PUBLIC LAW BOARD NO. 4219 CASE NO. 8

PARTIES TO THE DISPUTE: Brotherhood of Maintenance of Way Employes

and

Union Pacific Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when outside forces used to re-roof the Maintenance-of-Way Shops Building at Pocatello, Idaho September 16 through November 8, 1985.

2. Because of the aforesaid violation, Carpenters A. S. Kunz, C. L. Haris, D. K. Naasz, H. L. Christiansen, R. E. Baker, G. V. Cuthbert and T. D. Stalder shall each be allowed two hundred sixty-three and one half (263-1/2) hours of pay at their respective rates.

OPINION OF THE BOARD:

At the time this claim arose, the Claimants held seniority and were regularly assigned as Bridge and Building Department carpenters on the Carrier's Idaho Division. On April 16, 1985, the Carrier notified the Organization's General Chairman that the Carrier intended to replace the roof of its Maintenance of Way Shop at Pocatello, Idaho, and would be soliciting bids from contractors to install a new roof of two-inch foam insulation topped by certain "Versigard" roofing material manufactured by Goodyear Rubber Co. In connection with this project, the Carrier intended to use its Maintenance of Way forces to remove existing wood decking, sky lights and asphalt roofing material, and to install new wood decking, exhaust fans, gutters and downspouts. The only portion of the job to be

contracted to outside forces was installation of the new roofing material and insulation.

On April 22, 1985, the Organization's General Chairman responded to the Carrier's notice, indicating that he believed there were Maintenance of Way Employes capable of some of the work, and suggesting that the Parties discuss the matter in conference. The Carrier replied on May 2, 1985, expressing its willingness to address the matter in conference.

The Organization did not docket the matter of the proposed roofing contract until the Parties' conference on September 12 and 13, 1985. During that conference, the Carrier repeated that Maintenance of Way personnel would perform substantial portions of the re-roofing job. The Carrier stated that application of the new roofing material was to be done by an outside roofing contractor in order to obtain Goodyear's ten-year warranty on the Versigard product. According to the Carrier, that warranty was available only if the Versigard roof membrane was installed by an authorized contractor.

The re-roofing project began on September 16, 1985 and was completed by November 8, 1985. The installation of the Versigard roof system was contracted to and performed by Pocatello Roofing Company, thereby securing Goodyear's ten-year warranty. The contractor utilized a crew of five.

On November 18, 1985, the Organization filed this claim, alleging that the Carrier had violated various rules of the Agreement as well as a letter of understanding between the Parties. The claim was handled on the property in the usual manner, and eventually progressed to the Third Division of the National Railroad Adjustment Board (NRAB). However, after the claim had been pending at the NRAB for one year, the Carrier exercised its statutory prerogative to have the claim withdrawn and assigned to this Public Law Board. That was done in June 1989. The Parties have filed supplemental submissions with this Board and have presented their arguments orally.

The Organization first argues that the work of re-roofing buildings on the Carrier's property is reserved to Maintenance of Way Employes by express provisions of the Agreement. Rule 1 of the Agreement provides:

RULE 1. SCOPE

> This agreement will govern the wages and working conditions of employes in the Maintenance of Way and Structures Department listed in Rule 4 represented by the Brotherhood of Maintenance of Way Employes Organization.

Rule 4 of the Agreement, referred to in Rule 1, sets forth the seniority groups of employees by position within the various Maintenance of Way subdepartments. Rule 4 does not, however, describe the work reserved to each group or position.

However, the Organization also refers to Rule 8 of the Agreement which provides:

RULE 8. BRIDGE AND BUILDING SUBDEPARTMENT

> The work of construction, maintenance and repair of buildings, bridges, tunnels, wharves, docks, non-portable car buildings, and other structures, turntables, platforms, walks, snow and sand fences, signs and similar structures as well as all appurtenances thereto, and other work generally so recognized shall be performed by employes in the Bridge and Building Subdepartment.

According to the Organization, the re-roofing project at Pocatello constituted the "maintenance [or] repair of [a] building" and, therefore, Rule 8 explicitly reserved the work to employees of the Carrier's B & B Subdepartment.

The Organization further contends that, even if the Agreement did not expressly reserve re-roofing work to B & B employees, the facts developed on the property show that such work traditionally has been performed by those employees. When it first filed the claim, the Organization asserted that, during the previous year (1984), B & B employees had installed the same Versigard roofing material on the Carrier's Crew Dispatchers Building at Pocatello. Throughout the processing of the claim, the Organization repeatedly reiterated that contention without refutation by the Carrier.

The Organization next argues that, since both the Agreement and the Parties' past practice reserve roof repair work to B & B

employees, the Carrier violated the Agreement by contracting that work in this case. Rule 52 of the Agreement provides:

RULE 52. CONTRACTING

(a) By agreement between the Company and the General Chairman work customarily performed by employes covered under this Agreement 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. 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. 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.

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

* * *

(d) Nothing contained in this rule shall impair

> the Company's right to assign work not customarily performed by employes covered by this Agreement to outside contractors.

The Organization points out that, even though the Carrier gave advance notice of its contracting plans in this case, and even though the Parties met to discuss their differences, the Organization did not assent or reach an understanding with the Carrier as contemplated in Rule 52.

On the property, the Carrier responded to the Organization's claim by arguing that Rule 52 was satisfied in this case. The Carrier stated that it had given ample notice of its intentions but the Organization had been dilatory in scheduling a conference. The Carrier also pointed out that it assigned much of the re-roofing project to B & B employees and contracted only that portion which had to be done by an authorized roofing contractor in order to secure the Goodyear warranty. According to the Carrier, this situation fell within the provisions of Rule 52 which authorize contracting when necessary to obtain "special material available only when applied or installed through supplier."

The Organization disputes the Carrier's interpretations of Rule 52. First, the Organization asserts that it did not delay unreasonably in protesting the Carrier's announced plans. The Organization replied promptly to the Carrier's notice and expressed its concerns. The record is not clear regarding when

the contract was awarded, but the Organization docketed the matter for conference before the contract work was performed. On this record, the Board cannot find that the Organization acted so tardily as to be barred from challenging the contracting. The Carrier has not shown how it was prejudiced by the Organization's failure to schedule the matter for conference earlier.

Furthermore, the Board agrees with the Organization that Rule 52 does not authorize contracting in this situation. The Carrier concedes that the Versigard roofing material was available for purchase regardless of whether it was to be applied by the supplier, a contractor, or the Carrier's own forces. The only thing not available, unless an authorized contractor was used, was the manufacturer's warranty. However, Rule 52 does not authorize contracting merely to ensure the applicability of a manufacturer's warranty. The Rule has only three specific exceptions. The exception for "special material" applies only when that material is completely unavailable unless applied by or through the supplier. That was not the case here. The Board may not add a fourth exception to the Rule or expand an existing one beyond its wording, even if to do so might be appealing. Revising the language of the Agreement is for the Parties to do in negotiations, if they are so inclined.

However, the Carrier also argues that the work of installing new roofing material was not work reserved to employees covered

by the Agreement in the first place. The Carrier insists that the Scope clause in the Agreement is a general one. Therefore, the Carrier contends, the Organization must first establish its right to the work before it may complain that the work improperly has been contracted to others in this case.1 Furthermore, the Carrier argues that the Organization can establish its right to the work only by proving that Maintenance of Way Employes traditionally have performed all such work system-wide.

The Parties have cited conflicting authority as to whether the Scope rule in the Agreement is a general one as opposed to a specific "position and work" rule. Obviously Rule 1, standing alone, is a "general" scope rule. It does not even undertake to define what work is reserved to members of the Organization. It refers to Rule 4, which lists the various positions encompassed by the Agreement and divides them into seniority groups, but Rule

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1 The Organization complains that the Carrier has "sandbagged" it by raising this issue at the last moment. In correspondence on the property, the Carrier did not dispute the Organization's right to the work. In fact, the Carrier did not raise the issue until after the claim was presented to this Board. On the property, the Carrier simply argued that Rule 52 had been satisfied.

However, where the Organization complains of the contracting of work, it must as a threshold matter establish that it owns the work in question. If the Agreement does not explicitly give it the work, the Organization must show that it owns the work by past practice. Until the Organization has made such a showing, the Carrier is not obliged to present evidence to the contrary. Therefore, we do not find that the Organization was improperly "sandbagged" in this case.

4 similarly fails to define the work reserved to those positions. To fill this gap the Organization invokes Rule 8, which classifies the duties allocated to the Bridge and Building Subdepartment. However, Rule 8 does not guarantee certain work to the Organization. Instead, its purpose is merely to describe what portion of the work belonging to the Organization is to be allocated to B & B forces. If the work described in Rule 8 is not otherwise reserved to the Organization, Rule 8 has no effect.

Therefore, since the Agreement itself does not guarantee roof repair and replacement work to the Organization's members, the Organization must establish that it has acquired the right to such work by past practice.

The Organization argues that it need not satisfy the "exclusivity doctrine" in a case like this. It contends that the "exclusivity doctrine" applies only in cases questioning whether certain work was assigned to employees of the wrong organization, i.e., in "jurisdictional" disputes. Indeed, as the Organization has noted, there is arbitral precedent for the view that the "exclusivity doctrine" applies only in such cases and not in contracting cases. However, the better and more widely accepted view is that the doctrine applies in both settings.2 Otherwise,

2 The Agreement makes that conclusion particularly compelling in this case. Paragraphs (b) and (d) of Rule 52 take pains to emphasize that the rule does not impair the Carrier's ability to contract work that has not customarily been performed by the employees represented by the Organization.

it would be theoretically possible for the Organization to prevail on a claim that the Carrier improperly awarded certain work to a contractor, even though the Organization could not have prevailed if the same work had been given to employees of another organization. Indeed, it would be possible for the Organization to prevail on a claim of improper contracting even though another organization possessed a superior claim to the work. There is simply no reason grounded in the Agreement why such a result should obtain.3 Proving such ownership of work has traditionally required satisfaction of the "exclusivity doctrine." See, P.L.B. 4070, Award No. __ (Case No. 4) (1990).

The Organization's claim that its forces performed such work in 1984 on another building at Pocatello, even though undisputed, is not enough. That fact hardly negates the possibility that other forces, including contractors, have frequently done such

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3 The Organization argues that the "exclusivity doctrine" represents bad policy because it discourages the Organization from permitting the Carrier to contract work even when such permission should be given. According to the Organization, if the "exclusivity doctrine" applies, the General Chairman can never agree to even a single instance of contracting, because it would mean that the Organization could never again prove "exclusivity." However, the Organization overstates the case. That the Organization has specifically authorized the Carrier to contract work on a few occasions would not defeat the Organization's assertion of exclusive ownership of that work. To the contrary, it would suggest the parties' consensus that the work otherwise belongs to the Organization.

work also. For all the record shows, the re-roofing of the Crew Dispatchers building in 1984 may have been an aberration. In order to prevail in this claim, the Organization is required to negate that possibility. The Organization bore the burden of presenting evidence of a system-wide pattern of using Maintenance of Way personnel to perform all roof repairs on the property. Because the Organization did not do so, the claim must be denied.

AWARD

Claim denied.

Lamont E. Stallworth, Neutral Member

C. F. Foose, Organization Member

R. D. Rock, Carrier Member

Dissent to follow

Dated this 6th day of Sept., 1990.

LABOR MEMBER'S
DISSENT
TO
CASE 8 - PUBLIC LAW BOARD NO. 4219
(Referee Stallworth)

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise of futility because they are neither read nor considered by subsequent arbitrators. This Organization does not belong to that school. For, to accept the theory that dissents are meaningless, is to accept the theory that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization is not ready to conclude that reason has become meaningless. Therefore, the Organization must respectfully but emphatically dissent to this award.

This dissent has two central themes: (1) the Board exceeded its jurisdiction by deciding the case on a new issue ("exclusivity") which was not properly before it and (2) the Board's ruling on the exclusivity issue (even if it had properly been before it) was contrary to the rules in the collective bargaining agreement, contrary to precedent on this property and contrary to the consensus of well-reasoned awards on this issue.

In order to fully understand how wrong this award is, it is first necessary to understand the procedural history of this case.

ON PROPERTY HANDLING

The initial claim was filed on November 18, 1985 and progressed through a three-step grievance procedure culminating with an appeal to and denial by the Carrier's highest officer designated to handle such matters (former Director of Labor Relations E. R. Meyers). At each and every stage of the claim handling procedure, the Organization stated in clear unambiguous language that the work was reserved to B&B employes by Rule 8 and that the work had "customarily and traditionally been assigned to and performed by the employees of the Bridge and Building Subdepartment". The Carrier NEVER, NOT EVEN ONCE, denied, contested or disputed the Organization's statements that the work was reserved not only by clear rules, but also custom and practice.[1] Of course, it is a hornbook principle of arbitration that undenied statements must be accepted as fact. This principle has even stronger application in the railroad industry where the arbitrator plays an appellate role rather than hearing de novo argument. As shall become apparent, the violation of this hornbook principle was the Board's first error.

[1]During the handling on the property, the Carrier simply did not contest that roofing work was within the Scope of the Agreement and customarily performed by BMWE employes. Instead, it relied upon a "special material" exception in Rule 52 based upon the fact that the contractor would warranty the work for ten years if his employes applied the materials.

PROGRESSION TO NRAB

On February 4, 1987, the BMWE listed the dispute with the NRAB. In accordance with NRAB Circular No. 1, literally hundreds of awards, sound public policy and basic principles of fairness, the listing of the case at the NRAB effectively closed the record in this case.

Following the listing of the case, submissions and rebuttal submissions were exchanged in the normal manner. In its submission, the Carrier, for the first time in the history of the case, made a passing reference to "exclusivity" but did so only to the extent that it contended the Organization had not presented evidence that BMWE forces had exclusively applied "Versigard", the warranted roofing material.[2] However, the Carrier's position remained grounded on the "special material" argument as was made clear in the "SUMMARY OF CARRIER'S POSITION" at Page 15 of its submission, which reads:

"SUMMARY OF CARRIER'S POSITION:

Throughout the submission, the Carrier has clearly shown that:

1. The Organization's failure to conference the advance notice in a timely manner allowed the Carrier to proceed with the contracting.

2. Rule 52 allows the Carrier to contract in order to obtain special material avail-

[2]Of course, the Organization had never presented such evidence because scope coverage of the work had never been challenged on the property.

"able only when applied or installed through a supplier.

3. The Claimants suffered no monetary loss and, therefore, are not entitled to compensation.

The Carrier requests a denial award."

Subsequent to the exchange of submissions, the case was deadlocked by the NRAB. On November 9, 1988, the case was scheduled to be heard before a referee on June 22, 1989. On May 16, 1989, little more than a month before the hearing date, the Carrier exercised its statutory right to withdraw the case from the NRAB for handling on a Public Law Board. The case was subsequently listed on Public Law Board No. 4219.

PUBLIC LAW BOARD HANDLING

Despite the fact that the case would have been heard at the NRAB on June 22, 1989, it languished before Public Law Board No. 4219 for nearly nine months before it was scheduled to be heard on February 20, 1990. On February 13, 1990, four working days before the hearing, the Organization received a 39 page "Supplemental Brief" from the Carrier, wherein the Carrier: (1) raised four major new issues, including exclusivity and (2) presented new evidence in the form of numerous new documents never before seen by the Organization. In essence, the Carrier was attempting to change the entire character of the dispute more than four years after the dispute arose and only four days before the arbitration hearing.

THE ARBITRATOR EXCEEDED HIS AUTHORITY BY CONSIDERING NEW ISSUES

During the handling on the property, the Carrier never disputed the fact that roofing work was reserved to BMWE forces by the collective bargaining agreement, nor did it raise the so-called "exclusivity test". Circular No. 1 and literally thousands of NRAB awards thereby precluded the Carrier from raising those issues after the Organization filed its letter of intent with the NRAB. This prohibition on raising or considering new issues extends to cases later withdrawn from the NRAB not only by force of logic, but also by award precedent.

When Congress amended the Railway Labor Act to provide for the establishment of Public Law Boards, its obvious intent was to expedite handling of backlogged cases. There was no intent stated, nor can it logically be implied that Congress ever intended that cases could be withdrawn from the NRAB to circumvent Circular No. 1. Withdrawing cases for the purpose of supplementing the record not only violates basic tenets of fairness, but is also contrary to sound public policy. When a case is progressed through the administrative machinery of the NRAB only to be withdrawn at the eleventh hour, public funds are needlessly wasted.

Moreover, the application of Circular No. 1 prohibitions on new evidence to cases that have been withdrawn from the NRAB for handling on a Public Law Board has clearly been recognized by previous awards. See Public Law Board No. 3943 - Award 1, which held:

"On May 18, 1983 a pay claim was filed by the Organization's Division Chairman, Albuquerque for Claimant H.W. Wittman. The claim alleged violation of the operant Agreement on March 24, 1983 when the Carrier '...required and/or permitted an employee not covered by the Agreement to handle a train order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed...'.

* * *

On May 31, 1984 the Organization notified the Third Division of the National Railroad Adjustment Board of its intention to file an ex parte submission on the dispute involving claims by the three Claimants stated in the foregoing. The case was docketed as CL-25829 before the Third Division. At the request of the Carrier the case was withdrawn from the National Railroad Adjustment Board.

On September 3, 1985 an Agreement was signed between the General Chairman of the Organization and the Carrier's Vice President of Personnel and Labor Relations where it was agreed, in accordance with the provisions of Public Law 89-456, to set up a Public Law Board to adjudicate the matter formerly docketed as CL-25829 before the National Railroad Adjustment Board.

* * *

The record before the Board on this case is fairly voluminous and, at points, considerably complex. The Board has studied closely both the exchanges on property, and the submissions by the parties to this Board. The Board notes, at points, information and arguments found in one or the other submission which adds to or augments that which is contained in the exchanges of record. The parties are, therefore, advised as a preliminary point that, in accordance with Circular No. 1 and the articulation of the doctrine therein by many subsequent Awards from the National Railroad Adjustment Board, information which is not part of the record per se cannot be utilized when formulating conclusions in this case (Third Division 20841, 21463, 22054; Fourth Division 4132, 4136, 4137). The positions of the parties outlined in that part of this Award which immediately follows, therefore, will at all times be consistent with those arguments proffered by the parties when the claims to this case were being handled on the property. ***"

In addition to violating Circular No. 1 and long-standing practice in the railroad industry, the Carrier's Supplemental Brief

violated the terms of the Public Law Board Agreement. Paragraph (e) of said Agreement clearly stipulates that:

> "(e) At a mutually agreeable date prior to the hearing, but in no event later than 15 days prior thereto, the parties shall exchange two copies of their respective written submissions containing an ex parte statement of facts, supporting evidence and argument of its positions, and at the same time furnish copy to the Neutral Member."

Receipts presented at the arbitration hearing clearly establish that the Carrier's Supplemental Brief was received by the Organization on February 13, 1990. The hearing was held on February 20, 1990. Hence, it is crystal clear that the Supplemental Brief containing the issues and arguments, upon which the Board ultimately decided the case, was not timely presented in accordance with the clear and unambiguous terms of the Public Law Board Agreement.

Despite the overwhelming evidence that the Carrier did not dispute the Organization's contractual right to the work or raise the exclusivity test on the property, the Board proceeded to decide the case on that issue. Fortunately, we are not left in the dark as to why the Board decided the case based on this issue. In fact, the Board clearly set forth its reason in Footnote No. 1 at Page 8 of the award. A careful reading of Footnote No. 1 reveals where the Board went wrong. It reads:

> "1 The Organization complains that the Carrier has 'sandbagged' it by raising this issue at the last moment. In correspondence on the property, the Carrier did not

"dispute the Organization's right to the work. In fact, the Carrier did not raise the issue until after the claim was presented to this Board. On the property, the Carrier simply argued that Rule 52 had been satisfied.

However, where the Organization complains of the contracting of work, it must as a threshold matter establish that it owns the work in question. If the Agreement does not explicitly give it the work, the Organization must show that it owns the work by past practice. Until the Organization has made such a showing, the Carrier is not obliged to present evidence to the contrary. Therefore, we do not find that the Organization was improperly 'sandbagged' in this case." (Emphasis added)

The Board clearly recognized, "*** In correspondence on the property, the Carrier did not dispute the Organization's right to the work. ***" Based on this sentence standing alone, this case should have been sustained. Railroad arbitration is not de novo arbitration. The Board is restricted to considering the record developed in the correspondence on the property. In that record, the Carrier never disputed the Organization's basic contractual right to the work.

In the second paragraph of the footnote, the error in the basic premise of the award is further elucidated. The Organization agrees that, "... it must as a threshold matter establish that it owns the work in question. ***" However, the Organization did just that. The Organization cited Rules 1, 4, 8 and 52 and stated that these rules reserved the disputed work to the Organization. As the Board recognized in the first paragraph of the footnote, the Carrier did not dispute this during the handling on the property. The Organization also repeatedly stated that BMWE had customarily and traditionally performed the disputed work. These statements

were likewise not disputed by the Carrier during the handling on the property. It would have been redundant indeed for the Organization to develop and present evidence to support statements which remained undenied and undisputed by the Carrier. If the Carrier had challenged either the rule support or the past practice position of the Organization, the Organization would indeed have been obligated to present evidence. BUT, NO SUCH CHALLENGE WAS EVER MADE.

Simple logic supports the Organization's position that it had no obligation to present evidence to support uncontested statements of fact. Moreover, the NRAB has repeatedly and consistently held that where basic issues such as scope coverage and exclusivity are not raised on the property, they may not be considered by the Board. See Third Division Awards 20230, 20258, 23354 and 26212 which are but a few of the many awards holding to this effect. Typical thereof is Award 23354, which held:

> "In its submission to this Board, Carrier raised the argument that the work in question was not work exclusively reserved to the Organization. That argument was not brought up on the property, and therefore cannot be raised for the first time before the Board. Consequently, the issue will not be considered here."

Footnote No. 1 makes it transparently clear that the Board was in error when it (1) considered the exclusivity argument and (2) held that the Organization was obligated to present evidence to support a position that was uncontested during the handling on the property.

In essence, a careful review of Footnote No. 1 establishes that Award 8 actually supports the Organization's position in this dispute and on contracting out disputes on the Union Pacific in general. The footnote clearly recognizes that the Carrier did not challenge scope coverage during the handling on the property. This finding is in harmony with the Organization's position in this and other claims that Rule 8 (as well as Rules 9 and 10) are clearly work reservation rules and have been so recognized by the Carrier for decades. This recognition by the Carrier is precisely the reason why no challenge to scope coverage was made during the handling on the property. The challenge was raised four years later, when new management unfamiliar with the historical mutual interpretation of the Agreement replaced Mr. Meyers. Until that time, not only Mr. Meyers, but also the Chief Engineering Officer had fully agreed with the Organization's understanding of Rule 8. That is precisely why no challenge was made to the Organization's Rule 8 position during the handling on the property.

THE EXCLUSIVITY TEST HAS NO APPLICATION UNDER THE CONTROLLING COLLECTIVE BARGAINING AGREEMENT

"Exclusivity" is a past practice test, it sets forth a degree of past practice. It has no application on the Union Pacific because Rule 8 is clear and needs no past practice clarification. This fact was clearly recognized in Third Division Award 14061 which interpreted the language in Rule 8 in 1965 and found that it specifically reserved work to BMWE employes. Hence, even if the

exclusivity test had been timely raised by the Carrier, it should have been rejected based on existing precedent on this property.

Even if reason could be found to reject the Organization's position on Rule 8 (which would be difficult in light of the fact that the Carrier itself did not reject that position during the handling on the property), the exclusivity test still must fail in light of Rule 52(a). Said rule clearly stipulates that work "customarily" performed by BMWE employes may be contracted out if certain stipulated exceptions are present. The logical conclusion is that work "customarily" performed by the employes can NOT be contracted out if the exceptions are not present. Hence, even if Rule 8, where excluded from consideration and past practice was controlling, the degree of practice that must be established is "customarily" - not "exclusively". The application of the exclusivity test under these circumstances is nothing less than an attempt to change the Agreement from what the parties have written ("customarily") to a standard which was not considered or negotiated into the Agreement. A virtually identical rule was considered in Public Law Board No. 4402, Award 20. In that case, the Board clearly rejected the exclusivity test based on the parties' use of the word "customarily" as opposed to exclusively in the Agreement. Although we hesitate to further burden this already lengthy dissent, due to its overwhelming relevance, we invite attention to the pertinent paragraphs of Award 20 of Public Law Board No. 4402:

> "Third, we disagree with the Carrier that in order to demonstrate a violation of the contracting provisions in the Note to Rule 55 and the December 11, 1981 letter

"that the Organization must show that work that has been contracted out has been previously performed exclusively by the covered employees. The negotiated language governs work 'which is *customarily* performed by the employees' - not work that is 'exclusively' performed [emphasis added]. The analysis on this question is similar to the resolution of the Organization's arguments concerning the notification requirements. Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so.[1] *See e.g.*, Third Division Award 20633 between the parties (quoting Third Division Award 20338) '"... Additionally, we observe that the Note to Rule 55 specifically alludes to work which is *customarily* performed by the employes rather than the frequently argued doctrine involving work *exclusively* performed."' [emphasis in original]); PLB 4370 Award 21, quoting Third Division Award 24280 ('... [T]he Organization need not meet the burden of exclusivity of work assignment ....'). Of particular interest is PLB 4768, Award 1 and awards cited therein, which, although discussed in a notice context, makes the correct analysis [emphasis in original]:

> ... [T]he Board takes guidance from Awards which distinguish 'customarily performed' from 'exclusively'. Citation of only a few of these will suffice.
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> Third Division Award No. 26174 (Gold) states:

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[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.

> "... 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]

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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."

EXCLUSIVITY APPLIES TO CLASS AND CRAFT CASES - NOT SUB-CONTRACTING

The Board continues in its divergence from well-reasoned precedent when it compares contracting out cases to inter-craft jurisdiction cases. The distinction between these two types of cases are clear and unmistakable. In craft jurisdiction disputes, the Board is faced with competing collective bargaining agreements. Where work appears to fall within both agreements or in the grey area between the agreements, arbitrators have looked to a showing of exclusive past practice to resolve the conflict. Sub-contracting cases are distinguishable because there is no competing collective bargaining agreement. This distinction was historically recognized and accepted by the NRAB in Third Division Awards 7836, 11733, 13236, 13237, 14121, 23217 and 25934. Moreover, the most recent awards of the NRAB and Public Law Boards establish an emerging consensus of arbitrators who are restricting the exclusiv-

ity test to class and craft jurisdiction cases. In addition to Award 20 of Public Law Board No. 4402 cited above, see Third Division Awards 27012, 28045 and Award 1 of Public Law Board No. 4768.

The Board states that it would somehow be unreasonable for the Organization to be able to prevail in a sub-contracting case when it would not be able to prevail if the same work was assigned to another craft. The Board is simply wrong as the following example clearly establishes. On many carriers, brush cutting on the right of way from property line to property line is within the BMWE collective bargaining agreement. However, within that geographical boundary, the work of cutting brush under the signal lines may be within the Signalmen's agreement. Hence, neither Organization would have an exclusive right to brush cutting. However, simply because there was an overlap or grey area between the competing collective bargaining agreements is no reason to remove the work from both agreements and assign it to a sub-contractor. This is precisely the principle that was recognized in Third Division Award 27012.

Moreover, the rationale that the exclusivity test applies only to instances where there are competing collective bargaining agreements has been extended to other types of cases. See Second Division Award 11902 and Third Division Awards 25469, 25991, 28185 and 28349. In each of these cases, non-agreement supervisors performed bargaining unit work. Despite the fact that the petitioning craft was unable to prove exclusive jurisdiction over

the work (as opposed to other crafts), the claims were all sustained based on the theory that the exclusivity test applies only to craft jurisdiction cases. The absence of a competing collective bargaining agreement nullified the exclusivity test.

The final error in Award 8 is reflected in Footnote No. 3 at Page 10. There, the Board recognizes that the so-called exclusivity test does not really mean "exclusive", i.e., that there can be exceptions. However, if there are exceptions, then the term "exclusive" no longer applies. That is precisely the Organization's point. Exclusivity is rigid, an unbending test that was certainly never negotiated into the Agreement by the parties and can not logically be implied because to do so does violence to the Agreement (Award 1 of Public Law Board No. 4768, supra).

If the exclusivity standard does not apply, what is the standard in past practice cases? Rule 52 answers that question, the controlling standard is "customarily" (Award 20 of Public Law Board No. 4402, supra).

CONCLUSION

Award 8 of Public Law Board 4219 is clearly an anomaly. It is based on reasoning the conflicts with:

(1) Public Law Board No. 3943, Award 1 concerning the application of Circular No. 1 to cases withdrawn from the NRAB for handling on a Public Law Board.

(2) Award 14061 concerning the interpretation of the Rule 8 language on this property and the rejection of the exclusivity test.

(3) Third Division Awards 20230, 20258, 23354 and 26212 which held that issue of scope coverage and exclusivity may not be considered if they were not raised on the property.

(4) Public Law Board No. 4402, Award 20 which interpreted language virtually identical to Rule 52(a) and ruled that the controlling standard was "customarily".

(5) Recent Second Division Award 11902, Third Division Awards 25469, 25991, 27012, 28045, 28185, 28349, Award 1 of Public Law Board No. 4768 and Award 20 of Public Law Board No. 4402 which have restricted the application of the exclusivity test to class and craft cases.

Therefore, I dissent.

Respectfully submitted,

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