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.