rights or claims under the Northern Lines Merger Decision, 331 ICC 228 (1967) or any other conditions imposed for the benefit of employees by the Interstate Commerce Commission or its successors.

4. Employee understands and agrees that her employment with the Company is terminated under this Agreement and she will not apply for or otherwise seek re-employment with the Company, its affiliates, subsidiaries or its successors, at any time. The Company shall have the absolute right, without incurring liability of any kind, to refuse Employee consideration for employment and she agrees that she shall not pursue or authorize any person or agency to pursue any claim for such refusal of employment.

* * *

8. Employee also promises neither to contest the validity of this Resignation and Release Agreement, nor sue BNSF concerning any claim she may have relating to her employment with BNSF or the termination of that employment. Nonetheless, if she should pursue litigation against BNSF regarding the validity of this Resignation and Release Agreement or any other matter covered herein, she agrees that she will, before filing any suit, return to BNSF the full value of all consideration she has received under this Resignation and Release Agreement, including any taxes withheld on her behalf, with interest at the post-judgment rate of interest for the state in which her suit was filed. Employee further agrees that she shall pay all BNSF's costs and reasonable attorney's fees incurred in defending against her legal action.

9. EMPLOYEE ACKNOWLEDGES THAT SHE IS BEING ADVISED BY THE COMPANY, HEREBY, TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT. EMPLOYEE ALSO ACKNOWLEDGES THAT SHE HAS BEEN

GIVEN AT LEAST TWENTY-ONE (21) DAYS, TO REVIEW THIS RESIGNATION AND RELEASE AGREEMENT OR EMPLOYEE HAS KNOWINGLY AND VOLUNTARILY AGREED TO WAIVE HER RIGHT TO THE FULL TWENTY-ONE (21) DAYS. EMPLOYEE HAS CAREFULLY READ AND FULLY UNDERSTANDS ALL THE PROVISIONS OF THIS RELEASE INCLUDING THE RELEASE OF ALL CLAIMS AND HAS HAD SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH HER PERSONAL FINANCIAL, TAX, AND LEGAL ADVISORS PRIOR TO EXECUTING THIS AGREEMENT. EMPLOYEE UNDERSTANDS THAT SHE MAY REVOKE THIS RELEASE AGREEMENT WITHIN SEVEN (7) DAYS OF EXECUTION AND THAT SUCH REVOCATION MUST BE IN WRITING AND ACCOMPANIED BY ALL SUMS RECEIVED HEREUNDER AND RECEIVED BY THE VICE PRESIDENT-HUMAN RESOURCES BY THE END OF THE SEVEN (7) DAY PERIOD. IF NOT REVOKED IN THE ABOVE MANNER, THIS AGREEMENT SHALL BE BINDING ON EMPLOYEE, HER HEIRS, SUCCESSORS AND ASSIGNS.

10. If any portion or aspect of any promise, covenant or understanding contained in this Resignation and Release Agreement, is or shall become invalid or unenforceable by operation of law, such enforceability shall not in any way limit or otherwise affect the validity and enforceability of any promise, covenant, understanding, or any aspect thereof, in this Resignation and Release Agreement which would otherwise be valid and enforceable by itself.

*** * ***

12. Employee has read and understands all of the foregoing, and agrees to all the provisions contained herein. Employee agrees that this Resignation and Release Agreement reflects a fair, equitable and fully satisfactory resolution of her employment with the Company."

*** * ***

The Resignation and Release Agreement excerpted above was signed by the Petitioner on March 8, 2001, and witnessed that same date by the attorney who was advising her. Although she had private email communications with the attorney thereafter that reflect second thoughts on her part, the signed and witnessed Resignation and Release Agreement was sent to the Carrier. By letter dated March 29, 2001, the Carrier sent the Petitioner's attorney a copy of the signed Resignation and Release Agreement along with the Carrier's check, which included the settlement amount plus 80 hours of vacation pay.

By email to her attorney on March 31, 2001, the Petitioner stated her desire to revoke the Resignation and Release Agreement. By letter dated April 3, 2001, the Petitioner's attorney notified the Carrier that the Petitioner was "... exercising her option to revoke ..." the Resignation and Release Agreement. The attorney's letter also enclosed the Carrier's check.

Further correspondence was exchanged over the next several weeks. The Carrier's letter dated April 25, 2001 appears to be the last piece of correspondence included in the Petitioner's Submission. That letter to the Petitioner stated that the Carrier "... considers the Agreement fully valid, binding and enforceable, and not validly revoked."

Our examination of the remainder of the record does not reveal any further exchange of documents prior to the Petitioner filing her Notice of Intent to file an Ex Parte Submission in September 2004, which was more than three years after the Carrier's April 25, 2001 letter. The record does not reflect that any claim was ever filed pursuant to a Collective Bargaining Agreement or handled on the property in the usual manner up to a decision by the Carrier's highest designated officer for handling such claims. No Rule of any Collective Bargaining Agreement was cited as having been violated by the Carrier.

Given the procedural history outlined herein, the Carrier contends that the matter must be dismissed by the Board for lack of jurisdiction. The record compels the Board to agree.

Section 3, First, (i) of the Railway Labor Act, as amended, requires that claims and grievances must be handled in accordance with the usual manner on the property before they may be properly referred to the Board for disposition on their merits. The

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record before the Board does not establish that the jurisdictional conditions have been satisfied. Therefore, the Board must dismiss the matter.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of December 2011.