Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35169
Docket No. MW-33713
00-3-97-3-167

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway Company (former
(St. Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Neosho Construction Company/Lee Catt) to perform Maintenance of Way work (using a track loader, 2 dump trucks, 4Uks, 1 dozer, 1 backhoe, and 1 grader in construction of a T. O. F. C facility) at Harvard, Arkansas on March 22 through April 29, 1995 (System File B-1635-1/MWC 95-06-23AC SLF).

(2) As a consequence of the violation referred to in Part (1) above, Special Equipment Operator (SEO) C. E. Green and the ten (10) senior employes entitled to perform the work in question shall each be compensated three hundred twenty hours (320) hours' pay at their respective straight time rates"

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.

In support of its claim, the Organization contends that portions of the following Rules and Agreement are relevant:

" Rule 1. Scope Rule

(a) These rules govern the hours of service and working conditions of employees in the Sub-Departments listed in Rule 5; and the following employees when work handled is under the jurisdiction of the Maintenance of Way Department:

(1) B&B Supply Yard Foreman and Laborers

(2) Timber Treating Plant Laborers

(3) Hoisting Engineers other than Brown Hoist Engineers

* * *

Rule 5. Sub - Department Defined

(a) The following Seniority Subdepartments are established:

(1) B&B Subdepartment
(2) Water Service Subdepartment
(3) Welding Subdepartment
(4) Fuel Subdepartment
(5) Steel Bridge Subdepartment
(6) Track Subdepartment
(7) System Rail Laying Subdepartment"

AGREEMENT MW-12 Between the St. Louis - San Francisco Railway Co. And its Employees Represented by The BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES (Dated June 13, 1974)

The Carrier, its defense, raises the following:

1. The work performed was on behalf of a Lessee
2. The Organization has failed to establish that the work in question was exclusively reserved to bargaining unit members.
3. All claimants were otherwise employed at the time the work was performed.
4. All the equipment under the control of the Carrier, necessary to the operation, was fully utilized at this and other locations.
5. At best, the sole claimant involved in the grievance is C.E. Green."

The first question to be resolved is whether the work at issue is that which is exclusively performed by bargaining unit personnel. The Organization sets forth in its letter of May 24, 1995, the claim that the work has historically been performed by the employees covered under the provisions of the Agreements. This contention is coupled with the Agreement reached between the parties on June 13, 1974. It is found that the work in question has been historically performed by the bargaining unit members.

The next issue relates to whether work being performed on behalf of a lessee of the Carrier is covered by the contract. The record indicates that bargaining unit members performed at least a portion of the work on the project in question and that the work was done under the control of the Carrier. In addition the Carrier was in control of the premises during the time the work was being performed. The close connection which the Carrier had with the work dictates a finding that such work is covered by the Agreement.

The Carrier contends that it was under a tight schedule; that it did not have the necessary equipment; and that the employees seeking relief were continuously

employed during the period in question. From the information presented it is clear the Carrier knew well in advance of the job requirements. The Carrier did have at its disposal a majority of the equipment required and has not refuted the Organization's contention that it could have leased whatever else was needed. The fact that the employees were regularly employed during the period in question does not relieve the Carrier from its responsibility to comply with the terms of the collective bargaining Agreement. It is determined that the Carrier is in violation of the Agreement.

The last matter to be resolved relates to the number of Claimants. The initial claim set forth in the Organization letter of May 24, 1995 asserts that Charles Green and the ten oldest employees in seniority eligible for the work are to be paid for the time the contractor worked from March 22, 1995 to April 29, 1995. Thereafter, on June 20, 1995 the Carrier responded by referring to the claim filed on behalf of Mr. Green. Subsequent letters refer to Green only. On November 18, 1996, Green directed a letter to the Organization, referring solely to himself in the context of the claim. On January 10, 1997, the Organization in response to the conference of this matter in a letter to the Carrier referring to the claim filed on behalf of Green and others and referring to the attached seniority roster. There is no indication that the Carrier was not aware that the claim included not only Green, but an additional ten employees.

The claim is granted on behalf of Green and the ten most senior employees. The Organization claimed 320 hours for each employee, but has not introduced any evidence to substantiate such claim. This matter is returned to the parties for the purpose of determining the ten most senior employees in addition to Green and also to determine the actual hours worked. When this has been done, the Claimants shall be compensated at their then regular hourly rate of pay for a proportionate share of the hours in question.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of December, 2000.

Carrier Members' Dissent
to Award 35169 (Docket MW-33713)
Referee Donald Cohen

This Award is one that cries for dissent. Ignoring the most basic of grievance handling principles, the Majority has destabilized the relationship between these parties on an extremely important and often litigated issue. The first fundamental principle ignored by the Majority was that the Organization never cited a rule(s) allegedly violated until its Submission to the Board. Argument or rule citation not raised during the on-property handling and presented by the Organization for the first time in its Submission to the Board should have been ignored as required by Circular No. 1. See on-property Third Division Awards 20121, 34041, and 34042.

Bypassing Circular No. 1, the Majority then correctly stated the basic matter for decision as, "...whether the work at issue is that which is *exclusively performed* by bargaining unit personnel." But, after correctly stating the basic matter for decision, the Majority, applied an entirely different and inappropriate test and concluded "...that the work in question has been *historically performed* by the bargaining unit members." From there, apparently without further consideration of the record or the Carrier's right to contract out work, the Majority determined that the work should have been assigned to the Employees. But historical past performance was not in dispute in this case. Past Awards on this property have established that the Organization, under a general Scope Rule, must show an exclusive past practice of performance of work to satisfy its burden of proof. Not occasionally performed, not maybe performed, not "historically performed," but exclusively performed. Here again this majority has ignored pertinent precedent involving these same parties. See PLB 4768 Awards 12, 22 as well as Third Division Awards 30947 and 33347. As was noted above, under a general Scope Rule and the well-established precedent on the territory encompassed by the former SLSF, the burden is on the Organization to substantiate that the work of grading has been exclusively performed by it at Hub facilities. There is no evidence in this record that supports the Majority's conclusion that this work had been exclusively assigned to the employees and is therefore reserved to them. In fact, the record establishes that the work had been contracted out in the past.

And even if the work were to be considered Scope-covered, that alone cannot circumvent the Carrier's right to contract out work. The record contained admissions by both the Organization in conference, and in the sole employee statement in the record, that such work had been contracted out in the past. In fact, the employee statement discussed work performed by contractor's forces at Memphis, another Hub center on the SLSF territory. The fact that past Awards recognize the Organization must conclusively demonstrate exclusivity of past performance to prevail in a case such

as this should have led the Majority to deny the claim for lack of proof. See on-property Third Division Awards 20640, 34217, and 34226.

Further, the number of Claimants was not something that needed to be determined by this Board. The record shows the Organization handled this dispute with the Carrier for 17 months and appealed the dispute on behalf of Mr. Green alone. With the appeal, no other Claimants were identified in any of the on-property correspondence. Then, at the last minute, the Organization changed the identity and number of Claimants. For the Majority to conclude that the Carrier was not deceived because of this deficiency has nothing to do with the fact that the Organization did not appeal the claim for anyone other than Mr. Green. Right or wrong, they did what they did. To reach this conclusion again required the Majority to ignore the record that was before the Board.

Finally, the MW-12 Agreement, on its face, established Special Equipment Operator (SEO) positions on a gang able to work over the entire SLSF system. It contains no language guaranteeing the assignment of any or all grading work to the employees. And, it does not contain any language eroding the Carrier's long-standing right to contract out grading work. The equipment listings and rosters do not provide a work guarantee to any employee and they do not change the unrebutted fact that Carrier owned equipment was already in use at Harvard and at other locations at the time.

The Majority's decision in this matter is not supported by the record developed in this dispute but is predicated solely on the assertions of the Organization. The Organization did not prove its case. And since this Award is in direct conflict with such other Awards applicable to this property such as Third Division Award 20121 and Award 12 of PLB No. 4768, this Award cannot be considered precedent on this property. The Award does however prove that re-litigation of the same issues over and over again will sooner or later produce an undeserved windfall to the claimants, as it did here.

For all these reasons, we dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 35169 (MW-33713)
Referee Donald Cohen

One school of thought among railroad industry arbitration practitioners is that dissents are, for the most part, not worth the paper they are printed on because they rarely consist of more than a sour grapes repeat of arguments that were considered and did not prevail in the case. While the Labor Member does not necessarily adhere to this school of thought, it is foursquare on point with respect to the dissent in this case. In a transparent attempt to assail the unassailable reasoning of the Majority, the Carrier Member's dissent misstates the facts, mis-characterizes the effect of the award and then cites anomalous awards as if they represent the dominant precedent on damages, which they do not.

The first problem with the dissent centers on the Minority's assertion that the Board erred by considering rules allegedly not cited by the Organization during the on-property handling. The problem here is that the initial letter of claim clearly cited a violation of the provisions of the March 1, 1951 and the August 1, 1975 Agreements. The Carrier took no exception to citation of those Agreements as to the violation at issue here during the on-property handling and was estopped from objecting to the Board alleging that no rule was cited. The Minority's assertions were not expressed when it had the opportunity to do so and such a complaint comes too late after the notice of intent is filed at the Board.

The second problem with the dissent is that it relies upon the false premise that the Carrier had a long-standing practice of contracting out the work in question. This is a misstatement of the facts. As the record shows, BMWE-represented employes secured with this Carrier a Special Equipment Operator Agreement that reserved work operating the very equipment the Carrier chose to contract out in this case. Since the negotiation of that Agreement the BMWE-represented employes operated under that Agreement for decades performing the very same work at issue here. Hence, the Majorities findings that such work is reserved to BMWE-represented employes was not a difficult finding. When, as here, the Board is faced with a general Scope rule the standard for establishing Scope coverage is whether the work has been customarily, traditionally and historically performed by the employes. Not exclusively performed as the Minority urges. Evidence of this standard is found within Awards 20 and 21 of Public Law Board No. 4402, 1 and 25 of Public Law Board No. 4768 **involving these parties**. Typical thereof is Award 20 of Public Law Board No. 4402, wherein the Board held:

> "Third, we disagree with the Carrier that in order to demonstrate a violation of the contracting provisions in the Note to Rule 55 and the December 11, 1981 letter that the Organization must show that work that has been contracted out has been pre-

viously performed exclusively by the covered employees. The negotiated language governs work 'which is *customarily* performed by the employees' - not work that is 'exclusively' performed [emphasis added]. The analysis on this question is similar to the resolution of the Organization's arguments concerning the notification requirements. Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so.[1] *See e.g.*, Third Division Award 20633 between the parties (quoting Third Division Award 20338) '"... Additionally, we observe that the Note to Rule 55 specifically alludes to work which is *customarily* performed by the employes rather than the frequently argued doctrine involving work *exclusively* performed."' [emphasis in original]); PLB 4370 Award 21, quoting Third Division Award 24280 ('... [T]he Organization need not meet the burden of exclusivity of work assignment ....'). Of particular interest is PLB 4768, Award 1 and awards cited therein, which, although discussed in a notice context, makes the correct analysis [emphasis in original]:

> ... [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.

---

[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.

"* * *

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]

---

[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."

Hence, the question as to the applicability of the exclusivity test has been answered on this property and the Minority's complaining over this issue must be silenced.

The Minority assails the remedy by stating that it was improper to allow compensation for employes that were not specifically named by the Organization. The initial claim named one Claimant (Green) and ten (10) senior employes. Thereafter, the Carrier never disputed the Claimant, named or unnamed during the handling of this dispute on the property. Again, the Minority's late lamenting as to the outcome of this claim can only be described as sour grapes. Since the very inception of the NRAB and Public Law Boards, arbitrators in this industry have been awarding monetary damages in contracting out cases and similar cases, not only to make claimants whole for wage loss suffered, but, more importantly, to enforce the integrity of the Agreements, whether named or unnamed.

Finally, the Minority attacks the validity of the June 13, 1974 Agreement establishing the Special Equipment Operator group. As is typical with most Carriers and this Carrier in particular as soon as the ink is dry on an Agreement, the Carrier sets out for a way around it rather than complying with the terms and conditions of the Agreement. In other words making an Agreement with the Maintenance of Way employes is an exercise in futility for the Organization insofar as good faith on the Carrier's part is concerned.

Award 35169 is a well-reasoned award that drew its essence from the plain language of the Agreements and set forth a remedy consistent with literally thousands of awards and dominant legal precedent. For all of these reasons, the Carrier Members' dissent falls short just as its initial case fell short and should be given the same amount of credence, which is to say none.

Roy C. Robinson
Labor Member