Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40213
Docket No. MW-38125
09-3-NRAB-00003-040003
(04-3-3)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (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 (Mariner Construction) to perform Maintenance of Way work (unearth concrete footings and foundation and fill/level excavation) in the old Roundhouse area in the Mandan yard on March 20, 21 and 22, 2000. [System File T-D-2067-H/11-00-0385 BNR].

(2) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (unearth concrete footings and foundation and fill/level excavation) in the old Roundhouse area in the Mandan yard on April 12, 2000. [System File T-D-2066-H/11-00-0384 BNR].

(3) The Carrier violated the Agreement when it assigned various outside forces (Including Chief Construction, Northwest Contracting, Jem Construction and Westcon) to perform Maintenance of Way work (excavation and building site preparation) in the old Roundhouse area in the Mandan yard beginning on April 28, 2000, and continuing. [System File T-D-2068-H/11-00-0386 BNR].

(4) The Carrier violated the Agreement when it assigned various outside forces (Including Chief Construction, Northwest Contracting, Jem Construction and Westcon) to perform Maintenance of Way work (construction of building and facilities for treatment of water) in the old Roundhouse area in the Mandan yard beginning on July 10, 2000, and continuing. [System File T-D-2122-H/11-00-0503].

(5) 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.

(6) As a consequence of the violations referred to in Parts 1 and/or 5 above, Claimant R. Hecker should now be compensated for sixteen (16) hours straight time pay and Claimant A. Schwindt shall now be compensated for eight (8) hours straight time pay. Pay is to be at the respective Group 2 Machine Operators rate of pay.

(7) As a consequence of the violations referred to in Parts 2 and/or 5 above, Claimant R. Hecker should now be compensated for sixteen (16) hours straight time pay and Claimant A. Schwindt shall now be compensated for eight (8) hours straight time pay. Pay is to be at the respective Group 2 Machine Operators rate of pay.

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimants T. F. Roll, R. A. West, T. B. Rakes, T. G. Kimsey, R. J. Thilmony, M. V. Renner, L. R. Aichele, A. L. Johnson, N. H. Singer, R. P. Hecker, and A. M. Schwindt, S. Riehl, J. M. Sullivan, L. G. Belden, H. L. Doll, J. G. Beehler, L. L. Waterson, L. D. Hofer, J. F. Siegel, T. Roma, R. L. Kellogg, L.

P. Hibl, L. K. Roberts, D. D. Marchiando, D. G. Lode, C. T. Jordan, J. L. Wright, R. O. Barth, T. J. Kreitinger, and T. D. Jochem shall now each 'receive an equal and proportionate share of all hours expended by the outside contract forces working in the Mandan Yard, beginning April 28, and continuing until they are removed from the Carrier's right of way. Pay is to be at Claimants' respective rates of pay.'

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants M. D. Anderson, K. M. Carlson, S. Riehl, M. Sullivan, L. G. Belden, H. L. Doll, J. G. Beehler, L. L. Waterson, L. D. Hofer, J. F. Siegel, T. Roma, R. L. Kellogg, L. P. Hibl, L. K. Roberts, D. D. Marchiando, D. G. Lode, C. T. Jordan, J. L. Wright, R. O. Barth, T. J. Kreitinger, and T. D. Jochem shall now each 'receive an equal and proportionate share of all hours expended by the outside forces in the construction of the steel structure 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 instant claim involves the construction of a wastewater treatment facility at the Carrier's facility in Mandan, North Dakota.

The record indicates that on May 21, 1992, the Carrier notified the Organization of its intent to utilize a contractor for "Installation of Groundwater Remediation Systems: Mandan ND."

The May 21, 1992 letter also provided:

> "This is a courtesy letter advising you that the Burlington Northern will be utilizing a 49 hour OSHA/RCRA trained contractor to install and operate a groundwater remediation system at Mandan, ND. In accordance with 29 CFR 1910.120(a)(1)(i-v) and (a)(3), this site is a hazardous substance release site and requires recovery system installation and remediation by personnel that have training in accordance with 29 CFR 1910.120 regulations.
>
> This project is scheduled to start in July, 1992."

The parties held a conference on June 9, 1992 and reaffirmed their respective positions. Later that day, the Carrier notified the Organization that it intended to proceed with the project.

The record indicates that the Carrier and the North Dakota Department of Public Health – Environmental Health Section were communicating in the Fall of 1999 regarding fuel remediation and ground water remediation. The communications continued until at least August 2000.

In a letter dated June 16, 2000, the Carrier notified the Organization about the "Mandan Interim Treatment Plant and Enhanced Product Recovery System." The letter stated:

> "As information, the Carrier intends to continue its efforts to construct an interim treatment plant and enhanced product recovery system at Mandan, North Dakota. The following is a list of operation tasks for work already completed and for future work planned for the remainder of the year."

The letter contained a section listing "Work Completed to Date" and another section listing "Work Planned for Year 2000."

In a June 21, 2000 letter, the Organization replied in pertinent part:

> "This concerns your letter . . . providing information that the Carrier intends to continue its efforts to construct an interim treatment plant at Mandan, North Dakota. Your letter does not indicate if any of the work is to be performed by outside contractors or, if that were the case, why such work should be performed by contractors. We presume you have provided us this information for a reason and we are therefore requesting a conference in which to meet to discuss it."

In a letter dated July 12, the Organization acknowledged that a conference had been held on July 11, 2000 and that the parties were unable to reach an understanding. The Organization stated that the notice was late under Rule 55. Further, the Organization rejected the Carrier's statement that the instant work was a continuation of the remediation work begun in the 1990's because the work involved construction of a new building and the contractors were entirely new contractors. The Carrier also rejected the Carrier's assertion that the remediation work required 40 hours training pursuant to Federal regulation – citing that the construction of the new building was not remediation, it was construction. The Organization concluded by asserting that the Agreement requires a project to be piecemealed when there is no detrimental effect.

The Carrier responded in a July 12, 2000 letter, stating in pertinent part:

> "This is to advise that this is a continuation of the groundwater recovery system efforts that you were given a courtesy notice dated May 21, 1992 and conference June 9, 1992. This is a hazardous substances release site and requires recovery system installation and remediation by personnel that have training with applicable regulations."

The Organization maintains that the Carrier violated the Agreement when it did not follow the notice requirements for subcontracting. Further, the Agreement was violated when the Carrier used outside forces to perform work that should have been done by Organization-represented employees. Moreover, the work is not part of the 1992 Groundwater Remediation project and the notice of the instant work was improper. The work here began prior to the June 16, 2000 notice to the Organization. The Carrier counters that the wastewater facility was the continuation of groundwater remediation that began in 1992, the work was not exclusive to Organization-represented employees and the Carrier is not required to piecemeal projects.

The Organization maintains that the test in a subcontracting matter is not "exclusivity" as that inquiry is reserved for intra-craft disputes. The Carrier counters that the Organization must prove an exclusive past practice of the work in order to show that the work should not have been performed by contractors.

The Board carefully reviewed the record. The Carrier asserts that the groundwater remediation project began in 1992 and is a continuing project where work is done as the environmental dictates of the State of North Dakota and Carrier budgets allow. Here, the record contains numerous correspondence that indicate to the Board that the groundwater remediation project has been a continuing project that is closely regulated by the State of North Dakota Department of Public Health. It began as early as 1992 and continued. Under the specific facts of this matter, the original 1992 notice was proper for the continuing remediation work.

The Organization points to no specific language in the Agreement reserving the work at issue. Further, there are numerous Awards in support of the proposition that Rule 1 is a general Scope Rule and does not provide an exclusive grant of work to the employees discussed therein. Accordingly, the burden is on the Organization to prove that the disputed work has traditionally, customarily and historically been performed by the Claimants' craft. Prior Awards indicate that "traditionally, customarily and historically" means that the work has been performed on a system-wide basis to the exclusion of others including outside contractors. (See Third Division Award 37618 and Awards cited therein.)

Here, the Organization cannot prove that the work is reserved to BMWE-represented employees by the Agreement or that the work has been performed by them on a system-wide basis to the exclusion of others. It is undisputed that Federal regulation requires that remediation work be performed by trained employees. BMWE-represented employees do not possess the requisite training. Further, the Organization provided some evidence that a portion of the work at issue has been previously performed by BMWE-represented employees, but that evidence is insufficient for the Organization to meet its burden of proof. Further, the Carrier is not required to piecemeal a project and the Organization failed to prove that its members possessed the required OSHA training to perform the remediation work. (See Third Division Award 34217.)

The Organization has not met its burden of proof. 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 21st day of December 2009.

LABOR MEMBER'S DISSENT
TO
Award 40213, Docket MW-38125
Referee Clauss

The Majority erred in its findings in this award and a Dissent is in order. The Majority erred in its interpretation of the Scope and notice provisions of the Agreement, based its findings on award precedent not applicable on this property and ignored the precedent that is applicable between these parties.

This case involved the Carrier's decision to contract out the unearthing of old concrete footings and foundations and thereafter fill and level the area in the Carrier's Mandan, North Dakota Yard on various dates in March, April and July, 2000. The Organization presented ample evidence during the on-property handling to show that such work is reserved to the employes covered by the collective bargaining agreement. As such, the Carrier was bound by the Note to Rule 55, the notice provisions of this Agreement, 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:**
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> **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 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 that 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."

A review of the above-cited Agreement language reveals the parties agreed that all work **customarily** performed by the employes covered by the Agreement is reserved to them and the Carrier could not contract out any work unless it met the exceptions listed within the Note to Rule 55. Sounds pretty straightforward to me, however, the majority went out of its way to ignore the clear language of the Agreement. To make things worse the majority then went on to ignore recent precedent on the property. The precedent the majority ignored is **Award 33 of Public Law Board No. 6204**, adopted September 14, 2007, **Third Division Award 36015 attached to our submission** and **Third Division 39685**, adopted May 26, 2009. These awards came to polar opposite conclusions as to the applicability of the exclusivity concept.

Instead the majority concocted an opinion that asserts the proper precedent is found in Award 37618 involving these parties. The flawed reasoning found within that award cannot stand as precedent here for the following reasons. The awards cited within Award 37618 are Third Division Award 37365, involving this Organization and the interpretation of the Union Pacific Agreement, Award 150 of Special Board of Adjustment No. 1016, involving this Organization and the interpretation of the former Conrail Agreement and Award 1 of Public Law Board No. 6537, involving this Organization and the interpretation of the St. Louis-San Francisco Agreement. None of the awards cited within Award 37618 involved these parties and this Agreement. In any event, regardless of the flawed reasoning found within that award a review thereof will reveal that it did not embrace the exclusivity concept espoused by the majority in this case. Instead the Board held in Award 37618 that:

> "Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the work of constructing roadbed is either definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work has customarily and traditionally been performed by members of the Organization."

No assertion that the exclusivity concept was ever made in the opinion of that award.

Noticeably absent in this award were the findings of **Award 33 of Public Law Board No. 6204** involving these same parties and a contracting dispute, which was presented to the neutral member of the Board at the hearing of this docket, wherein it held:

> "Upon the record as a whole the Board concludes that the union has sufficiently met its burden of proof in this case as moving party. The work done by the contractors at Murray yard in this case, with the exceptions noted that deal with demolition and soil testing, was work customarily done by members of this craft.[3] The Carrier violated the labor agreement provisions cited, including the Note and sidebar of 1981.
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> [3]There is no need, in this case, to address the distinctions between 'exclusive' versus 'customary' jurisdiction over work. This case is not about exclusive jurisdiction."

In **Award 36015**, which was in the Organization's submission in this case, involving these parties and the exclusivity concept the Board held:

> "Second, the Organization need not demonstrate that employees exclusively performed that work. See Third Division Award 32862 ('. . . exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims.'). See also, Public Law Board No. 4402, Award 21 and cases cited ('. . . the Organization need not demonstrate that the work performed by outside forces had previously been "exclusively" performed by the covered employees, but the Organization must show that work was "within the scope" of the Agreement and "customarily performed" by the employees.)"

And in the most recent award involving these parties and the exclusivity concept, which was presented to this neutral months prior to the issuance of this award, the Board in held **Award 39685**:

> "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.
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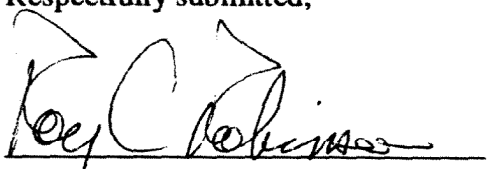
> For this purpose, bargaining unit work is defined by a combination of the Scope Rule, classification specifications set forth in Rule 55, and some custom. ***"

Standing in stark contrast to the findings of this award are the awards cited above. The Board in this case should have pointed out how the findings in this case were somehow different than the findings of **Award 33 of Public Law Board No. 6204, Third Division Awards 36015 and 39685**. Of course the majority in this Award did not do so, much to the detriment of the well-established principle of this Board that precedent involving parties to a dispute should be followed. Because of the erroneous findings of Award 40213, this award was wrongly decided and should not be followed.

Respectfully submitted,



Roy C. Robinson
Labor Member