Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37947
Docket No. MW-36976
06-3-01-3-609

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Lunda Construction Company) to perform Maintenance of Way work [all work involved in building two (2) bridges] at Ihlen, Minnesota on the Marshall Subdivision of the South Dakota Division beginning on July 8, 1997 and continuing through August 22, 1997 (System File T-D-1404-B/MWB 97-11-19AH BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out the aforesaid 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 B. J. Johnson, K. G. Borg, R. J. Hillestad, D. G. Skillman and G. W. Franka shall now each be compensated '...for an equal and proportionate share of thirteen hundred seventy-six (1376) hours straight time and

three hundred thirty-four (334) hours time and one-half at their respective 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 are a Foreman, two First-Class Carpenters, a Truck Driver, and a Blacksmith/Crane Operator, all of whom hold seniority either within the B&B Subdepartment or Roadway Equipment Subdepartment.

The instant dispute began when the Carrier notified the Organization by letter dated December 12, 1996, of its intent to contract out work related to a siding track extension project, including the construction of two bridges, in the vicinity of Ihlen, Minnesota. Specifically, the Carrier listed in its notice:

"Ihlen, Minn. MP 109.82 to MP 110.93
Extend siding 1.11 miles
By Contract
Grading 34,000 Cu Yds
Subballast 4,400 Cu Yds
Construct 2 bridges 1 – 100 lf 1 – 64 lf
Extend 1 42' RCP
Construct 1.1 miles of fence

By Carrier forces
Construct 1.11 miles of siding using conventional method
Construct 2 #20 T.O.'s
Rehab 1.19 miles of existing siding"

In response to the notice, the Organization requested a conference, which was held on January 9, 1997. By letter dated January 26, 1997, the Carrier rejected the Organization's objections to the work being contracted out. On May 30, 1997, the Carrier contracted with Lunda Construction Company (Lunda) to perform work including "Excavation, grading, placement of drainage structures, construction of bridges and placement of subballast relating to construction of siding track extension at Ihlen, MN...."

On September 5, 1997, the Organization filed a claim contending that the Carrier's contracting for the building of two bridges at Ihlen was in violation of the parties' Agreement. The Carrier denied the claim. Having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

Rule 1 (Scope) of the parties' Agreement, provides in pertinent part:

"A. These rules govern the hours of service, rates of pay and working conditions of all employes not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department . . .

B. The Maintenance of Way and Structures Department as used herein means the Track Sub-department, the Bridge and Building Sub-department, the Welding Sub-department, the Roadway Equipment Sub-department and the Roadway Machinery Equipment and Automotive Repair Sub-department of the Maintenance of Way Department as constituted on date of consummation of this Agreement."

Rule 2 (Seniority Rights and Sub-Department Limits) establishes that seniority rights generally are confined to the sub-department in which one is

employed. Rule 5 (Seniority Rosters) provides for the compiling of seniority rosters in each sub-department by seniority districts and rank.

Rule 55 (Classification of Work) establishes occupations within the sub-departments, including "F. First Class Carpenter. An employee assigned to construction, repair, maintenance or dismantling of buildings or bridges . . . ;" and "I. Steel Bridge and Building Mechanic. An employee assigned to the setting of columns, beams, girders, trusses, or in the general structural erection, replacement, maintaining or dismantling of steel in bridges, buildings and other structures . . . " In addition, the parties' Agreement includes the following 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 with the scope of this Agreement - in the Maintenance of Way and Structures Department . . . - perform work in connection with the construction and maintenance or repair 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. 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 to the parties' Agreement comprises a December 11, 1981 Letter of Understanding which states:

> "The carriers 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.
>
> 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."

The Organization contends that BMWE-represented employees have a contractual right to perform the bridge construction work in dispute, under Rules 1, 2, 5, 55 and the Note to Rule 55. The Organization further argues that Carrier forces, including the Claimants, have customarily performed such bridge construction work, and provided statements, photographs and other evidence in support of its assertion. It is the Organization's position that the Carrier failed to demonstrate a valid justification for contracting out the work at issue as required by the Note to Rule 55. According to the Organization asserts, the Carrier alleged that the work in dispute was of a "nature and magnitude" customarily contracted out,

and that the Carrier did not possess the necessary specialized equipment or skills to handle the work within the time necessary to complete it. The Organization contends that the Carrier's allegation in this regard was false, and that the Claimants could have performed the work in question using equipment owned or readily available to the Carrier.

As a first step along the road to prevailing, the Organization must prove that BMWE-represented employees have a right to the work at issue, either under the explicit terms of the parties' Agreement, or by virtue of past practice. With regard to the contractual provisions cited by the Organization as reserving such work to its members, the Board finds that there is no contractual language making such a reservation of work. Rule 1 of the Agreement, governing Scope, has been recognized many times by the Board as one general in nature and not conferring any ownership of work. Rules 2 and 5, regarding seniority, shed no light on the issue. Rule 55 is a classification rule only, as well-stated in Third Division Award No. 33938: "Authoritative precedent between these same parties holds that, standing alone, the Classification of Work Rule does not reserve work exclusively to employees of a given class . . . ."

In the absence of a contractual reservation of the work to the Organization's members, the Organization must show that such work has been customarily and traditionally performed by its members, systemwide, to the practical exclusion of others. See, e.g., Third Division Award 33938. The Organization provided evidence that the Claimants in the instant case have performed at least some work similar to that in dispute. However, the Carrier submitted evidence of hundreds of examples of new bridge construction projects that the Carrier contracted out over the last century, as well as statements from Structures supervisors and managers asserting that such projects have often been contracted out. In these circumstances, the Organization failed to prove that its members have performed the work in question to the exclusion of others, systemwide. At best, the record shows that a mixed practice has been followed with respect to using Carrier forces or a third party contractor to perform such bridge construction work.

Furthermore, without proving that the bridge construction work in question is reserved to its members, the Organization cannot prevail in its assertion that the Carrier violated the Note to Rule 55 by providing a 'false' reason for the contracting

out. Authoritative precedent dictates that the requirements of the Note to Rule 55 are not triggered unless the work at issue is work belonging exclusively to the Organization's members. See, e.g., Third Division Award 33938; Public Law Board No. 2206, Award 8. Where, as here, the work has been subjected to a mixed practice, the Carrier's reason for contracting out the work is irrelevant to its entitlement to do so. The Note to Rule 55 poses no restriction on the Carrier's ability to contract out in accordance with the parties' past practice.

The Board further notes that, even had the Organization been able to prove that its members exclusively performed the work in question systemwide, the Organization still could not have prevailed under the Note to Rule 55. Arbitral precedent between the parties has established that projects such as that involved in the instant case are of sufficient magnitude to meet the Note to Rule 55's requirements. Public Law Board No. 4768, Award 14 and 71.) The Organization also failed to prove its assertions regarding any lack of proper notice or good faith. The Carrier provided notice of its intent to contract out the work in question, and conferenced with the Organization as requested, even though such notice arguably was not required because the work to be contracted out was not within the exclusive province of the Organization's members.

Having found that the Organization failed to prove any violation of the Agreement, the Board must 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 19th day of September 2006.

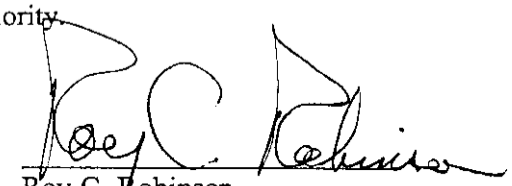
LABOR MEMBER'S DISSENT
TO
Award 37947, Docket MW-36976
Referee Parker

Because the thoroughly rejected "exclusivity theory" was the pivotal underlying premise relied upon by the Majority in Award 37947, a dissent is required to emphasize its palpably erroneous conclusions which are worthless as precedent.

First, it is important to note that the dispute involved this Carrier's decision to contract out a 1.11 mile-long siding track extension which included the subject construction of one 100 foot-long bridge and one 64 foot-long bridge at Ihlen, Minnesota beginning July 8, 1997. Although the Majority correctly noted that both the employes and the Carrier had presented evidence during the on-property handling in support of their respective positions concerning the past assignment of such work, it erroneously concluded that such constituted a "mixed practice" which fell short of the Note to Rule 55 requirement of customary performance to show that the work belonged "exclusively" to the Organization's members.

"Exclusivity" vis-a-vis the "notice" provisions of Article IV and rules such as the Note to Rule 55 which were taken verbatim therefrom, has been **REJECTED** by dint of arbitral authority. Hence, the Majority's decision revealed naivete or mindless haste to formulate an extremely narrow brand of industrial justice - or both. Selective quotation of two (2) awards from the same arbitrator can not serve to cure the infirmity because beginning with Arbitrator Dugan in Third Division Award 18305 (CMP), more than TWENTY (20) other arbitrators have unanimously rejected the application of "exclusivity" to the same contracting "notice" provisions - See Third Division Awards 19631 (IC) Brent; 19899 (SLF) J. Sickles; 23354 (Mil-KCS) Dennis; 23578 (UP) LaRocco; 24173 (CMP) Sirefman; 24236 (SLF) C. Sickles; 26016 (PPU) Gold; 26212 (SPE) Cloney; 26673 (MCR) Lieberman; 27012 (CRC) Marx; 27185 (CRC) Muessig; 27634 (CRC) Goldstein; 27650 (EJE) Suntrup; 28692 (TTR) McAllister; 28936 (SSY) Vernon; 29007 (MPR) Wallin; 29253 (KCS) Fletcher; 29021 (MPR) Marx; 29825 (MPR) Wesman; 29677 (MPR) Duffy; 29979 (SPE) Meyers; 31599 (KCS) Eischen; 31777 (LNR) Marx and 36015 (BN) Benn. The only reasonable conclusion being that Award 37947 is clearly anomalous and without precedential value.

The Majority compounded its calamitous "exclusivity" error by characterizing the subject work project, which involved just five (5) employes working normal hours for six (6) weeks, as being work of a magnitude beyond the capabilities of the Carrier's veteran B&B forces. ***On its face***, this was both false and implausible. This Carrier has gangs much larger in number of men that customarily perform such work than the crew used by the contractor. Yet, the Majority ignored the obvious and provided encouragement to the Carrier's specious pitch - a pitch that will continue as long as there is one rube left at the carnival with a nickle in his pocket. Because of the illogical findings of Award 37947, we submit it was wrongly decided and should not be followed nor cited as authority.



Roy C. Robinson
Labor Member