SPECIAL BOARD OF ADJUSTMENT NO. 570
Established Under
Agreement of September 25, 1964

SBA No. 570
Award No. 1096
Case No. 1269

PARTIES	Brotherhood of Railroad Carmen Division Transportation Communications International Union
TO	and
DISPUTE:	Burlington Northern Railroad Company

STATEMENT OF THE CLAIM:

1. That the Burlington Northern Railroad Company violated the terms of our Current Agreement, in particular Appendix "G-1" National Mediation Agreement of September 25, 1964, Article I, when they failed to give proper notice of a change in operation and failed to provide Claimants with protective benefits as per Sections 6 or 7 of Article I.

2. That, accordingly, the Burlington Northern Railroad Company be ordered to compensate furloughed Carmen R., L. Todd, D. L. McCabe, S. C. Young, E. E. Fraerich, J. J. Schoolcraft, S. D. Toombs, P. E. Ayers, and K. H. Eloge in the amount of fifty-five (55) days pay each for their rate and class account of the deficiency in notice of the change in Carrier operation and that the Claimants be afforded a monthly dismissal allowance as provided for in Article I, Section 6 or their option of Section 7 of September 25, 1964 Agreement.

FINDINGS:

By bulletin dated January 13, 1987, the Carrier abolished three train yard inspector positions in the Mechanical Department at Guernsey, Wyoming, effective January 18, 1987. By bulletin dated January 20, 1987, the Carrier abolished two leadman relief, two leadman and ten Carman positions at Alliance, Nebraska, effective January 25, 1987. By bulletin dated January 20, 1987, the Carrier advertised for two leadman, one leadman relief, two relief carman/leadman and two carman positions at Alliance. By bulletin dated January 20, 1987, the Carrier furloughed seven of the eight named Claimants at Alliance, effective January 30, 1987. By corrected abolishment notice dated January 21, 1987, the

Carrier abolished two leadman, one Leadman relief and nine carman positions effective January 30, 1987.

According to the Carrier, these abolishments occurred as a result of the decision of Oklahoma Gas and Electric Company (OG&E) to cease coal shipments under a contractual arrangement with the Carrier during the remaining two years of that arrangement—an arrangement that, according to the Carrier, expired December 31, 1988.[1] The Carrier asserts that in December 1986 it was advised by OG&E that OG&E was going to divert all of the Red Rock tonnage to another carrier effective January 1, 1987, which ultimately resulted in a loss of approximately 4 million tons of coal, or approximately 40,000 cars of business in 1987, thereby causing the abolishment of certain carman positions at Guernsey and Alliance.

This Board does not find that the Organization has sufficiently demonstrated the existence of an Article I, Section 2 event and therefore we must deny the claim.

First, a threshold dispute raised by the Carrier focuses upon the Carrier's assertion that Article I, Section 2(e)'s reference to "Voluntary or involuntary discontinuance of contracts" is not applicable to the coal hauling contractual arrangement between the Carrier and OG&E because at the time Article I, Section 2(e) was drafted the kind of contractual arrangement between the Carrier and OG&E was illegal. Specifically, the Carrier argues that these types of arrangements were not made lawful until the ICC established a procedure in 1978 for determining the legality of such provisions which was then superseded by the passage of the Staggers Rail Act of 1980 which expressly permitted private rate contracting. The Organization asserts that the arrangement between the Carrier and OG&E constitutes a contract within the meaning of Article I, Section 2(e).

The Carrier's argument is not persuasive. This Board is confined to the clear lan-

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[1] The record discloses the existence of two contracts between the Carrier and OG&E. The first involves the movement of Wyoming Powder River Basin coal via BN-Kansas City-MP to OG&E's Muskogee Plant at Fort Gibson, Oklahoma. The second involves the movement of Wyoming Powder River Basin coal via BN-Kansas City-ATSF to OG&E's Sooner Plant at Red Rock, Oklahoma.

guage of the Agreement. Assuming for the sake of discussion that contracts of the type between the Carrier and OG&E were illegal at the time the Agreement was drafted, it is undisputed that at the time of the relevant incidents in this matter those types of contractual arrangements were lawful. A fundamental rule of contract construction is that negotiated words are to be given their ordinary and commonly accepted meaning. *At the time this dispute arose*, the contractual relationship between the Carrier and OG&E was a valid "contract". Had the sophisticated negotiators of this Agreement intended that the kind of contractual arrangement between the Carrier and OG&E not be within the ambit of Article I, Section 2(e), then, when those types of contracts were made lawful, they could have easily exempted them from coverage from Article I, Section 2(e). Their failure to do so speaks eloquent silence to that fact that such was *not* intended. Although perhaps simplistic, given the rule of construction requiring ordinary and common usage of words, the argument that "a contract is a contract is a contract" is a persuasive one.

The Carrier's cited authority does not change our conclusion. The Carrier cites Awards standing for the proposition that the Agreement must be construed in accordance with existing laws and practices and, for example, cites to Awards 283 and 710 of this Board and Third Division Award 12970. However, examination of those Awards shows that contract provisions which conflicted with existing law *at the time the dispute arose* would not be applied because such would itself be unlawful. See Award 283 (ICC issued notice it would enforce existing regulations concerning car cleaning); Award 710 ("the [statutory] requirement of a master plumber was in force *at the time* that the work was contracted out ...."); Award 12970 ("due to the *existence* of this ordinance [requiring licensed individuals to perform plumbing and electrical work], we hold the Carrier did not violate the agreement when it allowed an outside contractor to perform the work ....") [emphasis added]. In those cases, at the time the dispute arose the existing statute, regulation or ordinance conflicted with the terms of the relevant Agreement and, therefore, the

Board would not construe the contract so as to violate the existing law. That is not the case herein. Here, *at the time the dispute arose* in 1987, there was nothing unlawful about the contractual arrangement between the Carrier and OG&E.

Second, with respect to the Organization's position, we are not persuaded that the facts herein demonstrate a "discontinuance of contracts" under Article I, Section 2(e). It is undisputed that the arrangement between the Carrier and OG&E "was to expire in December, 1988" as the Carrier asserts. See the Organization's letter of July 21, 1987 (Org. Exh. I). Thus, it is not disputed, that at the time the events arose in January 1987, the contractual arrangement between the Carrier and OG&E existed and had approximately two years to run. Therefore, we cannot say that there was a "discontinuance" of the contractual arrangement between the Carrier and OG&E therefore making the occurrence in this matter an Article I, Section 2 event. At most, OG&E did not utilize the contractual arrangement to the extent it did in the past. But nevertheless, the contractual arrangement remained in effect after the incident involved in this case.[2]

The Organization's cited authority does not change our conclusion. Reliance upon the line of authority typified by Awards 95 and 406 of this Board show that in those cases there was an action by the customer to "cancel the arrangement" (Award 95) or a "termination of the agreement" (Award 406). Here, the evidence shows that the contractual arrangement remained in effect for two years after the incidents giving rise to the dispute.

Third, with respect to the notice question, Article I, Section 4 mandates "at least sixty (60) days ... written notice of the abolition of jobs as a result of changes in operations for any of the reasons set forth in Section 2 hereof ...." The Carrier clearly did not give 60 days notice in this matter. However, because we are not satisfied that an Article

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2 According to the affidavit of Assistant Vice President K. M. Flanagan (Car. Exh. 8), OG&E continued to move tonnage under the contract covering the Muskogee plant.

I, Section 2 event has been shown, we are unable to find a violation of the notice provisions in Article I, Section 4.

Fourth. we must address the consequences of the Carrier's failure to provide a copy of the OG&E contract to the Organization. Because of confidentiality reasons arising out of the competitive nature of the coal business, the Carrier declined to provide the Organization with a copy of the contract between it and OG&E. Instead, the Carrier provided an affidavit from Assistant Vice President Flanagan addressing certain aspects of the arrangement.[3] Under other circumstances, such a failure to disclose would entitle the Organization to adverse inferences against the Carrier. See Third Division Awards 28430 and 28229 (the carriers were not permitted to rely upon the terms of leases that they refused to timely divulge to the Organization). However (with the exception of the Organization's assertion that OG&E bought back the contract discussed immediately below), here the existence of the contractual arrangement between the Carrier and OG&E is not disputed and the duration of that arrangement for two years after the events in question is similarly not disputed. Given these undisputed facts essential to the resolution of this dispute, we are not satisfied that disclosure of the terms of that contractual arrangement would have changed the result of this matter. Most significantly, the Carrier has not relied upon a specific term of that contractual arrangement as a defense in this matter wherein the existence of that term is disputed by the Organization and that term is material for the resolution of the dispute. Again, the operative and undisputed determinative fact is the existence of the contractual arrangement between the Carrier and OG&E which ran until December 1988. Compare Third Division Award 28430 ("after having failed to produce the Lease *upon which it relied*, the Carrier cannot now rely upon the terms of that Lease as a defense to the Claim." [emphasis added]). Here, the Carrier has not relied upon a disputed term of the OG&E contract which is material to the resolution of this

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[3] According to the Carrier (Car. Submission at 17), confidentiality is further mandated by ICC rules.

dispute.[4]

Fifth, while the record developed on the property shows that the existence of the contractual arrangement between the Carrier and OG&E lasting until December 1988 was not a disputed fact, the Organization did argue that OG&E "bought back a contract with the Burlington Northern Railroad Company for an amount of twenty-one million dollars ($21,000,000) which was paid to the Burlington Northern Railroad ... [which] information was received by one of [the Carrier's] supervisors." See Org. Exh. I. We find that, without further detail, such an unsupported assertion is, at most, speculative and not sufficient for this Board to find that the Organization has shown that the contractual arrangement between the Carrier and OG&E which was to last until December 1988 ceased to exist before that date.

Thus, the record sufficiently demonstrates that as a result of OG&E's actions, the Carrier incurred a loss of approximately 4 million tons of coal, or approximately 40,000 cars of business in 1987 thereby causing the abolishment of certain positions at Guernsey and Alliance. See SBA 570, Award 409 (no violation where a shipping route was changed at the request of shippers). We are therefore unable to sustain the claim.

Based on the above, the claim must be denied.

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[4] Perhaps this entire problem could have been avoided through a disclosure of the terms of the contract with the competitive material deleted. However, given a circumstance where the Carrier specifically relies upon a term of a non-disclosed contract which term is material to the resolution of the dispute, we cannot say the result would be the same. See Awards 28430, 28229, *supra* and cases cited therein. While we recognize the need (and, indeed the requirement in some circumstances) for confidentiality, by the same token, the Organization is entitled to see the information material to the resolution of a dispute upon which the Carrier may rely. Procedures for disclosure of arguably confidential material are routine in litigation (e.g., through use of protective agreements preventing disclosure to outside interests, excising of competitive material and the like). The same could have been accomplished here which would have effectively balanced the Carrier's right to confidentiality and the Organization's right to see evidence.

AWARD:

Claim denied.

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants not be made.

Edwin H. Benn, Neutral — Dissent attached

Carrier Members

Labor Members

Adopted at Chicago, Illinois, this 20 day of JANUARY, 1993.

SPECIAL BOARD OF ADJUSTMENT NO. 570

AWARD NO. 1096

(SBA CASE NO. 1269)

REFEREE: EDWIN H. BENN

CONCURRING AND DISSENTING OPINION OF THE LABOR MEMBERS

OF SPECIAL BOARD OF ADJUSTMENT AWARD NO. 570

The Labor Members of SBA 570 concur in the findings of the eminent and distinguished neutral in this instant case wherein he stated:

> "According to the Carrier, these abolishments occurred as a result of the decision of the Oklahoma Gas and Electric Company (OG&E) to cease coal shipments under a contractual arrangement with the Carrier during the remaining two years of that arrangement-an arrangement that, according to the Carrier, expired December 31, 1988.[1/] The Carrier asserts that in December 1986 it was advised by OG&E that OG&E was going to divert all of the Red Rock tonnage to another carrier effective January 1, 1987, which ultimately resulted in a loss of 4 million tons of coal, or approximately 40,000 cars of business in 1987, thereby causing the abolishment of certain carmen positions at Guernsey and Alliance."

Labor Members point out to the interested reader of this document that the referee has accurately and factually set forth

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[1]The record discloses the existence of two contracts between the Carrier and OG&E. The first involves the movement of Wyoming Powder River Basin coal via BN-Kansas City-MP to OG&E's Muskogee Plant at Fort Gibson, Oklahoma. The second involves the movement of Wyoming Powder River Basin coal via BN-Kansas City-ATSF to OG&E's Sooner Plant at Red Rock, Oklahoma.

the exact position of the carrier and the employees in this instant dispute. This dispute is bottomed on Article I of the September 25, 1964 Agreement, as amended and it is noted that certain provisions of this agreement reads specifically:

> "The protective provisions of the Washington Job Protection Agreement of May, 1936, shall be applicable, as more specifically outlined below, with respect to employees who are deprived of employment or placed in a worse position with respect to compensation and rules governing working conditions as a result of any of the following changes in their operations of this individual carrier:
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> ---
>
> e. Voluntary or involuntary discontinuance of contracts;"

The Labor Members carefully point out that the exact contract language above (e. Voluntary or Involuntary Discontinuance of Contracts) does not contain the word cancellation and/or termination. It is discontinuance. It was and is the position of the employees that the OG&E was engaged in the voluntary discontinuance of its contract with this carrier when it diverted 40,000 cars of business away from this carrier. It was and continues to be the position of the employees that this carrier was involved in an involuntary discontinuance of contracts, over which it had no control, when the customer (OG&E) discontinued the use of its contract. It is simply pointed out that in the agreement

itself there is no necessity and no need for a cancellation or a cessation of a contract but rather the voluntary or involuntary discontinuance of that contract will trigger benefits.

The employees dissent to the referees finding that:

> "The Board does not find that the Organization has sufficiently demonstrated the existence of an Article I, Section 2 event, and therefore, we must deny the claim."

The employees simply point out that the learned and revered referee has clearly indicated a connective cause or a causal nexus that directly affected the named claimants when this carrier lost approximately 40,000 cars of business by a discontinuance of a contract by its customer. In the same breath this referee finds that there is no connective cause between the placing of these employees in a worse position with respect to compensation and working rules and the discontinuance of contracts that covered approximately 40,000 cars of business. The employees vigorously dissent to the finding that there was not a connective cause between the furloughing of the named claimants in this claim and the carrier being affected by an involuntary discontinuance of the contract on its part and these named claimants were affected by a voluntary discontinuance of a contract with this carrier on the part of the OG&E. With SBA 570 Awards 658, 704 and 739, in front of him the referee elected to find that there was no nexus or connective cause between these two events. SBA 570 award 658, 704 and 739 define, by referee's, a connective cause or a causal nexus

between events and claimants under Article I of the September 25, 1964 Agreement, as amended.

The findings of this Board also state:

> "The Organization's cited authority does not change our conclusion. Reliance upon the line of authority typified by Awards 95 and 406 of this Board show that in those cases there was an action by the customer to "cancel the arrangement" (Award 95) or a "termination of the agreement" (Award 406). Here, the evidence shows that the contractual arrangement remained in effect for two years after the incidents giving rise to the dispute."

It is once again carefully pointed out to the interested reader of this document that the words of the agreement itself do not contain "cancellation" or "termination" but rather the "voluntary or involuntary discontinuance" of a contract.

The employees respectfully submit that this award contains palpable error and is, therefore, worthless for any use as precedental value in any arbitration forum, including but not limited to those created under the Railway Labor Act.

E. W. Mann
Labor Member

Don L. Davis
Labor Member

Mark Filipovic
Labor Member

Billy Hiro Fett
Labor Member

CARRIER MEMBERS' CONCURRING
AND DISSENTING OPINION
TO
AWARD 1096, CASE 1269
(Referee Benn)

The Referee denied the claim on the basis "...the operative and undisputed determinative fact is the existence of the contractual arrangement between the Carrier and the OG&E which ran until December 1988." The record supports the existence of the contract and the Referee's decision is clearly correct in that regard.

We cannot agree, however, with the Referee's dicta rejecting the Carrier's assertion that the BN-OG&E Agreement could not properly be characterized as a "contract" within the meaning of Article I, Section 2 of the September 25, 1964 Agreement.

While there is much that could be said about this matter in support of the Carrier's argument, inasmuch as the issue is moot insofar as this case is concerned, we will refrain from doing so. In our view, the Referee erred by addressing the matter and further erred with respect to his conclusion concerning it.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga

James E. Yost
J. E. Yost

January 20, 1993