Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40516
Docket No. MW-39530
10-3-NRAB-00003-060299
(06-3-299)

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 (M bar D) to perform Maintenance of Way and Structures Department work (rebuild and repair right of way fence) at locations between Sheridan, Wyoming and Gillette, Wyoming beginning on November 15, 2001 and continuing through January 6, 2002 [System File C-02-C100-110/10-02-0173(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 R. Bohlman, B. Blakeman, G. Pinder, E. Moore, W. Husted, M. Sutphin, W. Truax, B. Buckler, W. Hoff, G. Chandler, K. Pinder, C. Penn, J. Pearson and R. Myers shall

now each be paid for an equal proportion of the two thousand two hundred ninety-two (2,292) straight time man-hours at their respective straight time rates of pay, and each shall be paid for an equal proportion of the one thousand five hundred sixty-two (1,562) overtime man-hours at their respective time and one-half 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 held seniority in various classes within the Maintenance of Way and Structures Department in the Track Sub-department and the Work Equipment Sub-department on District 200 during the claim period. On the dates involved here, the Claimants were either regularly assigned and working their respective positions on the Clearmont Section or the Sheridan Maintenance crew or were furloughed.

On July 1, 2001, a new Wyoming statute became effective authorizing fines up to $750.00 for each day railroads failed to construct and maintain fences on both sides of their rights-of-way as well as cattle guards at crossings. In an August 20, 2001 letter, the Carrier notified the Organization it intended:

> ". . . to contract for construction and/or repair, and dismantling, of approximately 68 miles of right-of way fence. . . . This work has been customarily performed by ranchers, landowners, contractors, and others in the past. With the recent change in Wyoming fencing laws, it has become necessary to perform this work on an expedited basis. . . . [T]here are no available Carrier employees possessing the skills and expertise on either seniority district to perform this work within the required time frame."

The notice stated the Carrier would contract out work no later than September 5, 2001. As the law required, the Carrier submitted a plan for the completion of the work, which the State approved in September 2001.

The Organization filed a claim protesting the Carrier's use of the contractor to perform the work as well as the lack of proper notice. The parties conferenced the claim on September 20, 2001, but without resolution.

The scope of work involved 68 miles of right-of-way, was substantial and time was of the essence. Work on the project began on November 15, 2001 and continued through January 6, 2002. The Carrier's professed goal was to avoid government sanctions and problems with landowners. The Carrier used the contractor to perform the work. The Claimants were qualified to perform this fence work. The Carrier also used its own employees to perform the work.

All craft employees regularly assigned remained fully employed throughout the period the contractor worked. Insofar as the record indicates, employees on furlough were not recalled during the period.

The Organization submitted evidence including dozens of written statements documenting that Carrier employees had performed fence work in the past decades. One example was a letter dated January 15, 1987 from Leonard Hoffer which stated in part:

> "I started working for Burlington Northern June 16, 1971. . . . Every section I have worked with has always had the job and

> responsibility of building and repairing the right of way fences. . . . I have never known an outside contractor to build or repair fences."

Carrier evidence included statements from Roadmasters attesting to a history of landowners constructing their own fencing, as well as recollections of using contractors to construct fences. One such letter from Roadmaster Raymond Brennan stated in part:

> "I have been working for the BNSF for 28 years. When I was working in the Nebraska Division from 1985 to 1990 we did supply farmers with crossing material and they would put up their own fences. Also in this time frame the Roadmaster that I worked for did contract out the building of fences for adjacent landowners. . . . Since I have been the Roadmaster here in Broken Bow, NE beginning in November 2000 my people have done all of the fencing for the adjacent landowners. . . ."

An additional statement from another Carrier officer reveals that:

> "All locations that I worked as a Roadmaster used outside contractors for fencing issues and even furnished supplies for owners to fix our fences. . . . This is a standard practice on all territories worked previous and at present."

Although the Organization made specific and detailed claims for hours worked by the contractor, no documentary evidence was produced for the record to support the requests for pay. The Carrier rejected the claim for straight time and over-time pay as excessive. It stated that the Claimants were fully employed or furloughed on the days at issue and lost no earnings for those days. The Organization did not dispute this characterization of the Claimants' work status.

The involved Rules read, in relevant part, as follows:

"RULE 1. SCOPE

These rules govern the hours of service, rates of pay and working conditions . . . in the Maintenance of Way and Structures Department. . . .

Rule 2A. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service. . . .

RULE 5. SENIORITY ROSTERS

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

D.

*** * ***

Rank A . . . Section Foreman. . . .

*** * ***

Rank C . . . Fence and Tile, Gang Laborer. . . .

*** * ***

RULE 55 CLASSIFICATION OF WORK

*** * ***

P. Truck Driver.

An employe assigned to primary duties of operating dump trucks. . . .

* * *

RULE 55 CLASSIFICATION OF WORK

* * *

Q. Sectionmen.

Employees assigned to constructing, repairing and maintaining roadway and track and other work incident thereto.

NOTE to RULE 55

* * *

Employes included within the scope of this Agreement - in the Maintenance of Way and Structures Department . . . 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. . . .

. . . In the event the Company plans to contract out work . . . 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. . . . 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 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. . . . [T]he advance notices shall identify the work to be contracted and the reasons therefore."

The Organization argues that it met its burden of proof to show that the Carrier violated Rules 1, 2, 5, 55, the Note to Rule 55 and Appendix Y.

The Organization acknowledges that the Carrier provided correspondence regarding contracting fence work; however, it argues that this was inadequate as a notice because the Carrier was proceeding with its intended contracting, no matter what; and neither its plan nor the conference included a good-faith effort to reduce the incidence of subcontracting or to increase the use of its forces to the extent practicable as required by Rule 55 and Appendix Y.

The Organization cites the following language in Third Division Award 32862 in which the Board concluded that lack of notice as to intended contracting was a violation of the Agreement:

". . . [T]he Carrier's failure to give the Organization notice of its intent to contract the work frustrates the process of discussions contemplated by article IV. *See* Third Division Award 31280:

'The function of the notice is to allow the Organization the opportunity to convince the carrier to not contract out the work. Therefore, that opportunity to convince the Carrier to not contract out the work was prevented by the Carrier's failure to give notice.'"

The Organization further contends that the work at issue had historically, traditionally, and customarily been assigned to Carrier forces system-wide, to the exclusion of contractors, and that assignment of this scope-covered work to an outside contractor violated the Agreement. The Organization calls the Board's attention to the dozens of letters from current and former Carrier employees stating that they performed fence work in numerous locations in multiple years.

The Organization points out that the Claimants hold seniority on the territory where the contractor performed the work in question, were available and qualified to perform the work and would have done so had the Carrier assigned them. The Organization argues that the Carrier therefore owes compensation for the Claimants' lost work opportunities, irrespective of their fully employed status.

The Organization further contends that the burden of establishing an exception to the Scope Rule rested with the Carrier and that it failed to provide probative evidence to establish lack of sufficient forces, lack of skills, existence of an emergency or any other exception.

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 provision of the Agreement. It points out that a timely notice was sent to the Organization in its August 20, 2001 letter identifying the work to be contracted along with the reasons for doing so. It maintains that the parties subsequently engaged in a conference in good-faith. The Carrier points to the Organization's letter to the Carrier dated September 20, 2001 which acknowledges receipt of the notice and confirms the conference, including the names of the participants.

The Carrier states that the Organization alleges, but provides no actual evidence, that the fence work at issue had historically, traditionally, and customarily been assigned to Carrier forces system-wide to the exclusion of contractors and others, or that this work falls within the parameters of the Scope Rule. The Carrier reiterates that it is the Organization's responsibility to provide probative evidence to support its claim. The Carrier asserts that it is not required to piecemeal the work. Nevertheless, the Carrier states that it did just that.

In denying that Rule 1 reserves the disputed work to BMWE-represented forces, the Carrier argues that the Rule is a general Scope Rule and does not delineate any particular tasks the Carrier is required to assign to BMWE-represented employees. The Carrier contends that in light of the general nature of the Rule, it is Organization's burden to prove that past work has been assigned to its members exclusively. The Carrier contends that the Organization failed to meet its burden of providing evidence of a system-wide exclusive practice or proving that Carrier employees have a contractual right to performance of the work in question.

As an affirmative defense, the Carrier argues that the change in law constituted an "emergency" which justified using a mixed force of contractors and Carrier employees to accomplish the mandated work. It points out that the scope of work was substantial, that it involved 68 miles of right-of-way and that, due to potential penalties, time was of the essence. It alleges that its local workforce available in the two affected districts was insufficient in number of employees for the task and that this was undisputed by the Organization.

The Carrier denies that its employees have the exclusive right to the work at issue and contends that, it is at best, a mixed practice. It points out that it submitted statements from Roadmasters attesting to a history of landowners constructing their own fencing as well the Roadmasters' recollections of using contractors to construct fences.

The Carrier argues that the numerous written statements from employees submitted by the Organization's members merely state that they worked on fences – not that they had historically performed this work to the exclusion of all others on a

system-wide basis. It relies on the following language from on-property Third Division Award 33938 which analyzes the Note to Rule 55:

> "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. See Third Division Award 24281 and Public Law board No. 4104 Award 13. 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. . . ."

The Carrier argues that the Organization violated the Agreement by listing fence construction claims it had previously filed and that the parties had settled without either party admitting an Agreement violation. It contends that many such claims were settled through payment by the Carrier on a non-referable basis, that is after signing a document promising non-disclosure of the settlements' terms. It calls the Board's attention to the Organization's January 16, 2006 letter in which the General Chairman states:

> "Again, I realize that many of these claims have been settled on a non-referable basis during conference with Labor Relations. . . ."

The Carrier asks the Board to exclude from evidence the Organization's January 16, 2006 letter.

The Carrier argues that there is no authorization in the Agreement to support the Organization's request that damages be awarded where there is no proof of actual financial harm to the Claimants.

The Carrier points to statements of its Officers in the record that the Carrier contracted fence work in the past. It argues that the Organization's multiple statements are self-serving and not sufficient to prove no fence work was contracted system-wide. It cites the following language in Public Law Board No. 4768, Award 32:

> "Even where the Union has overwhelmingly larger number of witness statements, Carrier's few contravailing statements are sufficient evidence on past practice to defeat claims."

The Carrier argued that its refusal to draw upon employees from other seniority districts and to move them to the districts at issue did not indicate bad faith on the Carrier's part. It asserts that the request to bring employees across seniority districts was a tacit admission by the Organization of the insufficient number of Carrier employees in the two districts to perform Fence Work.

In response to the Organization's allegation that Classification of Work Rule 55 reserves the work in question to the Claimants, the Carrier argues that it has been well established in arbitration that Classification Rules are not Scope Rules and, therefore, do not guarantee any particular work assignment to Carrier employees.

The Carrier argues, contrary to the Organization's position, that even if there were a basis for sustaining a violation of the Agreement, no compensation should be awarded because the Claimants were fully employed on the relevant dates and that the Organization provided no evidence that the Claimants were other than fully employed or suffered an actual monetary loss on the dates at issue.

The Carrier asserts that in rules cases, the burden rests with the Organization as to all elements of its claim and that in this instance, it failed to meet that burden. The Carrier cites the following language in Third Division Award 25002:

> "This Board, while finding that the Carrier did not furnish the mandated notice, does not find sufficient reason to award pecuniary relief. The Claimants have not proved loss of work or earnings. There is solid precedent (see Third Division Awards No. 18305 (Dugan), No. 23345 (Dennis), No. 20275 and 20671 (Eischen)) that to award a penalty, Claimants must show distinct damages."

The Carrier also cites on-property Third Division Award 36715 which stated the following:

> "The Organization argued that the Claimants were 'qualified and available;' however, the record demonstrates that those Claimants who were available were fully employed throughout the claim period. Therefore, the Claimants were not available to operate the necessary equipment, rented or otherwise. And because of this full employment, the Carrier was '. . .not adequately equipped to handle the work. . .' as clearly set forth in the second paragraph of the Note to Rule 55."

The burden of providing probative evidence to prove a violation of the Agreement rests with the Organization. The record evidence persuades the Board that the Carrier provided the appropriate notice and conferenced the issue.

As the Carrier correctly argued, past Awards have established that the Scope Rule is a general Rule and that Classification Rules are not Scope Rules and, therefore, do not guarantee work assignments. The Board finds no evidence of record that Carrier employees performed fencing work system-wide to the exclusion of others, which is a necessary element for considering the application of the Note to Rule 55. Because that element is not present here, the Note to Rule 55 does not apply.

The Board notes the Carrier's use of craft employees in addition to contractors, insofar as they were available, in order to decrease contractor use. The record contains no proof that additional BMWE-represented employees were available within the relevant seniority districts to perform fence work in the timeframe allocated for the project.

The Board further concludes that the Organization failed to prove that the Claimants sustained lost work opportunities or monetary loss. The Board reiterates its prior rulings that the burden to prove each element of its claim initially rests with the Organization. Here, it failed to meet that burden. Evidence in the record does not support a violation of the Agreement. In view of the above, the Board need

not reach the Carrier's allegations that the Organization improperly referred to claims previously settled between the parties on a non-referable basis.

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 15th day of June 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40509, DOCKET MW-39403
AWARD 40516, DOCKET MW-39530
AWARD 40517, DOCKET MW-39531
(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 40509, 40516 and 40517 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, its 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 20 of Public Law Board (PLB) 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.

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[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 20 of PLB No. 4402 hardly stand alone. To the contrary, over the last two (2) decades, six (6) 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 1 of PLB No. 4768 (Marx - 1990), Award 21 of PLB No. 4402 (Benn - 1991), Award 25 of PLB No. 4768 (Marx - 1992), Award 61 of PLB No. 4768 (Marx - 1995), Award 36015 (Benn - 2002), Award 37901 (Kenis - 2006), Award 38010 (Zusman - 2007) and Award 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 40509, 40516 and 40517 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

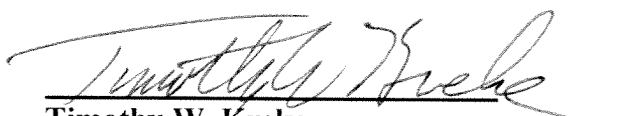
> exclusivity doctrine applies when the issue is whether Carrier has the right to assign work to different crafts and classes of its employees - not to outsiders.')"

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 (50) 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 40509, 40516 and 40517 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 40509, 40516 and 40517 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,



Timothy W. Kreke
Labor Member