AWARD NO. 36
CASE NO. 36

PUBLIC LAW BOARD NO. 6249

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
	)	
	)	**UNION PACIFIC RAILROAD COMPANY (FORMER SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES))**

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned Burlington Northern Santa Fe Railway forces (BNSF) to perform work (removed and installed track panels, surfaced and lined track and other track maintenance work) in the vicinity of Mile Post 125.6 on the Lafayette Division, New Iberia, Louisiana on December 21, 1996 through January 27, 1997 (System File MW-97-110/1056997, MW-97-111/1056976 and MW-97-112/1056975 SPE).

2. As a consequence of the violation referred to in Part (1) above, Messrs. J. D. Guidry, J. M. Baltazar, C. J. Williams and L. R. Harmon shall each be allowed one hundred sixty (160) hours' pay at their respective straight time rates and one hundred five (105) hours' pay at their respective time and one-half rates; Messrs. R. E. Cunigan, J. Leger, E. J. Himel, T. G. McGill, J. L. Bush, M. J. LaCoste, P. K. LeJeune, D. W. Francois, R. F. Riggins, G. Serf, Jr. and L. Davis shall each be allowed one hundred seventy six (176) hours' pay at their respective straight time rates and one hundred sixty-eight and one-half (168.5) hours' pay at their respective time and one-half rates; Messrs. R. Ruffin, L. R. Bush, M. D. Favorite and E. Nixon shall each be allowed seventy one (71) hours' pay at their respective time and one-half rates.

OPINION OF BOARD

This is another dispute between the parties arising as a result of the UP/SP merger and after the December 12, 1996 transfer of jurisdiction from the Carrier to the BNSF.

Awards 27, 28, 29, 33 and *35* of this Board which dealt with claims arising out of the UP/SP merger were contracting disputes. This is not. Here, the assertion is that BNSF maintenance of way employ-

ees rather than Claimants as former SP maintenance of way employees performed the work. We therefore cannot view this as a typical contracting dispute because there is no evidence that the Carrier contracted with the BNSF for the BNSF to perform the work.

Because this is not a contracting dispute, the contracting out principles are not applicable. Specifically, in contracting disputes, the principle of exclusivity does not apply and the question is whether the disputed work fell within the scope of the applicable schedule agreement.[1]

Here, for purpose of discussion (but noting that the Carrier maintains that as a result of the UP/SP merger and after the December 12, 1996 transfer of jurisdiction from the Carrier to the BNSF, it did not control the work in question), we shall give the Organization the benefit of the doubt and assume that the Carrier controlled this particular work. Even with the Carrier controlling the work, the dispute is really over which group of employees should have performed the work — BNSF maintenance of way employees or Claimants as former SP maintenance of way employees. In such circumstances, the principle of exclusivity must apply.[2]

The Carrier asserts that the Organization has not "... demonstrate[d] that such work has been performed historically, customarily and exclusively by Claimants ... [t]here is nothing on the record that

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[1] *See Award 28, supra* where we rejected application of a requirement in contracting disputes that the Organization demonstrate that it performed the disputed work on an exclusive basis:

> The work involved is "... work within the scope of the applicable schedule agreement ...." The described work is classic maintenance of way work. "... [E]xclusivity is not a necessary element to be demonstrated by the Organization in contracting claims.'" *Third Division Award 32862* and awards cited therein.

[2] *See e.g., Third Division Award 18471*:

> The Scope Rule of the Agreement, is general in nature, and under innumerable decisions handed down by the Board, does not grant the Organization exclusive right to the work in question. Nor does Rule 29, the Classification Rule, support the Organization's contentions. It is axiomatic that the mere inclusion of a classification rule, does not, by itself, mean that the work of each classification will be restricted exclusively to the employes of the class. Rule 29 cannot be construed to provide the Organization exclusive right to the disputed work.
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> Since the Agreement does not vest in the Brotherhood the exclusive right to wall and ceiling washing, in order to prevail, the Organization must prove that work of such nature has been traditionally and exclusively reserved to B and B employes. This is a question of fact which must be proven by a preponderance of the evidence.

would indicate that this work has been reserved to Maintenance of Way employees to the exclusion of all others".[3] The Organization has a different view of the situation. According to the Organization, this was "... traditional and historical work of maintenance of way Roadway Track and Machine Department employees ...."[4]

We cannot guess. We can only decide these cases on the basis of the record *facts* developed in each case. The Organization has a burden here to show that the covered employees exclusively performed the work. The Organization states that such work has been exclusively performed by the covered employees. The Carrier takes a different position. Aside from those generalized assertions, we have no persuasive factual proof either way. The record is therefore in conflict. The Organization's burden has not been carried.

This claim shall be denied.[5]

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 7-24-02

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3 *See e.g.*, the Carrier's letter of July 31, 1997.

4 *See e.g.*, the Organization's letter of April 11, 1998.

5 This dispute is a consolidation of three claims raised on the property. In light of the ultimate result, the Carrier's objections to that consolidation as discussed in its submission are moot.