Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40462
Docket No. MW-39278
10-3-NRAB-00003-060023
(06-3-23)

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 Agreement was violated when the Carrier assigned outside forces (J-L Construction Company) to perform Maintenance of Way and Structures Department work (construction of a maintenance building and related work) at McCook, Nebraska on July 24, 25, 26, 31, and August 7, 8, 9, 10, 11, 14, and 15, 1995 (System File C-95-C100-91/MWA95-10-31AC BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants J. Pfeiffer, D. Linner, S. Martin, R. Karash, L. Rakes and C. Powers shall now each be '. . . paid at their respective rates of pay for all straight time and overtime hours relative to that of the six man crew from J-L Construction Co.,

for the days of July 24, 25, 26, 31, and August 7, 8, 9, 10, 11, 14 and 15, 1995 that was worked in the new construction of the maintenance building at McCook, NE."

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, all Claimants held seniority on District 9 in the Bridge and Building ["B&B"] Sub-Department of the Maintenance of Way and Structures Department. Claimant J. Pfeiffer held seniority as a Foreman. Claimants D. Linner, S. Martin, R. Karash, and L. Rakes held seniority as First Class Carpenters and Claimant C. Powers held seniority as a Truck Driver. All Claimants were fully employed in the foregoing classifications and were regularly assigned as described above in the vicinity of McCook, Nebraska.

In an April 10, 1995 letter, the Carrier notified the Organization of its intent to use a contractor to construct a steel maintenance building in McCook, Nebraska, including digging footers, forming and pouring concrete, installing a concrete foundation measuring 50 feet by 60 feet, creating a floor, erecting steel side walls, and installing four overhead doors and a roof with a 16-foot eve height. The notice indicated that the contractor would provide a 20-year warranty on the building.

The Organization requested a conference to discuss the proposed contracting. Discussions were held on April 24 and in May 1995. No agreement was reached.

Subsequently, in a letter dated May 15, 1995, the Carrier provided a list of 13 examples of on-property new construction of BNSF buildings by outside contractors between 1970 and 1994.

The Carrier used a contractor to construct the building. The contractor's six employees worked 11 eight-hour days to construct the building. The dates of work were July 24, 25, 26, 31, and August 7, 8, 9, 10, 11, 14, and 15, 1995.

Rule 1, the Scope Rule states, in pertinent part:

> "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. . . ."

The Note to Rule 55 of the Agreement (Classification of Work) states, in pertinent part:

> "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 . . . 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 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 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. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith."

Appendix Y of the Agreement (the December 11, 1981 Letter of Understanding) reads in part:

"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 therefore."

The Carrier asserts that the Organization failed to meet its burden of proving that by subcontracting the work at issue, the Carrier violated the Note to Rule 55, Appendix Y or any other portion of the Agreement.

The Carrier contends that the Organization was obligated to prove that the Agreement reserves an exclusive right for this work to the employees or, if not, it must show that the work in question has been exclusively reserved to BMWE-represented employees by custom, practice and tradition system-wide.

The Carrier disputes the Organization's allegation that the Claimants and other BMWE-represented employees have customarily and traditionally performed this type of building construction work and it disputes the Organization's claim that this is scope-covered work and that assigning this work to an outside contractor is a violation of the Agreement.

The Carrier concedes that the Claimants held seniority on the territory where the contractor performed the work in question. However, it contends that the evidence establishes that the work is neither customarily nor exclusively reserved to BMWE-represented employees and that it is not covered by the Scope Rule of the Agreement.

The Carrier contends that Organization provided no evidence for the record to prove that this work was customarily reserved to BMWE-represented employees or that this work is within the scope of the Parties' Agreement. The Carrier asserts that, at best, there is a mixed-practice and, therefore, no violation of the Agreement occurred.

The Carrier points to evidence of multiple instances of new building construction by outside contractors from 1970 through 1994 as negating the Organization's claim that it customarily performed the work. It also argues that because its employees were unable to provide the 20-year warranty requested by the

Carrier, the Organization could not prove that BMWE-represented employees could complete the project in the manner it required.

The Carrier argues that it is not required to piecemeal the work, that is, to give some to Organization-represented employees and contract out the rest, because such a practice would be inefficient.

The Carrier argues that it provided the Organization with adequate notice in advance, identified the work to be contracted (new Maintenance Building construction) and stated the reasons therefore (need for a 20-year warranty on the building). The Carrier also asserts that it provided in conference evidence of "thousands" of incidents of work contracted out on the property from 1922 through 1967, the majority of which the Carrier describes as new construction. It further argues that in the notice it described the project to the Organization in good faith and provided additional evidence of 13 new construction projects from 1970 through 1974. It asserts that this history indicates that this was not scope-covered work. The Carrier asserts therefore, that the Note to Rule 55 and Appendix Y present no barrier to the Carrier's having contracted out this work.

The Carrier asserts that Rule 1 is a general Scope Rule and does not delineate any particular tasks that the Carrier is responsible to assign to Maintenance of Way employees. It contends that, when a scope rule is general in nature, it is the Organization's burden to prove that the work claimed has been assigned to its members exclusively in the past. The Carrier cites language from Third Division Award 20640 to support its position that the Organization is required to prove that the work at issue has been assigned exclusively to Maintenance of Way employees before the work can be considered scope-covered:

> "In order to sustain the Organization's position on Claim (1), the Organization must show that the Agreement clearly reserves to the employes an exclusive right to the work in question, or if not, then it must show by probative evidence that the work in question has been exclusively reserved to the employes by custom, practice and tradition, system wide. No exclusive reservation of the work in question is found in the Scope Rule. Nor does the record show

> exclusive reservation of the type of work to the employes by custom, practice, and tradition, system-wide. Since the Organization has not met its burden of proof on this issue, we must deny claim."

The Carrier also cites Public Law Board No. 2206, Award 8:

> "The Scope Rule of the parties' agreement, like that of the NP, is a general Scope Rule. In such circumstances the Organization, to prevail under the Note to Rule 55, must show reservation of the disputed [work] to maintenance of way employees by exclusive system-wide [performance]."

In further support of its position that the Scope Rule requires proof of reservation of the disputed work by clear and convincing evidence of system-wide performance to the practical exclusion of others, the Carrier cites the language below from on-property Third Division Award 33938:

> "Authoritative precedent between these same parties holds that, standing alone, the Classification of Work Rule does not reserve work exclusively to employees of a given class or serve as a Scope Rule . . . The general nature of Rule 1, the operative Scope Rule, requires proof of reservation of disputed work by clear and convincing evidence of system-wide performance, to the practical exclusion of others."

The Carrier urges the Board, based on the above Awards, to hold that BMWE-represented employees do not perform new construction of buildings or other Carrier facilities exclusively on a system-wide basis.

In response to the Organization's allegation that the Note to Rule 55 reserves the work in question to employees in the Maintenance of Way craft, the Carrier argues that it is well established that classification rules are not scope rules and, therefore, do not guarantee work assignments. It cites Third Division Award 19922 in which the Organization alleged the Classification of Work Rule in effect

guaranteed a particular assignment to BMWE-represented employees. The Board held:

> "The Petitioner's reliance on Rule 2 we find to be without merit. We have held in many prior Awards that Classification Rules do not reserve work exclusively to employees of a given class (Award 13638, 17421, 18471, 18876 and others). Petitioner had the burden of establishing the exclusive right to work in question by evidence of a system-wide practice. . . ."

The Carrier also cites on-property Public Law Board No. 4104, Award 13 as holding that Classification Rules do not guarantee any particular work assignment to employees. That Award provides:

> "The Organization contends that Rule 55 R and Q require that the disputed work be performed exclusively by members of its craft. In addition, it submits that its forces have customarily engaged in this work. Therefore, it argues, that the Agreement and the practice of the parties compels a sustaining award.
>
> * * *
>
> After reviewing the record, the Board is convinced that the claim must be denied. This so for a number of reasons. First, no rule in the Agreement specifically reserves the disputed work to the Organization. Rule 1, the Scope Rule, does not deal specifically with this issue. Furthermore, Rule 55, cited by the Organization, is a Classification of Work rule. It is not a Scope Rule. It well established that Classification Rules do not reserve work exclusively to employees of a given class."

In response to the Organization's position that the Claimants should be compensated for their loss of work opportunity irrespective of their fully employed status, the Carrier cites Third Division Award 29202 as holding that even if there is

a basis for sustaining a claim, no compensation is warranted where the Claimants are fully employed and suffer no loss.

The Organization concedes that the Carrier provided advanced notice of the work to be contracted, however, it asserts that the Carrier gave no reason other than the need for a 20-year warranty on the new construction and failed to conference the matter in good faith. In addition, the Organization argues that (1) no special equipment or skills were needed or used to construct the building at issue (2) B&B forces had been honored by the Carrier for their work after constructing similar buildings (3) the Carrier's "warranty" reason for contracting the work was deficient and disingenuous (4) "exclusivity" is not the appropriate test to apply (5) the Carrier failed to make good faith efforts to decrease the use of outside contacting and (6) it failed to make good faith efforts to increase the use of BMWE-represented employees to the extent practicable.

The Organization points out that the Claimants hold seniority on the territory where the contractor performed the work in question and argues that because the Claimants have customarily and traditionally performed this type of building construction work, the work is covered by the Scope Rule and the assignment of this scope-covered work to an outside contractor is not protected by the Note to Rule 55 or Appendix Y. It argues that the burden of establishing an exception to the Scope Rule is the Carrier's and that it failed to meet that burden.

Finally, the Organization argues that the Claimants should be compensated for their loss of work opportunity irrespective of their fully employed status. It asserts that such a remedy is necessary to redress the Carrier's violation.

The Organization bore the burden of proving that the Carrier violated the Agreement by subcontracting the work at issue. Based on review of the Agreement and the Awards cited by the parties, the Board concludes that no Rule or past practice requires the Carrier to assign new construction of buildings to the Organization system-wide. There is no showing in the record that BMWE-represented employees have customarily or exclusively performed this work in the past. To the contrary, the Board is persuaded that the Carrier met its burden of proving its affirmative defense that this type of work had been contracted to outside

forces multiple times over the years leading up to this incident. The demonstrated history of contracting out construction of new buildings shows that this type of work is not reserved to the Claimants or to any craft.

In December 1981, the Organization was assured by the Carrier that it would "assert good-faith efforts to reduce the incidence of subcontracting . . . to the extent practicable. . . ." and that part of that would be advance notice so the parties could discuss the effects and see if contracting out could be avoided. The Board notes that the Organization admitted that the Carrier provided notice (on April 10, 1995) that it would contract out the work more than 15 days before the date on which the contracting actually began (July 24, 1995). As required by the Agreement, the Carrier's advance notice document identified the work to be contracted and its reasons for sending it to the contractor.

The record evidence reveals that the Carrier made the business judgment that it needed a 20-year warranty on the new building construction. The Carrier is to be afforded reasonable discretion in making such judgments. There is no indication that craft employees could provide such a warranty, which is a material benefit in the construction of a building. That placed the project beyond the craft's ability and gave the Carrier the right to choose an outside contractor to construct the building. The Board concludes that the record contains insufficient evidence to establish that the Carrier violated the Agreement.

Finally, the Board concludes that, even if it decided that there was a basis for sustaining this claim, no compensation would be warranted because of the Organization's acknowledgment that the Claimants were fully employed. Consequently, they suffered no monetary loss.

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:

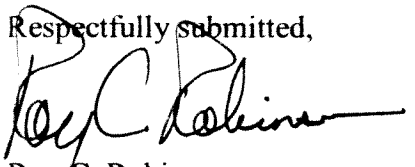
> **"Further, the Board holds that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that 'The exclusivity 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