

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40466
Docket No. MW-39399
10-3-NRAB-00003-060038
(06-3-38)**

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 Employees 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 (Pavers Contractors, Inc.) to perform Maintenance of Way and Structures Department work (haul track panels and ballast) from Carling and from the ballast stockpile in Lincoln Terminal at Lincoln, Nebraska to new track alongside the F-3 Track and to the switch by MG 05 on the south running track on April 8, 16, 19, 22, 23, 26 and 27, 2004 [System File C-04-C100-79/10-04-0234(MW) 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 violations referred to in Parts (1) and/or (2) above, Claimant S. Thomas shall now be compensated for fifty-four (54) hours at his respective straight time rate 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.

The Claimant held seniority in the Maintenance of Way and Structures Department as a Group 2 Machine Operator.

In a February 27, 2004 letter, the Carrier notified the Organization that it would begin a construction and reconfiguration project at the Lincoln, Nebraska, Yard. The notice stated the Carrier's intent for Maintenance of Way employees to perform construction, realignment and installation of track structures and, on or after March 15, 2004, to contract out work, including rerouting utilities (oil, gas, water, sanitary sewer, storm drains) asphalt work, relocation of fencing, upgrading of road or bridge structures and "dirt work" including inserting culverts, placement of topsoil, soil compaction, sub-grade work, and embankment work. To assist Carrier forces, the contractor would provide heavy equipment such as side booms and cranes.

The notice stated that the Carrier's reason for contracting out this portion of the work was that it did not have the equipment and skills necessary to complete all aspects of the project. The Carrier offered as evidence the following email statement of Assistant Roadmaster J. M. Chapple dated August 5, 2004:

"This was a very large project involving the replacement of 19 turnouts and extending several miles of track. . . . The BNSF does

not possess the amount of equipment necessary to complete a project of this magnitude, therefore machines and operators were contracted to help complete this project on time . . . in conjunction with the use of BMW labor and machinery. . . .”

The parties held a conference in response to the notice, but without resolution. Work began April 8, 2004. The Organization provided no affidavit, document or other evidence to substantiate its assertion that the one contractor employee at issue here drove a truck (the contractor’s tractor attached to the Carrier’s lowboy flat bed trailer) for six hours on April 8 carrying track panels and hauled ballast in a dump truck for eight hours on the other six days – a total of 54 hours. The Organization provided no affidavit, document, or other evidence to substantiate what the Claimant’s employment status was on those days. The Carrier rejected the claim for 54 hours of straight time as excessive. It provided no employment or contractor records, although it did assert that the Claimant worked on April 8, 22, and 23 and lost no earnings for those days.

The Organization asserted, but provided no written statements, documents or other evidence indicating that BMW-represented employees had in the past performed this type of work for the Carrier on a customary or exclusive basis to the exclusion of contractors. The Organization’s sole piece of evidence was a brochure indicating that Hertz Equipment in Omaha, Nebraska, rented box dump trucks.

The language from the Parties’ Agreement, provides as follows:

“RULE 1. SCOPE

These rules govern the hours of service, rates of pay and working conditions of all employees 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 5. SENIORITY ROSTERS

* * *

**Machine Operator Group 2
Group Two Machines**

* * *

Tractor-Lowboy

RULE 55 CLASSIFICATION OF WORK

* * *

N. Machine Operator.

An employe qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5.

* * *

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 . . . 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 employees 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 employees, 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.

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 employees.

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 claim protesting the Carrier’s action was timely filed and progressed on the property in the usual manner up to and including the Carrier’s highest designated officer, but without resolution.

The Carrier asserts that the Organization failed to meet its burden of proving that the Carrier violated the Note to Rule 55, Appendix Y or any other portion of the Agreement. It points to the Note to Rule 55 which authorizes contracting “when work is such that the Company is not adequately equipped to handle the work. . . .”

The Carrier points out that a timely notice was sent to the Organization identifying the work to be contracted, along with the reason for doing, so and the parties discussed the issue in conference, which it claims to have been in good-faith.

The Carrier contends that the Organization’s Submission provides no evidence that the work at issue here had historically, traditionally, and customarily been assigned to Carrier forces to the exclusion of contractors, or that this work is covered by the Agreement’s Scope Rule. The Carrier argues that, in any case, it is not required to piecemeal the work, that is, to give some to Organization-represented employees and to contract out the rest.

The Carrier contends that the Organization failed to meet its burden of demonstrating a system-wide exclusive practice by which BMW-represented employees had a contractual right to performance of the work in question and, further, that the Organization failed to meet its burden by providing any evidence that the contractor’s employee drove a truck on any specific date or for any particular number of hours.

The Organization acknowledges that the Carrier did provide notice of the work to be contracted, however, it argues that (1) the assignment of this scope-covered work to an outside contractor violated the Agreement (2) the burden of establishing an exception to the Scope Rule is the Carrier's and (3) the Carrier failed to make good faith efforts to decrease outside contacting.

Finally, the Organization argues that the Claimant should be compensated for the loss of work opportunities even if he was fully employed by the Carrier. It asserts that such payments are required in order to police the Carrier's compliance with the Agreement.

After a thorough review, the Board finds adequate evidence in the record to determine that the Carrier provided the appropriate notice and conferenced the issue. As the moving party, the Organization bears the initial burden of establishing material facts necessary to make out a prima facie violation of the Agreement. While the Organization argues that the hours worked by the contracted worker are as stated in its claim, the Board determines that mere assertions do not serve as evidence. The record contains no evidence to establish the type or amount of work performed, and identifies no time, date, or individual performing the work. There are no statements from other employees or even from the Claimant himself. Without such threshold evidence, the Board is unable to make an informed judgment concerning what work, if any, was done by the contractor or even where or when it may have been done. The Board is compelled to deny the claim due to the petitioner's failure to provide enough evidence to make even a prima facie case.

A careful review of the record convinces the Board that it contains no evidence to indicate that the Carrier violated the Agreement. Accordingly, the claim is denied.

AWARD

Claim denied.

Form 1
Page 8

Award No. 40466
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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 employees in the Maintenance of Way and Structures Department:

Employees included within the scope of this Agreement--in the Maintenance of Way and Structures Department, including employees in former GN and SP&S Roadway Equipment Repair Shops and welding employees--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 employees 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 employees 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 employees, 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 employees "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 employees. 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 employees.

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 employees) could be performed by those employees 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 employees.

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 employees claims a right to perform certain work to the exclusion of all other employees, 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 employees 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 employees 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 employees. 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 employees, 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 employees, 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 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:

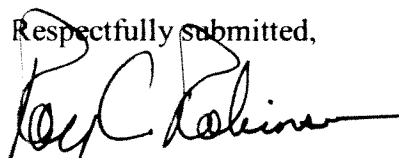
"Further, the Board holds that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that 'The exclusivity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

A handwritten signature in black ink, appearing to read "Roy C. Robinson", with a long horizontal flourish extending to the right.

Roy C. Robinson
Labor Member