Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40517
Docket No. MW-39531
10-3-NRAB-00003-060300
(06-3-300)

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 (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (snow removal) in the Lincoln, Nebraska Terminal on January 27 and 28, 2004. [System File C-04-C100-65/10-04-0198(MW) BNR].

2. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (snow removal) at the Yards in Havelock, Nebraska on January 29 and 30, 2004 [System File C-04-C100-66/10-04-0199(MW)].

3. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (snow removal) in the Lincoln, Nebraska Terminal on February 2, 2004 [System File C-04-C100-67/10-04-0204(MW)].

4. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (snow removal) in the Lincoln, Nebraska Terminal on February 3, 2004 [System File C-04-C100-68/10-04-0205(MW)].

5. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (snow removal) in the Lincoln, Nebraska Terminal on February 5, 2004 [System File C-04-C100-69/10-04-0206(MW)].

6. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (snow removal) in the Lincoln, Nebraska Terminal on February 6, 2004 [System File C-04-C100-70/10-04-0207(MW)].

7. The Agreement was further violated when the Carrier failed to provide the General Chairman advance notice of its plans to contract out the above-described work as stipulated in the Note to Rule 55 and Appendix Y.

8. As a consequence of the violations referred to in Parts (1) and/or (7) above, Claimants R. Stoner, V. West, L. Johns, D. Hannerman, A. Ewoldt, M. Tennant, J. Mammen, D. Klaus, J. Beals, D. Biggs and D. Johnson shall now each be compensated for fourteen (14) hours at their respective straight time rates of pay and for twenty-one (21) hours at their respective time and one-half rates of pay.

9. As a consequence of the violations referred to in Parts (2) and/or (7) above, Claimants R. Stoner, W. Stickney and J. Beals, shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for five (5) hours at their respective time and one-half rates of pay.

10. As a consequence of the violations referred to in Parts (3) and/or (7) above, Claimants R. Stoner, V. West, L. Johns, D. Hannerman, A. Ewoldt, M. Tennant and J. Beals, shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for twelve and one-half (12.5) hours at their respective time and one-half rates of pay.

11. As a consequence of the violations referred to in Parts (4) and/or (7) above, Claimants R. Stoner, V. West, L. Johns, D. Hannerman, A. Ewoldt, M. Tennant and D. Biggs, shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half rates of pay.

12. As a consequence of the violations referred to in Parts (5) and/or (7) above, claimants R. Stoner, V. West, L. Johns, D. Hannerman, A. Ewoldt, M. Tennant, J. Beals and D. Biggs shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for fifteen (15) hours at their respective time and one- half rates of pay.

13. As a consequence of the violations referred to in Parts (6) and/or (7) above, Claimants R. Stoner, V. West, L. Johns, D. Hannerman, A. Ewoldt, M. Tennant, J. Beals and D. Johnson shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for six (6) 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.

During an 11-day period, including on January 25, January 26, February 1 and February 5, 2004 snow fell on the Carrier's property at the Havelock, Nebraska, Yard and the Lincoln, Nebraska, Terminal. BMWE-represented employees, as well as employees from Pavers Construction and its sub-contractors, were used to remove, load and transport snow. The Carrier provided no advance written notice to the Organization.

Carrier forces were used continuously during the period to operate Carrier equipment. The contractors operated their own front loaders, backhoes, and trucks. Contractor employees worked throughout the period except that they performed no work on January 31, February 1 or February 4, 2004.

During the period of January 25 through February 6, 2004, the Carrier placed all working Sectionmen, Machine Operators, Truck Drivers, and Foremen on snow removal duty. Documents from the Personnel Activity Tracking System show that Claimants R. Stoner, V. West, L. Johns, D. Hanneman, A. Ewoldt, M. Tennant, D. Klaus, J. Beals, D. Biggs worked overtime as well as regular time during the 11-day period and were fully employed. Carrier records indicated that during the claim period, J. Mammen and D. Johnson were not working. No work information or status was submitted for W. Stickney.

The Carrier submitted as additional evidence the email statement of Assistant Roadmaster J. M. Chapple dated April 5, 2004 which stated that:

> "Pavers was contracted due to a snow storm emergency that accumulated over 18 inches of snow in the Lincoln area. All of the claimants listed were utilized for snow removal during this period of time, however, the snowstorm could not be cleaned up solely by the carriers equipment and employees without a major service interruption. Pavers were therefore utilized during the snowstorm emergency. . . ."

The Organization provided a May 11, 2006 statement from one of its employees, Staci Moody Gilbert, stating in part that:

"On May 11, 2006, I spoke with 'John' from Hertz Equipment Rental of Omaha, NE. I asked him if they had any rental service in Lincoln, NE. He told me no, but the Omaha, NE office does serve the Lincoln area - the man's name is Bill. I asked him if I needed a dump truck in an emergency situation, to haul snow, how long would it take to rent a truck. He told me that dump trucks are readily available at any time."

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 of all employes not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department. . . .

* * *

RULE 5. SENIORITY ROSTERS

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

* * *

G.

* * *

Group Two Machines

* * *

Front End Loader. . . .

* * *

RULE 55 CLASSIFICATION OF WORK

* * *

N. Machine Operator.

An employe qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5.

* * *

P. Truck Driver.

An employe assigned to primary duties of operating dump trucks, stake trucks and school bus type busses.... When vehicles equipped with snowplow blades are used for plowing snow or moving dirt, the truck driver rate will apply.... Truck Driver will perform such other work as may be assigned to him when not engaged in driving a truck.

* * *

NOTE to RULE 55

* * *

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. . . .

. . . [W]ork as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases.

* * *

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."

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 asserts that it met its burden of proving that the work at issue is covered by the applicable Scope Rule. It contends that the Claimants have customarily and traditionally performed this work and that the Claimants hold seniority where the contractor performed the work in question. Consequently, it maintains that the Carrier's assignment of this snow removal work to an outside contractor violated the Agreement.

The Organization also asserts that the Carrier failed to meet its burden of providing probative evidence to prove any of its affirmative defenses.

The Organization further argues that the Carrier failed to notify the Organization of its intent to contract the work, in violation of the procedures set forth in the Note to Rule 55.

The Organization notes that the Carrier did not contend that its equipment was unsatisfactory or that Carrier forces were unqualified to perform the work at issue as is allowed by the Note to Rule 55.

The Organization argues that the Carrier possessed, or could acquire, equipment to remove the snow and that its Claimants were qualified to operate the Carrier's equipment.

The Organization argues that the work involved no special skills, or special equipment and that the contractor used common group 2 machines and dump trucks to perform this work. It contends that the use of contractors in light of the nature of the work and the equipment required establishes a violation of the Note to Rule 55.

The Organization argues that the Carrier failed to provide evidence to support its affirmative defense that the snow event was an "emergency." It cites the following language in Third Division Award 27614:

> "As this Board has noted in previous awards, an 'emergency' is defined as an 'unforseen combination of circumstances which calls for immediate action.'"

The Organization asserts that snow in Nebraska during the months of January and February is not an "unforseen circumstance" and that due to technology, any snowfall is predicted in advance with relative accuracy. Therefore, because the Carrier knew well in advance that this event was to occur, it did not fall within the definition of an emergency.

The Organization points to the May 11, 2006 handwritten statement from one of its members, Staci Moody Gilbert, stating that she had contacted Hertz Equipment Rental and was advised that dump trucks are readily available at any time.

The Organization contends that the full employment status of available craft employees does not defeat the claim. It maintains that compensation to the Claimants for time worked by the contractors is necessary to remedy the Carrier's violation.

The Carrier argues that the burden rests with the Organization to prove a violation of the Agreement. It contends that the Organization failed to meet that burden. It asserts that in order to sustain its burden, the Organization was obligated to prove that the work is reserved exclusively to BMWE-represented employees by the Agreement or, failing that, it was obligated to prove that the work in question has been exclusively reserved to BMWE-represented employees by custom, practice and tradition system-wide to the exclusion of all others. It contends that the Organization failed to prove that the work is reserved to BMWE-represented employees either by contract or practice.

Specifically, the Carrier argues that snow removal is not exclusive to Maintenance of Way employees or restricted to certain Sub-Departments, members of its various rosters or limited to Sections by territory assignment. It asserts that other crafts, or, when conditions warrant, outside contractors remove ice and snow to facilitate performance of the work assignments given to those crafts.

The Carrier argues that prior precedential Awards between these same parties hold that, standing alone, the Classification of Work Rule does not reserve work exclusively to employees of a given class. 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:

> "Absent specific provisions reserving work to any particular class or craft of employees, the Organization must show with prohibitive evidence exclusive past performance of the disputed work on a system-wide basis. . . .
>
> 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 Scope Rule is general in nature and does not list any specific tasks (including snow removal) that are assigned to BMWE-represented employees. In support of its argument that the Organization has the burden of proving the work at issue has been assigned to its members exclusively in the past, the Carrier draws the Board's attention to Third Division Award 20640, which provides, in part:

> "In order to sustain the Organization's position on Claim (1), the Organization must show that the Agreement clearly reserves to the employes an exclusive right to the work in question, or, if not, then it must show by probative evidence that the work in question has been exclusively reserved to the employes by custom, practice and tradition, system wide. No exclusive reservation of the work in question is found in the Scope Rule. Nor does the record show exclusive reservation of the type of work to the employes by custom, practice and tradition, system wide."

The Carrier cites the following language in on-property Public Law Board No. 3460, Award 67, which involved a claim that the Carrier used outside contractors for snow removal:

> "This dispute turns on two principles. The first one was addressed by the Board in Award 56, as well as in Award 65 of this board. In those awards, the Board indicated that there was no evidence that the removal of snow was exclusively reserved to Maintenance of Way employees. Perhaps, the most important element, however, with respect to this dispute, is the last paragraph of the Note to Rule 55. . . .
>
> . . . [D]uring the emergency, Carrier was permitted to use outside contracted forces and/or equipment in an effort to reduce the emergency and clear it up in the shortest possible time. For those reasons, therefore, the claims must be denied."

The Carrier contends that because snow removal work is not within the Scope of the Agreement and is not exclusively Maintenance of Way work, Appendix Y does not apply to this claim.

Moreover, the Carrier contends that, even if evidence was in the record to show that snow work was customarily and historically reserved to BMWE-represented employees on a system-wide basis to the exclusion of others including contractors, the snow emergency required a rapid response without time to provide notice.

To support its assertion, the Carrier provided weather reports from the Lincoln Municipal Airport, snowfall amounts from the National Weather Service, newspaper articles, maps of total snowfall and photos including from the University of Nebraska-Lincoln High Plains Regional Climate Center regarding what the Carrier termed a "blizzard and heavy snow in the Lincoln Terminal area." The Carrier contends, therefore, that neither the Note to Rule 55 nor Appendix Y present a barrier to contracting out the work at issue.

Specifically, the Carrier argues that even if snow work had been exclusively performed by Maintenance of Way employees, which it denies, the Carrier was authorized by the Note to Rule 55 to contract it out because emergency time requirements existed that presented undertakings not contemplated by the Agreement and beyond the capacity of the Carrier's forces.

Contrary to the Organization's assertion, the Carrier contends that it need not provide the General Chairman with advance written notice of contracting where, as here, "emergency time requirements" existed.

The Carrier further argues that all Claimants who were available for work, were fully employed performing snow removal work at overtime as well as regular pay during the emergency. It argues that the loss of work claims are excessive and that the Agreement does not provide for punitive damages. The Carrier cites Third Division Award 29202 as supporting its position that even if there is a basis for sustaining a claim, no compensation is warranted where claimants are fully employed and suffer no loss.

It was the Organization's burden to prove that the Carrier violated the Agreement by subcontracting the work at issue. The Board is not persuaded that the Organization met its burden.

The Board concludes that language in the Scope Rule does not enumerate types of work falling within the exclusive jurisdiction of covered employees. 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 Carrier employees on a system-wide basis to the exclusion of others, including outside contractors.

The Board is persuaded that the record does not contain sufficient evidence to establish the disputed work as having been exclusively performed by BMWE-represented employees. Even if the Organization's evidence had established a prior practice, exclusive or mixed, of using Carrier employees in the craft for snow removal, the Board finds no evidence that this work was reserved exclusively to

BMWE-represented employees on a system-wide basis. No Rule or past practice requires the Carrier to assign snow removal to Carrier employees system-wide. Consequently, the Board concludes that contracting out the work at issue did not violate the Agreement.

As to the Organization's argument that the Carrier could have rented equipment its members were capable of operating, the Board is mindful that the Carrier is entitled to make determinations as to the type of mechanical equipment appropriate for a job, unless restricted by law or agreement and is not able to acquire such equipment in order to perform the work at issue. The record contains no evidence of either of these types of restrictions on the use of end loaders and trucks. The Carrier must be afforded reasonable latitude to determine the equipment and personnel to be used to perform a particular job in the most effective manner.

Based on the above conclusion, the Board need not reach the issue whether this snow fall constituted an emergency which would, in and of itself, constitute a specific exception to restrictions on contracting out work and to the requirement of providing advance notice to the Organization. The fact that the Carrier was willing to pay time and one-half overtime to the Claimants while also making additional expenditures to the contractor for the same work is an indication to the Board that the Carrier believed this situation and the payments to remedy it constituted an emergency.

The mere fact that the Carrier may have had some advance notice of the blizzard does not make the impact of such weather either unforeseen or not requiring immediate response. The Carrier is entitled to flexibility to make judgments of this nature.

The Board finds that, during the claim period, the Claimants were fully employed performing snow removal work, both during their scheduled work days and on overtime. The record evidence substantiates that nine Claimants were working overtime and were fully employed and three others were not working during the claim period for reasons that do not appear in the record. We find that

even if the Organization had prevailed in establishing the Carrier's liability, it failed to prove that the Claimants suffered damages.

The Board concludes that there is insufficient evidence in the record to indicate that the Carrier's use of contractors under the circumstances violated the Agreement. The claim must be denied as without merit.

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

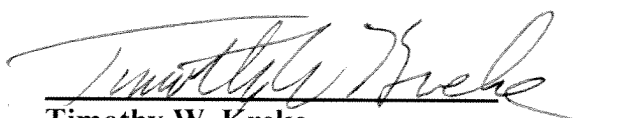
> **exclusivity doctrine applies when the issue is whether Carrier has the right to assign work to different crafts and classes of its employees - not to outsiders.')"**

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