Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40509
Docket No. MW-39403
10-3-NRAB-00003-060045
(06-3-45)

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 Emlpoyes 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 main line ballast) from the ballast stockpile in Lincoln Terminal to the right of way at 1st Street in Lincoln, Nebraska, to the right of way near Carling and to the new F-3 Track in Lincoln, Nebraska on May 14, 25 and June 2, 2004 [System File C-04-C100-81/10-04-0243(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 violation referred to in Parts (1) and/or (2) above, Claimants D. Klaus and R. Burhoop shall now be compensated for twenty-four (24) hours at their respective straight time rates of pay and three (3) hours at their respective time and one-half 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.

The Claimants held seniority in the Maintenance of Way and Structures Department in the Truck Driver classification and were fully employed on May 14, 25 and June 2, 2004.

In a February 27, 2004 letter, the Carrier notified the Organization that it would begin a large construction and reconfiguration project at the Lincoln, Nebraska, Yard. The notice stated that the Carrier would contract out work on or after March 15, 2004 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. The notice specified that "Carrier forces do not have the equipment and skills necessary to complete all aspects for the project that will be contracted out." To assist Carrier forces, the contractor stated that it would provide heavy equipment such as side booms and cranes.

The Carrier indicated that the above described work was consistent with its historical practice of contracting out such work. After detailing activities to be contracted, the notice listed work that would not be contracted. It declared, "Carrier forces will be responsible for the construction, realignment and installation of the track structures associated with this project."

The parties conferenced the claim but without resolution. Work on the entire project began on April 6, 2004. On May 14, 25 and June 2, 2004, the contractor used two of its employees to operate two of its trucks to haul ballast. The Organization's evidence included Claimant Klaus' written statement dated July 18, 2005 that the contractor's employees expended 24 hours each at straight time rates and three hours at time and one-half rates during the claim period. The Claimants were qualified to perform this ballast hauling work.

The Organization's evidence also included a brochure indicating that Hertz Equipment Rental in Omaha, Nebraska, rented dump trucks. The Organization provided no affidavit, statement, or other evidence to prove what the Claimants' employment status was on the days at issue or to support its claim that the work was exclusively reserved system-wide to Carrier forces to the exclusion of contractors.

The Carrier confirmed its reasons for contracting the hauling work by submitting as evidence the email statement of Assistant Roadmaster J. M. Chapple that stated:

> "This was a very large project involving the replacement of 19 turnouts and extending several miles of track. The MOW's portion of this project started on 04/06/2004 and the project is still underway as of 08/05/2004. Several machines and trucks were contracted during this period. . . . 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 BMWE labor and machinery as well as contracted services. . . ."

The Carrier rejected the claim for straight time and over-time pay as excessive. It stated that the Claimants were fully employed on the claim dates and lost no earnings for those days.

The involved Rules read, in relevant part, as follows:

"RULE 1. SCOPE

These rules govern the hours of service, rates of pay and working conditions . . . in the Maintenance of Way and Structures Department. . . .

Rule 2A. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service. . . .

RULE 5A. SENIORITY ROSTERS

A. Seniority rosters of employes of each sub-department by seniority districts and rank will be compiled. . . .

RULE 42A.

All claims or grievances must be presented in writing . . . within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . .

RULE 55 CLASSIFICATION OF WORK

* * *

P. Truck Driver.
An employe assigned to primary duties of operating dump trucks

* * *

NOTE to RULE 55

* * *

> Employes included within the scope of this Agreement - in the Maintenance of Way and Structures Department . . . 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. . . .
>
> . . . In the event the Company plans to contract out work . . ., 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 . . . 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.
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> * * *
>
> Appendix Y.
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> * * *
>
> 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. . . . [T]he advance notices shall identify the work to be contracted and the reasons therefore."

The Carrier initially argues that Rule 42A time barred the claim because it was received July 12, 2004, more than 60 days after the April 6, 2004 date on which the project first began. The Carrier disputes the claim's assumption that the first day of ballast hauling work – May 14, 2004 – is the first occurrence date for purposes of filing a claim pursuant to Rule 42A.

The Carrier asserts, with respect to the substance of the dispute, that the Organization failed to meet its burden to prove that contracting out the work at

issue violated Rules 1, 2, 5, 55, the Note to Rule 55, Appendix Y or any other portion of the Agreement. It notes that a timely notice was sent to the Organization identifying the work to be contracted along with the reasons for doing so, after which the parties engaged in a conference in good-faith.

The Carrier states that the Organization alleged but provided no evidence that ballast hauling work had historically, traditionally and customarily been assigned to Carrier forces system-wide to the exclusion of contractors, or that this work falls within the parameters of the Scope Rule. The Carrier reiterates that it is the Organization's responsibility to provide probative evidence to support its claim. If an affirmative defense is required, the Carrier asserts that it is not required to piecemeal the work.

In denying that Rule 1 reserves the disputed work to BMWE-represented employees, the Carrier argues that Rule 1 is a general Scope Rule and does not delineate any particular tasks the Carrier is required to assign to M of W forces. In such instances, it becomes the Organization's burden to prove that past work has been assigned to its members exclusively. The Carrier contends that the Organization failed to satisfy its evidentiary burden to prove a system-wide exclusive practice or that the Carrier's M of W employees have a contractual right to perform the work.

In response to the Organization's allegation that Rule 55, the Classification of Work Rule, reserves the work in question to the Claimants, the Carrier argues that it is well established in arbitration that Classification Rules are not Scope Rules and, therefore, do not guarantee any particular work assignment to Carrier employees. The Carrier cites on-property Public Law Board No. 4104, Award 13, which held:

> "[T]he claim must be denied . . . 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 well established that Classification Rules do not reserve work exclusively to employees of a given class."

The Carrier argues, contrary to the Organization's position, that even if there were a basis for sustaining a violation of the Agreement, no compensation should be

awarded because the Claimants were fully employed on the relevant dates and the Organization provided no evidence that the Claimants were other than fully employed or suffered a monetary loss. The Carrier asserts that in Rules cases, the burden rests with the Organization as to all elements of its claim and that in this instance, it failed to meet that burden. The Carrier cites the following language in Third Division Award 25002:

> "This Board, while finding that the Carrier did not furnish the mandated notice, does not find sufficient reason to award pecuniary relief. The Claimants have not proved loss of work or earnings. There is solid precedent (see Third Division Awards No. 18305 (Dugan), No. 23345 (Dennis), No. 20275 and 20671 (Eischen)) that to award a penalty, Claimants must show distinct damages."

The Carrier also cites on-property Third Division Award 36715 which held the following:

> "The Organization argued that the Claimants were 'qualified and available;' however, the record demonstrates that those Claimants who were available were fully employed throughout the claim period. Therefore, the Claimants were not available to operate the necessary equipment, rented or otherwise. And because of this full employment, the Carrier was '. . . not adequately equipped to handle the work . . .' as clearly set forth in the second paragraph of the Note to Rule 55."

The Organization acknowledges that the Carrier provided notice of certain contracted work, however, it argues that the letter failed to provide notice that the contractor would use its equipment and employees to perform ballast hauling work. It contends that the work at issue here had historically, traditionally and customarily been assigned to Carrier forces system-wide to the exclusion of contractors and that assignment of this scope-covered work to an outside contractor violated the Agreement.

The Organization further contends that the burden of establishing an exception to the Scope Rule rests with the Carrier and that the Claimants were available and fully qualified to perform the work. Finally, the Organization argues that the Carrier owes compensation for the Claimants' lost work opportunities

irrespective of their fully employed status in order to deter the Carrier's future violations.

The Board concludes that work on the project began on April 6, 2004; however the events on which the claim was based occurred on May 14, 25 and June 2, 2004. The claim was received by the Carrier on July 12, 2004. All three dates are within 60 days of the claim's receipt, meeting the requirements of Rule 42A. Consequently, it was timely filed.

The evidence persuades the Board that the Carrier provided the appropriate notice and conferenced the issue. As the Carrier correctly argued, past Awards, including the holdings cited above, have established that the Scope Rule at issue is a general Rule and that Classification Rules are not Scope Rules and, therefore, do not guarantee work assignments. It was the burden of the Organization to prove that Carrier employees customarily performed ballast hauling work system-wide to the exclusion of contractors. The Board determines that this is the necessary element for consideration of the application of the Note to Rule 55. The record contains no evidence to meet the Organization's burden.

The Board notes the Carrier's commitment to use craft employees and to minimize the use of contractors. However, there is no proof either that the contractor performed the ballast hauling work at issue or that craft employees were available to perform the work in the timeframe allocated for the project. The Board also concludes that the Organization failed to prove that the Claimants sustained lost work opportunities or monetary loss. The Board confirms prior Awards by the Board holding that fully employed Claimants will not be compensated for lost work opportunities. In the final analysis, the Board reiterates its prior rulings that the burden to prove each element of its claim rests with the Organization. Here, it failed to meet that burden. Evidence in the record does not support a violation of the Agreement. Accordingly, the claim is denied.

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 15th day of June 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40509, DOCKET MW-39403
AWARD 40516, DOCKET MW-39530
AWARD 40517, DOCKET MW-39531
(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 40509, 40516 and 40517 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, its 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 20 of Public Law Board (PLB) 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.

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[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 20 of PLB No. 4402 hardly stand alone. To the contrary, over the last two (2) decades, six (6) 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 1 of PLB No. 4768 (Marx - 1990), Award 21 of PLB No. 4402 (Benn - 1991), Award 25 of PLB No. 4768 (Marx - 1992), Award 61 of PLB No. 4768 (Marx - 1995), Award 36015 (Benn - 2002), Award 37901 (Kenis - 2006), Award 38010 (Zusman - 2007) and Award 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 40509, 40516 and 40517 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

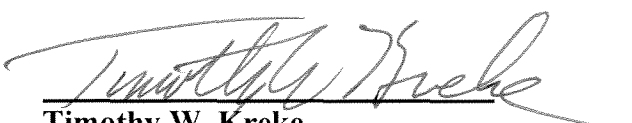
> exclusivity doctrine applies when the issue is whether Carrier has the right to assign work to different crafts and classes of its employees - not to outsiders.')"

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 (50) 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 40509, 40516 and 40517 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 40509, 40516 and 40517 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,



Timothy W. Kreke
Labor Member