Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40460
Docket No. MW-39276
10-3-NRAB-00003-060018
(06-3-18)

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF 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 (Hulcher) to perform Maintenance of Way and Structures Department work (install a switch and panels) at Murray Yard in Kansas City, Missouri on December 12, 2002 [System File C-03-C100-53/10-03-0148(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 W. Calvin, C. Oliver, R. Newberry, G. Cecineros, R. Hernandez, J. Young, L. Craig and S. Genova shall now each be compensated for eight (8) hours at their respective straight time 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.

At the time of the incident giving rise to this claim, all Claimants and held seniority in the Maintenance of Way and Structures Department and were regularly assigned to the positions and classes listed below on the Brookfield Subdivision.

W. L. Calvin	Foreman
C. D. Oliver	Foreman
R. A. Newberry	Sectionman
G. M. Cecineros	Sectionman
R. G. Hernandez	Sectionman
L. D. Craig	Group 2 Operator
S. V. Genova	Group 2 Operator
J. M. Young	Group 2 Operator

In a November 15, 2002 letter, the Carrier notified the Organization of its intent to use a contractor to provide three side booms with operators to help Carrier forces install a switch and track panels on the Brookfield Subdivision. BNSF stated that it did not own side booms capable of lifting a switch or track panel and that its employees were not qualified to operate such equipment. The letter indicated that work was scheduled to begin on or after December 10, 2002. It invited the Organization to discuss the project and provided a Carrier Official's contact name (Mr. Yeck) and phone number.

By letter dated November 19, 2002, the Organization requested a conference pursuant to the Note to Agreement Rule 55. Therein the Organization objected to contracting out the work, disputed the assertion that the Carrier did not possess the machinery and skills necessary to perform the work, and alleged that this type of work had customarily been performed by Carrier forces.

The Organization's November 19 letter confirmed that its request had been left with the Carrier by voice mail on November 18, 2002, asked the Carrier to contact Vice Chairman, Holder, provided a phone number and stated that any additional equipment the Carrier needs could be rented. Notes written by W. Yeck on the Carrier's phone log indicated that he left messages for Vice Chairman Holder on December 9, 10, 13 and 16, 2002. In a statement dated December 12, 2003, Holder denied that he ever received such a call from Yeck. No conference was held. Each party alleged that the other failed in the conference provision found in the Note to Rule 55 and Appendix Y.

On December 12, 2002, Hulcher Company forces used side booms to install the switch and two track panels as described in the notice. Three Machine Operators, three Laborers and two Foremen worked one eight-hour day.

All maintenance-of-way work at the location, other than the work performed by Hulcher personnel, was performed by BMWE-represented employees. All but two Claimants were fully employed for eight or more hours and were working elsewhere on the day in question. The other two Claimants were on vacation.

The Organization submitted statements from its members asserting that they had in the past performed the type of work described without a side boom. One employee said that he had removed and installed 50 panels, as well as switches, with Carrier-owned machinery (Caterpillar end loaders). The other employee said that he had installed several switches in one piece with an end loader and another time with a Speed Swing. Both said that they had performed these tasks in the Murray Yard where the work at issue occurred.

The Organization obtained and provided a February 11, 2004 letter from Fabick Tractor Company stating that Fabick would rent Caterpillar brand side booms, without operators, on a minimum one month basis.

The Note to Rule 55 of the Agreement states, in pertinent part:

> ". . . Employes included within the scope of this Agreement . . . 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. . . ."

Appendix Y (the Berge/Hopkins December 11, 1981 Letter of Understanding) reads in part:

> "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 therefore."

The Carrier argues that the burden was on the Organization to prove a violation of the Agreement. It contends that the Organization was obligated to prove that the Agreement reserves an exclusive right for this work to be performed by BMWE-represented employees or, if not, it was obligated to prove that the work has been exclusively reserved to BNSF employees by custom, practice and tradition system wide. It contends that BMWE failed to meet its burden of proof.

The Carrier argues that the project requires specialized equipment and expertise which the Carrier does not possess. It asserts that it was able to utilize the outside contractor, including both equipment and its operators, because it owns no side booms, which are specialized equipment. Moreover, it contends, the Organization was unable to prove that its members are qualified to operate side booms or that they had operated

this, or similar, equipment on a customary or exclusive basis. The Carrier asserts that no evidence was produced to show that this work was customarily reserved to BMWE-represented employees or this work is craft work within the scope of the Parties' Agreement. The Carrier contends that even if such evidence had been introduced into the record, it lacks such specialized equipment which was owned by the outside contractor. It contends, therefore, that neither the Note to Rule 55 nor Appendix Y to the Agreement present any barrier to the Carrier's contracting it out.

The Carrier disputes the Organization's assertion that the Carrier failed to contact the Organization to conference the notice and points out that its form entitled "Notes on Contracting Conference" indicates that the Carrier made four calls to Vice Chairman Holder. In addition, the Carrier contends that it is only required to notify the Organization in advance of its intent to contract out work. It contends that no language in the Agreement requires further contact or conferences. The Carrier asserts that by providing written notice on November 5, 2002 of work to start on or after December 20, 2002, it fully met the Agreement's requirements. It further contends that once the Carrier met the requirement to give notice, it was the Organization's responsibility to contact the Carrier to arrange to discuss the notice. The Carrier alleges that as a courtesy, its representative phoned the Organization's representative on December 9, 10, 13 and 16, 2002. It denies that the Organization contacted the Carrier by telephone, as its November 19 letter asserts.

The Carrier further argues that where there is a dispute over an essential fact - in the instant case, who phoned whom - the Board must dismiss the case or rule against the moving party. The Carrier cites on-property Public Law Board No. 5405, Award 18 and Third Division Award 31831.

In support of its position that the Scope Rule requires proof of reservation of the disputed work by clear and convincing evidence of system-wide performance to the practical exclusion of others, the Carrier cites on-property Third Division Award 33938 wherein the Board held:

> "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 or serve as a Scope Rule . . . The general nature of Rule 1, the operative Scope Rule, requires proof

of reservation of disputed work by clear and convincing evidence of system-wide performance, to the practical exclusion of others."

In response to the Organization's exhibit indicating that side boom equipment can be rented from the Fabick Tractor Company, the Carrier points out that the exhibit states that the minimum rental period is one month and that work covered by the Organization's claim is for only a single eight-hour day.

The Carrier asserts that this is a one-day piecemeal claim for a small portion of the work and that the remainder of the work not requiring rented specialized equipment was performed by BMWE-represented forces.

The Carrier further argues that the Organization did not prove any damages by showing that the Claimants were available and unemployed on the day at issue. It cites on-property Third Division Award 36715 for the proposition that damages cannot be awarded to claimants who are already working on assignments elsewhere because they were not available to perform the disputed work. The Carrier argues that, with respect to this specific claim, the number of hours the Claimants request, based on the alleged number of hours the contractor's employees worked is excessive.

The Carrier points out that all Claimants were paid for the day that Hulcher forces performed work. It cites Third Division Award 29202 as holding that even if there is a basis for sustaining a claim, no compensation is warranted where the Claimants are fully employed and suffer no loss.

The Organization argues that the Claimants hold seniority on the territory where the contractor performed the work in question and that because the Claimants have customarily and traditionally performed this work, the assignment of this scope-covered work to an outside contractor violated the Agreement. It argues that the burden of establishing an exception to the Scope Rule rested with the Carrier. BMWE asserts that the Carrier failed to meet its burden.

The Organization argues that the record evidence establishes that the Carrier violated the Agreement by using Hulcher to perform the work. It argues that side booms were not the only type of equipment that could be used to install switches and that the Claimants were available and qualified to perform the work involved here. It points to evidence that craft employees had previously performed similar work using a

front end loader. It asserts that the Carrier had no need to rent side booms to perform the work and could have used equipment (e.g., front end loader) already available on the property.

The Organization further argues that the Carrier failed to contact the Organization to conference the notice and that even if it had tried to make contact, this was just days before and days after the work had been performed. It protests that such efforts do not constitute a good faith effort.

The Organization contends that full employment does not disqualify the claim or the Claimant and that if any Claimant was working elsewhere during the claim period, such was at the Carrier's direction. It maintains that compensation to the Claimants for time worked by the contractor's employees is necessary to remedy the Carrier's violation.

The Organization bore the burden of proving that the Carrier violated the Agreement by subcontracting the work at issue. After reviewing the Agreement, the Board concludes that no Rule or past practice requires the Carrier to assign the installation of switches and track panels to the Organization's members system-wide or to cause switches and track panels to be installed only with equipment other than side booms. There is no showing in the record that BMWE-represented employees have performed the work customarily or exclusively in the past.

The Carrier is afforded reasonable latitude to determine the type of equipment to be used to perform a particular job in the most effective manner. In any event, no evidence was introduced to establish that the installation of switches and track panels was restricted to the use of front end loaders or that the use of side booms is improper or inefficient. There is no evidence that Carrier-owned front end loaders were available at the site on December 12, 2002. No evidence was provided that side booms could have been rented for less than one month, which the Board believes is commercially unreasonable in light of the one-day duration of the job. Neither is there evidence that craft employees are trained and qualified to operate side booms.

The Board notes that in December 1981, the Organization was assured by the Carrier that it would "assert good-faith efforts to reduce the incidence of subcontracting . . . to the extent practicable . . ." and that part of that would be advance notice so the parties could discuss the effects and see if contracting out could be

avoided. The Carrier's November 15, 2002 notice that it would contract out the work was more than 15 days before the December 12, 2002 date on which the contracting first occurred. As required by the Agreement, the notice identified the work to be contracted and the reasons for contracting out. The Board concludes that the Carrier did not violate the 15-day notice requirement.

It is not disputed that no conference took place. However, there is no requirement for such a conference, and there is insufficient evidence to establish that either party conveyed a refusal to meet to discuss this matter in conference. There is some evidence that each party attempted to contact the other. The record shows little more than that the parties failed, despite their efforts, to arrange a date to conference. That is not sufficient to establish that the Carrier violated its contractual obligation.

The Organization did not prove that the Carrier violated the Agreement by refusing to engage in a conference regarding the issue. The fact that no conference took place is not, itself, a violation of the Agreement.

As to the Organization's argument that the Carrier could have rented equipment that its members were capable of operating, the Board is mindful that the Carrier is entitled to make management decisions about what type of mechanical equipment is appropriate for a job unless restricted by law or agreement. The record contains no evidence of either of these types of restrictions on the use of side booms. Although the Organization may have in the past performed this type of work with front end loaders, there is no requirement that performance of this work be limited to the use of only one type of machinery. In any event, there is no evidence in the record that the Carrier still owned front end loaders, that front end loaders were available for this assignment at a location close enough to be brought to the site where this one-day work project was to take place.

As to the use of side booms, the record evidence reveals that the Carrier does not own such equipment. There was no evidence that the Claimants had operated this type of equipment in the past or had the training or skill to operate this specific equipment. Even if the Claimants had been available for training and were capable of being trained to safely operate side boom equipment, its use for only eight hours did not afford a practical length of time to accomplish the training. The availability of side booms for monthly rental does not obligate the Carrier to obtain equipment on such basis to accomplish a one-day job.

This was a one-day piecemeal claim for a portion of the work, the remainder of which was performed by BMWE-represented members. Nothing in the Agreement restricted the Carrier from making the judgment that it did not own this specialized equipment to do the job or the qualified operators to operate it. The Board concludes that there is insufficient evidence in the record to indicate that the Carrier violated the Agreement.

Even if the Organization had prevailed in establishing the Carrier's liability, it has not made a showing regarding damages, that is that the Claimants could have worked on the job in question. The evidence is that two were on vacation and the others were fully employed for the eight hours involved in this case.

In view of all of the foregoing, the claim must be 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 14th day of May 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40460, DOCKET MW-39276, AWARD 40461, DOCKET MW-39277
AWARD 40462, DOCKET MW-39278, AWARD 40464, DOCKET MW-39397
AWARD 40466, DOCKET MW-39399, AWARD 40467, DOCKET MW-39400
(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 40460, 40461, 40462, 40464, 40466, and 40467 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, it's 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 No. 20 of Public Law Board 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.

[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 No. 20 of PLB No. 4402 hardly stand alone. To the contrary, over the last two decades, six 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 No. 1 of PLB No. 4768 (Marx - 1990), Award No. 21 of PLB No. 4402 (Benn - 1991), Award No. 25 of PLB No. 4768 (Marx - 1992), Award No. 61 of PLB No. 4768 (Marx - 1995), Award 36015 (Benn - 2002), Award 37901 (Kenis - 2006), Award 38010 (Zusman - 2007) and Award No. 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 40460, 40461, 40462, 40464, 40466, and 40467 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:

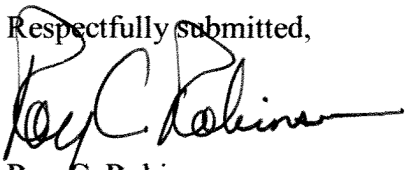
> **"Further, the Board holds that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that 'The exclusivity 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 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 40460, 40461, 40462, 40464, 40466, and 40467 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 40460, 40461, 40462, 40464, 40466, and 40467 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,



Roy C. Robinson
Labor Member