Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36853
Docket No. MW-36212
04-3-00-3-406

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Annex Railroad Builders) to perform Maintenance of Way work (switch, tie and ballast installation, surfacing and all other related work) between the North and South road at Rock Island Junction from February 19 through March 5, 1999 (Carrier's File 013-30/T-1-99).

(2) As a consequence of the violations referred to in Part (1) above, Messrs. J. J. Wilson, J. West, D. Stogner, R. Gatner and R. Gower shall each be allowed '*** pay for all straight hours and overtime hours worked by the contractor during this period that contractor was performing the work that was rightfully the claimants.***"

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.

Under date of November 6, 1998, the Carrier issued a notice of its intent to contract out the installation of a No. 9 turnout at Kessler Container in St. Louis, Missouri. In its notice, it indicated that there would be at least one BMWE-represented employee involved from start to finish and that all forces were currently involved in other projects and would not be furloughed. A proper conference was held concerning the notice.

By letter dated April 16, 1999, the Organization filed a claim that the project proceeded without taking account of the fact that the work belonged to BMWE-represented employees. It further argued that the Claimants thereby experienced the loss of work opportunity when the outside contractor performed the work. The Organization's central argument on the property is that the Claimants "experienced the loss of work opportunity and the loss of monetary opportunity" when their Scope protected work was performed by outside forces.

The Board reviewed the entire record. The Carrier stated that it "is simply not true as claimants lost no work opportunities nor did claimants lose any monetary opportunity. Claimants were fully employed during the entire claim period including working numerous hours of overtime."

The letters from employees demonstrate that this is work previously performed by BMWE-represented employees. Awards cited by the Carrier demonstrate that track work has also been previously contracted out on this property. Such mixed practice under this general Scope Rule does not prove a violation. While the Organization alleged that the work could have been postponed or rescheduled and routine work could have been rearranged so that the Claimants could have worked on this project, there is nothing in Article IV or in the evidence

of this record that would lead to that conclusion or become relevant under these circumstances. While notice was given in 1998 that the work would begin in November, the actual claim from February to March 1999 is still premised on the fact that the Carrier denied work to BMWE-represented employees. Beyond allegation, there is no persuasive evidence that the employees could have ever been rearranged.

Due to the fact that the work was not customarily and traditionally performed by BMWE-represented employees; that notice was properly given; that Article IV was not violated; and that all employees were fully employed as stated by the Carrier ("all TRRA forces are involved in major TRRA projects and will not be furloughed during the above work") we find no violation of the cited Rules and Agreement. Lacking any persuasive evidence that Carrier forces were available to be rearranged or not involved in major projects, the Board has no recourse but to deny the claim.

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 28th day of January 2004.

LABOR MEMBER'S DISSENT
TO
AWARD 36853
DOCKET MW-36212
(Referee Marty E. Zusman)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the record as it was developed on the property. Such is the case here.

It is apparent from a reading of this award that the Majority has a particularly biased view of contracting out under this Agreement. So much so that its biased view has clouded its judgment. The record was replete with first hand, uncontroverted statements from long time employes that confirmed this is work that has been customarily and traditionally performed by Maintenance of Way employes for decades. In contrast the Carrier presented no evidence to show, much less prove, that it had contracted out such work in the past without protest from the Organization.

The Majority's twisted view of a "mixed practice" is truly troubling. When the Carrier issues a notice of intent, in accordance with Article IV of the May 17, 1968 National Agreement, to contract out work and the Organization desires a meeting the parties are required to meet and discuss the matter in good faith. In the event no understanding is reached the carrier may proceed with said contracting, **and the organization may file and progress claims in connection therewith**. Nothing in Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection with the Carrier's intent to contract out the work. Apparently the Majority considers the fact that the parties have adjudicated contracting claims in the past as evidence of a "mixed practice" resolving in favor of the Carrier. Clearly, this mind set exhibits a prejudiced view in contracting out claims on this property. There is absolutely no language in Article IV that gives either party a right they did not already possess.

What is particularly troubling is that the Majority completely ignored **Awards 2, 3, 6, 7, 11, 12, 13, 14 and 15 of Public Law Board No. 6086** involving these parties and similar fact patterns, which were presented during panel discussion. It was pointed out that this case was nearly identical to **Award 15** of that Board and involved the same contractor. The Board held in that case:

> "As this Board has explained in Awards 3,4,6,1,11,12,13,and 14, the Organization has the burden of going forward and making out a *prima facie* case of Scope Rule violation by a preponderance of record evidence showing consistent and regular performance of the claimed work under a 'General' Scope Rule. But if the Organization makes that evidentiary showing, the burden of persuasion shifts and Carrier must (sic) sufficient evidence to rebut such a showing and/or to support its assertion of an affirmative defense under Article IV, e.g., necessity for specialized equipment. In our considered judgement, on this record, the Organization carried its burden of proof by a preponderance of record evidence demonstrating that Carrier historically and traditionally assigned its Track Sub-Department employees, including Claimants, to perform tie replacement work indistinguishable from the work disputed in this case, at various locations throughout TRRA property. Carrier did not effectively rebut that evidence nor has Carrier persuasively supported with any evidence the mantra of counter assertions set forth in its final denial letter of June 27, 1996, *supra*." (Emphasis in original)

The facts and evidence presented in this case was virtually identical to that which was presented to **Public Law Board No. 6086** which ultimately led to **Award 15**. It is astonishing that the Majority in this case did not even see fit to mention any of those Public Law Board Awards in its analysis of this case.

For a mixed practice to exist there must be some evidence that other than Maintenance of Way forces have performed the work and that such evidence must establish more than a few isolated incidents. Moreover, there must be a showing by the Carrier that such work had gone uncontested by the Organization for years. The evidence that the Board relied on here were awards wherein the Organization contested the Carrier's actions. In this instance, the Carrier presented absolutely no evidence during the handling of this dispute on the property to prove it had an established past practice of contracting out this type of work in the past. Undoubtedly, a contested action by the Organization to the Carrier use of an outside contractor cannot be equated to a "mixed practice".

The award is therefore palpably erroneous and of no precedential value.

Respectfully submitted,

Roy C. Robinson
Labor Member - NRAB