Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40467
Docket No. MW-39400
10-3-NRAB-00003-060039
(06-3-39)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Dickey-Burham) to perform Maintenance of Way and Structures Department work (replace windows) on the roof of the Main Car Shop at Havelock, Nebraska beginning on January 12, 2004 and continuing, instead of B&B Foreman R. A. Larimer, B&B 1st Class Mechanic/Carpenter J. N. Stewart, R. L Thoms and F. Scrum [System File C-04-C100-59/10-04-0164(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 violations referred to in Parts (1) and/or (2) above, Claimants R. A. Larimer, J. N. Stewart, R. L Thoms and F. Scrum shall now each be compensated at their respective

and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning January 12, 2004 and continuing."

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 established and held seniority in the Bridge and Building ("B&B") Sub-department – R. A. Larimer as a Foreman and J. N. Steward, R. L. Thoms and F. Scrum as First Class Mechanics/Carpenters.

In an August 1, 2003 letter, the Carrier notified the Organization that it intended to contract for the replacement of windows on the upper level of the north side of its Havelock, Nebraska, Car Repair Facility with windows electrically operated from switches located at ground level. The work included wiring for electrical control and attaching electric motors to the controlled windows. The Carrier's stated reasons were that it did not have the available forces with the skills required to install these specialty windows and that the work had historically been contracted out. The notice did not state a projected start date. On August 14, 2003, the parties held a conference regarding this issue but without resolution.

The Organization provided multiple signed statements indicating that on December 6, 2003, the contractor entered the property to take measurements, but no work on the windows began until January 12, 2004. A June 22, 2004 letter from

contractor Dickey-Burham, Inc. to the Carrier stated that window work commenced December 6, 2003.

The Carrier submitted documentation, which showed that, windows on the building's south side were replaced with windows identical to those installed in this instance. That work was performed by contractor forces in 1999.

Claimant Thoms provided a signed letter indicating that he was personally aware of window work performed by B&B forces at various times from 1976 through 1995. The letter did not state whether any of this work involved windows above the lower level or whether the windows were electrically operated. Neither did the Organization offer evidence whether such work had been performed by B&B employees at locations other than Havelock, Nebraska, on an exclusive system-wide basis.

The Organization introduced no affidavit, document, or other evidence as to the Claimants' employment status during this period and no evidence as to specific monetary damages claimed. In rejecting the claim for damages, the Carrier asserted that the Claimants were fully employed during the claim period and denied that any employees suffered financial loss as a result of its use of the contractors. It provided no employment or contractor records to this effect for the record.

The Agreement provides, in part:

"RULE 1. SCOPE

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. . . .

RULE 5A. SENIORITY ROSTERS

Seniority rosters of employes of each sub-department by seniority districts and rank will be compiled. . . .

RULE 42A.

All Claims or grievances must be presented in writing . . . within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . .

RULE 42D.

A claim may be filed at any time for an alleged continuing violation. . . .

RULE 55 CLASSIFICATION OF WORK

* * *

B. Foreman.

An employe assigned to direct the work of men and reporting to officials of the railroad shall be classified as a foreman.

* * *

F. First Class Carpenter

An employe assigned to construction, repair, maintenance or dismantling of buildings or bridges, including the building of concrete forms, erecting false work, etc. He shall be a skilled mechanic in house and bridge work and shall have a proper kit of carpenter tools. . . .

* * *

NOTE to RULE 55

* * *

. . . [W]ork . . . 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. . . 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. . . . 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.

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."

A claim was filed by the Organization protesting the Carrier's use of the contractor. Its action was dated February 25 and received by the Carrier February 27, 2004. The claim was progressed on the property in the usual manner up to and including the Carrier's highest designated officer but without resolution.

The Carrier initially argues that the claim is procedurally defective, as time barred by Rule 42A, because it was received on February 27, 2004, i.e., more than 60 days after the December 6, 2003 date on which the claim was based. It disputes the Organization's allegation that work began January 12, 2004 and cites the contractor's signed statement in the record. The Carrier contends that the Organization's statement that this is a "continuing claim" does not cure the late filing. It cites Third Division Award 37293 in which the Board dismissed a claim filed more than 60 days after the contractor began work.

As to substantive issues, the Carrier asserts that the Organization failed to meet its burden of proving that contracting out the work at issue violated Rules 1, 2, 5, 55, the Note to Rule 55, Appendix Y or any other portion of the Agreement.

The Carrier disputes the allegation that it failed to provide appropriate advance notice. It points to its notice identifying the contracted work and the reasons for doing so.

The Carrier argues that the Organization's Submission provides no evidence showing that the work at issue had historically, traditionally, and customarily been assigned to Carrier forces to the exclusion of contractors or that this work is otherwise covered by the Agreement's Scope Rule.

The Carrier asserts as an affirmative defense that the identical work – demolition and installation of electrically controlled elevated widows – was performed on the other side of this same building five years previously by contractor forces, apparently without protest by the Organization. It also argues

that it is not required to piecemeal the work, that is, to give some to Organization-represented employees and to contract out the rest.

In denying the Organization's assertion that Rule 1 reserves the disputed work to BMWE-represented employees, the Carrier cites Public Law Board No. 4104, Award 13 for the proposition that Rule 1 confers no reservation of any specific work. It argues that Rule 1 is a general Scope Rule and does not delineate any particular tasks that the Carrier is responsible to assign to B&B forces. It asserts that where a general Scope Rule is involved, the Organization must prove an exclusive past practice of assigning the work at issue to Carrier forces. The Carrier contends that the Organization introduced no probative evidence that B&B employees have performed this work in the past, whether exclusively or as a mixed practice. The Carrier contends that the record contains no historical evidence that Maintenance of Way employees have installed electrically controlled windows; it asserts, in any event, that such work would be within the scope of the Electrician craft, rather than Maintenance of Way.

In further 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:

> "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 addition, the Carrier argues that neither Rule 1 nor Rule 2 reserves any work to B&B employees on this property because they merely preserve rights existing prior to the BN merger. It contends that the Organization failed to prove the existence of any such rights under predecessor Agreements or practices.

The Carrier disputes the allegation that it violated Rule 5 - Seniority. It asserts that Rule 5 merely addresses the establishment of seniority and maintenance of seniority rosters and does not serve to reserve work to employees.

In response to the Organization's citation of Rule 55, Classification of Work, as reserving work to BMWE-represented employees, the Carrier asserts that Rule 55 does not mention elevated window installation or even window installation.

The Organization argues, as an initial matter, that the record contains written statements that the contractor came into the building to take measurements on December 6, 2003, but that no work referred to in the notice was performed until January 12, 2004. It asserts that the claim's February 27, 2004 filing was, therefore, well within Rule 42A's 60-day time limit.

The Organization acknowledges that the Carrier provided notice of the contracted work and did meet in conference, however, it argues that (1) the notice was inadequate (2) the Carrier failed to make good faith efforts to decrease outside contacting (3) maintaining Carrier-owned buildings is historically, traditionally and customarily performed by B&B forces and (4) the work is contractually reserved to them pursuant to Rules 1, 2, 5, 55 and the Note to Rule 55. It contends that assignment of this scope-covered work to an outside contractor violated the Agreement, and maintains that the burden of establishing an exception to the Scope Rule is the Carrier's. Finally, the Organization argues that the Carrier owes compensation for lost work opportunities resulting from use of the contractor, even if the Claimants were fully employed.

As to the threshold issue of the claim's timeliness, the Board notes that the Carrier's notice described the work of the contractor as demolition and disposal of existing windows and installation of windows electrically operated from switches at ground level. It did not indicate that this work included measuring prior to the initiation of the actual work. While the contractor did appear at the work site in December so it could prepare for starting work on the building in January, the evidence is that the work, as referenced in the Carrier's notice, began within 60 days of the claims being received by the Carrier as contemplated by Rule 42A. The Organization did not base its claim on preparation activities for the work to be done

in the future, but on the first date of the actual work as described in the notice. The Board rejects the Carrier's argument that the claim was untimely filed. The "continuing claim" issue is, therefore, moot.

As to the merits of the dispute, the language of the Scope Rule (Rule 1) does not enumerate types of work falling within the Agreement. The Board follows prior Awards holding that where, as here, the Scope Rule is general, the Organization has the burden of proving by a preponderance of evidence that the disputed work has traditionally and customarily been performed by a Claimant's craft on a system-wide basis to the exclusion of others, including outside contractors. This record does not contain sufficient evidence to establish the disputed work as having been exclusively performed by craft employees within those parameters. Even if the Organization's evidence had established a prior practice, exclusive or mixed, for installation of elevated electrical windows, the Board finds no evidence of record that this work was reserved exclusively to BMWE-represented employees system-wide.

The Board is also persuaded that Rules 1 and 2 of the Agreement preserve rights existing prior to the BN merger. The record contains no evidence demonstrating that M of W employees on the predecessor property had the exclusive right to perform the work at issue in this dispute.

The Board notes that Appendix Y states the parties' intentions to establish a vehicle to discuss reduction in contracting. It does not set criteria or provide a penalty for a party's failure to observe it. The Board determines that proper notice was given and a contracting conference was scheduled and completed. Therefore, the Board concludes that Appendix Y was not violated.

The Board concludes that the record contains no evidence to establish that the Carrier's action violated the Agreement. Because the Organization did not meet its burden of proof, 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 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:

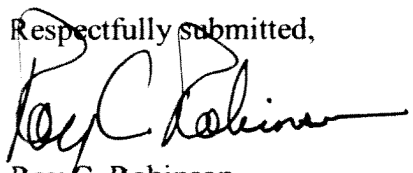
> **"Further, the Board holds that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that 'The exclusivity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