Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40461
Docket No. MW-39277
10-3-NRAB-00003-060019
(06-3-19)

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
( IBT Rail Conference
(
(BNSF Railway Company (former Burlington
( Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Rock & Roll and Sue Trucking) to perform Maintenance of Way work (hauling rock) from Lincoln, Nebraska to Omaha, Nebraska on September 26, 2003 [System File C-04-C100-24/10-04-0063(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman advance notice of its plans to contract out the above-described work as stipulated in the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Stoner and J. Mammen shall now be compensated for seven and one-half (7.5) hours' pay at their respective straight time rates 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.

At the time of the incident both Claimants were represented by the Organization, held seniority as Truck Drivers in the Track Sub-Department and were regularly assigned their respective positions.

On September 25, 2003 at 2:00 P.M., four cars from Train L-NEB6091-24 derailed while en route westbound to Council Bluffs on the Bayard Subdivision mainline. The cars did not overturn but were dragged, causing damage to the track structure and roadbed. To repair and return the track to service, ballast rock was hauled by Carrier employees from the Hobson Yards in Lincoln, Nebraska, to the derailment site near Omaha, Nebraska. Both Claimants worked on this derailment on the day at issue in this dispute (September 26, 2003). Also, on that same day, two employees from Rock & Roll and Sue Trucking hauled a total of six loads between 8:00 A.M. and 4:00 P.M. The track was placed back in service at 9:00 P.M. later that same day. The Carrier did not provide the BMWE advance notice of the type of work to be performed by outside forces.

The Carrier's incident report shows that the main line was blocked by four derailed cars which remained upright. The incident report stated the need for four track panels, 1500 ties, and 15 carloads of ballast. It recites that Hulcher personnel placed the cars back on the rails during the early morning hours of September 26. Track repairs were completed later in the early evening that day. The report noted

that $73,600.00 was spent to repair the damage, including a contractor expense of $7,500.00.

The Note to Rule 55 states, in pertinent part:

> ". . . Employes included within the scope of this Agreement . . . perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service. . . .
>
> . . . [W]ork . . . customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted . . . when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work . . , it shall notify the General Chairman of the organization in writing . . . not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. . . .
>
> Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

The Carrier argues that this was an emergency situation on a blocked main line which required immediate attention. Those conditions allowed the Carrier to utilize contractors, it contends; and time constraints precluded advance notice to the Organization. It points out that both Claimants worked this job as Truck Drivers on the day at issue.

In support of its affirmative defense (emergency) the Carrier points to the incident report as uncontradicted evidence that this was a derailment on a single track mainline necessitating ballast hauling on an expedited basis in order to reopen the line to revenue traffic as soon as possible. The Carrier points out that it successfully opened the line the same day after the ballast hauling was completed. It cites the Note to Rule 55 as specifically addressing the situation at issue. It contends that because the emergency affected traffic movements, the 15-day advance notice to contact out work need not be given. It adds that the Organization did not meet its burden to prove otherwise.

The Carrier acknowledges that the Scope Rule embodied in Rule 1, as well as the Classification of Work Rule 55, but contends that emergency situations like this one are specific exceptions allowed by the Footnote to Rule 55.

The Carrier disputes the seven and one-half hours of straight time pay requested by each Claimant. It argues that no proof of loss was provided by the Organization, which had the burden of proof. It points to the statement introduced into the record by Claimant R. Stoner in which he admits that he was paid to haul one load of ballast before his truck was assigned to carry other items. The Carrier characterizes the claims as excessive, unsubstantiated, and unproven.

The Carrier asserts that these are one-day piecemeal claims for a portion of the ballast hauling work allowed by the Note to Rule 55, and that the burden of proof was on the Organization to prove otherwise. It contends that the Organization failed to prove a violation of the Agreement.

The Organization argues that it met its burden of proof to show that the Carrier violated the Agreement. It asserts that the Claimants are Truck Drivers covered by Section P of Rule 55 (Classification of Work) that the work involved track repair, that hauling ballast is common maintenance-of-way work, and that such work is customarily performed by Maintenance of Way forces.

BMWE contends that the Carrier's failure under such circumstances to assign all ballast hauling work to craft employees was in violation of the Agreement. The Organization argues that the Scope Rule applies to the Claimants and was

violated by the Carrier when it contracted work out away from BMWE-represented employees. It cites the following language in Rule 1 (Scope) and Rule 55 (Classification of Work):

> "Rule 1 Scope
>
> These rules govern the hours of service, rates of pay and working conditions of all employes not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department, including . . . the Track Sub-Department. . . .
>
> * * *
>
> Rule 55 P - Truck Driver.
>
> An employee assigned to primary duties of operating dump trucks, stake trucks and school bus type busses. . . ."

The Organization further asserts that, even though a derailment occurred, there was no emergency permitting the Carrier to contract out scope covered work. It maintains that the work was within the capacity of BMWE-represented employees. The Organization characterizes the Carrier's emergency defense as an affirmative defense for which it contends the Carrier did not meet its burden of proof. It cites Third Division Awards 25968, 27710, 31888 and 33421 for the proposition that the Carrier has the burden to prove its affirmative defense.

BMWE also argues that the Carrier failed to provide the Organization with at least 15 days notice prior to contracting out the work. It points to the portion of the Note to Rule 55 requiring such notice to the General Chairman not less than 15 days prior to contracting out work. It draws the Board's attention to Appendix Y of the Agreement (the December 11, 1981 Berge/Hopkins Letter of Understanding) which reads in part:

> "The carriers . . . will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable. . . .
>
> The parties jointly reaffirm . . . that advance notice requirements be strictly adhered to. . . . [T]he advance notices shall identify the work to be contracted and the reasons therefore."

The Organization emphasizes the language in Appendix Y above reaffirming that advance notice requirements will be strictly adhered to and that the 15-day notice must specify the work to be contracted out and the reason for the decision to send that work out. It protests that the Carrier provided no such notice.

The Organization contends that the Claimants' full employment does not invalidate the claims. It maintains that the Carrier's violations of the contract require the payment of money damages.

The Organization bore the burden of proving that the Carrier violated the Agreement by contracting out the ballast hauling work at issue. The record evidence reveals that (1) both Claimants are Truck Drivers covered by the Scope and Classification of Work Rules, as well as the Note to Rule 55 and Appendix Y (2) that the work involved track repair and (3) hauling ballast is common maintenance-of-way work customarily performed by Maintenance of Way forces.

The evidence also persuades the Board that the derailment, which triggered the contracting out, blocked the only track, a one-track mainline. Until the track was restored to service, no trains could run. The Board is persuaded that this event constituted an emergency within the meaning of the negotiated language. The Not to Rule 55 authorizes the Carrier to contract out work in an emergency situation. Here, it contracted out hauling ballast to the derailment site. That work was necessary on an expedited basis to restore the track to service. The Board concludes that the emergency exception to the prohibition on contracting out was applicable to the situation.

The Note to Rule 55 requires that the Carrier notify the Organization in advance of engaging a contractor. However, in the instant situation, where the derailment occurred and the track damage was repaired within a single day, no such advance notice was possible. Because prior notification is not required in situations such as this, the Organization's arguments that the advance notice must identify the work to be contracted out and must specify the reasons therefore also fail.

The Board notes that both Claimants worked on the day in question. Consequently, the situation does not involve the Carrier using a contractor in lieu of existing craft employees. There is no proof of lost wages and benefits as a result of the Carrier's action.

The Carrier met its burden of showing that an emergency existed as a result of the derailment on its main line. That emergency authorized the Carrier to contract out work related to the repair. The Organization was unable to prove that the Carrier violated the Agreement by not providing the Organization 15 days notice before engaging a contractor. Such notice was impractical, given the existence of the emergency and the short time (less than one day) in which the work was performed. The Board concludes that the claim that the Carrier violated the Agreement is without merit.

## AWARD

Claim denied.

## 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 14th day of May 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40460, DOCKET MW-39276, AWARD 40461, DOCKET MW-39277
AWARD 40462, DOCKET MW-39278, AWARD 40464, DOCKET MW-39397
AWARD 40466, DOCKET MW-39399, AWARD 40467, DOCKET MW-39400
(Referee Vaughn)

One school of thought espoused by some rail industry advocates is that dissents are an exercise in futility because they are not given much weight by subsequent Referees. This Labor Member does not adhere to that school because to accept the theory that dissents are futile is to necessarily accept the premise that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, I am not willing to adopt the cynical conclusion that reason has become meaningless. Instead, I accept the inexorable logic that the precedential value of an award is proportionate to the clarity of reasoning in the award. Without offering a shred of reasoning or explanation, Awards 40460, 40461, 40462, 40464, 40466, and 40467 applied the so-called exclusivity test to contracting out disputes in direct conflict with the: (1) black letter and spirit of the Agreement; (2) well-reasoned precedent on this property; and (3) dominate precedent across the rail industry, including the Neutral Member's own prior findings. Consequently, these awards are outliers that should be afforded no precedential value and I am compelled to vigorously and emphatically dissent to each of them.

## I. Clear Contract Language

The application of the so-called exclusivity test to contracting out disputes on this carrier is in direct conflict with the clear contract language. Without providing any analysis or reasoning the Neutral Member declares that these contracting out disputes were controlled by the general Scope Rule. But this declaration ignores the fundamental principle that specific language in an agreement supercedes a more general clause and that the parties themselves wrote a specific provision that expressly controls contracting out. That provision, the Note to Rule 55, provides as follows:

> "NOTE to Rule 55: **The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department**:
>
> > **Employes included within the scope of this Agreement--in the Maintenance of Way and Structures Department**, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes--**perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service**, and work performed by employes of named Repair Shops.

> **By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein**, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. ***"

It is transparently clear that the general Scope Rule identifies the employes "included within the scope of this Agreement" and that the specific language of the Note to Rule 55 expressly controls contracting out of work "**customarily**" performed by those employes. A schoolboy with a dictionary could readily determine that "customarily" does not mean "exclusively". Humpty Dumpty would be right at home with these Awards: "When I use a word," he told Alice, "it means just what I choose it to mean – neither more or less." Only in Wonderland – or in these Awards – could "customarily" be taken to mean "exclusively".

In addition to the adoption of the "customary" standard in the specific contracting provisions of the Note to Rule 55, the parties subsequently adopted the specific contracting out provisions of the national December 11, 1981 Letter of Agreement (codified in Appendix "Y"), which provides:

> **"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employes.**
>
> **The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."**

Attempting to apply an exclusivity standard in the face of an express contractual obligation to make "good-faith" efforts to **reduce** the incidence of subcontracting" is like trying to pound a square peg into a round hole – it simply can not be done without mangling the peg and the hole. Clearly, work that may have been contracted out under one set of circumstances

(and thus not "exclusively" performed by company employes) could be performed by those employes under a different set of circumstances if the company made a good-faith effort to reduce subcontracting. Indeed, the entire notion of "good-faith efforts to **reduce** the incidence of subcontracting" implies that work that had previously been contracted will be returned to the carrier's employes.

## II. Construing The Agreement As A Whole

It is by now axiomatic that Agreements must be construed as a whole so as to give meaning to all parts of the Agreement. Applying the so-called exclusivity test to contracting out disputes is not only contrary to the black letter of the Note to Rule 55, but also in direct conflict with the spirit and intent of that provision as a whole. Unlike class or craft disputes where a class or craft of employes claims a right to perform certain work to the exclusion of all other employes, the Note to Rule 55 does not contemplate (and BMWED does not claim) an exclusive reservation of work as against contractors.

Instead, the Note to Rule 55 provides that work customarily performed by Scope covered employes may be contracted for the reasons expressly set forth in the Note (e.g., special skills, special equipment, special material and emergency time requirements). In light of these exceptions, it's safe to say that virtually any work customarily performed by employes within the Scope of the Agreement may have been contracted out at some time in the past and, therefore, none of this work would have been exclusively performed by Scope covered employes. In other words, applying the exclusivity test as the seminal test for the application of the Note to Rule 55 destroys the Note to Rule 55. Indeed, applying the exclusivity test would destroy the entire collective bargaining agreement because it drains all work from the Agreement and all terms and conditions of the Agreement attach to the performance of that work.

## III. Precedent On The Property

In addition to ignoring the black letter and spirit of the Agreement, the Neutral Member ignored well-reasoned precedent on this property. Indeed, there is substantial precedent on this property that has rejected the application of the exclusivity test in contracting out cases because that test is in conflict with the plain language as well as the spirit and intent of the Agreement. For example, Award No. 20 of Public Law Board No. 4402 (Benn - 1991) carefully examined the plain language of the Note to Rule 55 and the December 11, 1981 Letter of Agreement and concluded that the application of the exclusivity test was inconsistent with that plain language:

> **"... [T]he Board takes guidance from Awards which distinguish 'customarily performed' from 'exclusively'. Citation of only a few of these will suffice.**
>
> **Third Division Award No. 26174 (Gold) states:**

> **... While there may be a valid disagreement as to whether the work at issue was exclusively reserved to those employes, there can be no dispute that it was customarily performed by Claimants.**

* * *

Third Division Award No. 27012 (Marx) states as follows:

> **The Board finds that the Carrier's insistence on an exclusivity test is not will founded. Such may be the critical point in other disputes, such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obliged to make notification where work to be contract out is 'within the scope' of the Organization's Agreement. There is no serious contention that brush cutting work is not properly performed by Maintenance of Way employes, even if not at all locations or to the exclusion of other employees. ...**

**Therefore, we find that the Organization need not demonstrate exclusivity to prevail under the Note to Rule 55 and the December 11, 1981 letter. The exclusivity principle is for analysis of disputes determining which class or craft of the Carrier's employees are entitled to perform work and is not relevant to contracting out disputes. The Organization must, however, demonstrate that the employees have 'customarily performed' the work at issue. Given the descriptions of undercutting work found in the Agreement and further given the statements of the employees submitted by the Organization showing the extent of that work previously performed, we find that the Organization has demonstrated that the employees have 'customarily performed' undercutting work.[2]**

[1] **The difference between the definition of 'customarily' and the more restrictive 'exclusive' is significant. 'Customarily' is defined as 'usual ... conventional, common, regular.' 'Exclusive' is defined as 'not admitting of something else; incompatible ... shutting out all others.' *The Random House Dictionary of the English Language* (2nd ed.). Therefore, work can be 'customarily' performed while not being 'exclusively' performed. Further, given the prior extensive use of the word 'exclusive' in this industry, the failure to include that language in the relevant agreements but rather using**

**the word 'customarily' supports the conclusion that the parties did not intend to apply the exclusivity principle to contracting out issues.**

**[2] We recognize that there is a split in authority on this question and that awards exist requiring a demonstration of exclusivity. However, we believe that the basic principle of contract construction discussed above concerning manifestation of intent through the clear language of 'customarily' rather than 'exclusively' along with the rationale of those awards that do not adopt the exclusivity requirement are the better reasoned approaches to this question."** (Emphasis in original)

Similarly, in Award 39685 (Brown - 2009) involving these same parties, this Board held that bargaining unit work is the life blood of the collective bargaining agreement and that the application of the exclusivity test to contracting out cases undermined the very essence of the Agreement:

**"As the Board has noted in prior Awards, there are different standards for resolving intra-craft jurisdictional disputes and the contracting out of work. For the former, it is well established that the Organization must demonstrate exclusive performance, system-wide, by the classification claiming that work was improperly assigned. See Public Law Board No. 2206, Award 55, as well as Third Division Awards 757, 4701, and 37889.**

**The right to subcontract work is a different story; retention of bargaining unit work is the life blood of a Collective Bargaining Agreement. This has been an issue of contention for many years and the record reveals repeated promises by the parties to reduce contracting out where possible by a combination of defining what work may be contracted out and under what circumstances with a pledge for good-faith discussion to increase work by members of the bargaining unit. This issue goes to the heart of job security for employees.**

**For this purpose, bargaining unit work is defined by a combination of the Scope Rule, classification specifications set forth in Rule 55, and some custom. ***"**

Award 39685 and Award No. 20 of PLB No. 4402 hardly stand alone. To the contrary, over the last two decades, six different arbitrators (Marx, Benn, Kenis, Zusman, Suntrup and Brown) have carefully analyzed the Note to Rule 55 and Appendix Y and repeatedly held that the so-called exclusivity test does not apply to contracting out cases on this property. ***See*** **Award No. 1 of PLB No. 4768 (Marx - 1990), Award No. 21 of PLB No. 4402 (Benn - 1991), Award No. 25 of PLB No. 4768 (Marx - 1992), Award No. 61 of PLB No. 4768 (Marx - 1995), Award 36015 (Benn - 2002), Award 37901 (Kenis - 2006), Award 38010 (Zusman - 2007) and Award No. 33 of PLB No. 6204 (Suntrup - 2007).**

Notwithstanding the fact that a plethora of awards that rejected the application of the exclusivity test to contracting cases on this property were cited in the Organization's submission and handed to the Neutral Member during Panel Discussion, he failed to even acknowledge their existence, much less distinguish them or assail their reasoning and logic. In sum, Awards 40460, 40461, 40462, 40464, 40466, and 40467 are not simply poorly reasoned when it comes to the exclusivity issue, they are a bereft of any reasoning at all and therefore should be afforded no precedential value.

## IV. Prevailing Industry-Wide Precedent

In addition to the well-reasoned awards which reject the application of the exclusivity test on this property, the prevailing precedent across the rail industry rejects the so-called exclusivity test in contracting out cases. This precedent is particularly pertinent to the instant cases because the Neutral Member in the instant cases has previously rejected the application of the exclusivity test in contracting out cases. In Third Division Award 25934 (Vaughn - 1986), the Neutral Member unequivocally rejected the application of the exclusivity to the subcontracting cases as follows:

> **"Further, the Board holds that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that 'The exclusivity doctrine applies when the issue is whether Carrier has the right to assign work to different crafts and classes of its employees - not to outsiders.')"**

The Neutral Member was hardly sailing in unchartered waters when he rejected the application of the exclusivity test to contracting out disputes in Award 25934 in 1986. To the contrary, his 1986 award shows that he was adhering to the well-established precedent typified in Award 13236 (Dorsey - 1965) and Award 23217 (Larney - 1981). Moreover, other referees apparently recognized that Award 25934 was well reasoned and represented the prevailing precedent on the exclusivity issue because Award 25934 (Vaughn - 1986) was cited as authority for the proposition that the exclusivity test does not apply in contracting out cases in Third Division Awards 29878 (Goldstein - 1993) and 40212 (Campagna - 2009). Of course, all of these awards are consistent with more than fifty years of precedent holding that the so-called exclusivity test applies to class or craft disputes and has no application to contracting out cases. *See* Third Divisions Awards 11733, 13236, 14121, 23219, 24230, 24280, 27012, 27634, 27636, 28612, 38735, 29021, 29033, 29034, 29430, 29432, 29547, 29677, 29912, 30194, 21049, 31149, 31385, 31386, 31388, 31777, 32160, 32307, 32560, 32701, 32711, 32748, 32777, 32858, 32861, 32862, 32863, 32922, 32938, 35378, 35529, 35531, 35635, 35841, 35850, 36015, 36022, 36175, 36517, 36829, 37001, 37002, 37046, 37471, 37901, 38042, 38349, 39302, 39520, 39521, 39522, 40078, 40212, 40253 and 40373.

## IV. Conclusion

The Neutral Member's application of the exclusivity test to contracting out disputes in Awards 40460, 40461, 40462, 40464, 40466, and 40467 is in direct conflict with the clear language and spirit of the Agreement, well-reasoned on-property precedent, industry-wide precedent and the Neutral Member's own prior rulings on this issue. Notwithstanding the fact that these prior awards were clearly cited and provided to the Neutral Member, he failed to even acknowledge their existence, much less distinguish them or assail their reasoning and logic. Thus, Awards 40460, 40461, 40462, 40464, 40466, and 40467 are not simply poorly reasoned, but have no reasoning at all to support their conclusions and therefore, I emphatically and vigorously dissent and assert that these awards should be afforded no precedential value.

Respectfully submitted,

Roy C. Robinson
Labor Member