PUBLIC LAW BOARD NO. 2206

AWARD NO. 20

CASE NO. 26

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The carrier violated the Agreement when removing work customarily, traditionally and by practice performed by Track Sub-department employees at Wadena, Minnesota, commencing in January 1978 and continuously thereafter by permitting contract forces to take over and perform the work of cleaning cars without notification to General Chairman Funk. (System File T-M-208C)

(2) That Claimants R.J. Schneider, L.J. Geiser, K.E. Winterfield, L.E. Hotakaninen, A.R. Hotakaninen and their successors be allowed forty-three (43) hours per month each at their respective straight time rate of pay until violation referred to in part one (1) of claim is discontinued."

OPINION OF BOARD:

The Organization in this case maintains that Carrier violated Rules 1, 5(d) and the Note to Rule 55 by contracting out to Omni Car Cleaning Service the work of cleaning cars used by the Homecrest Furniture Company at Wadena, Minnesota. Wadena is a point on the former Great Northern property, now part of the merged Carrier. There is little doubt in the record that Section Employees performed the car cleaning work in question at that point until January 1978 when Omni was awarded the work. However, this is not alone

sufficient to establish exclusive reservation of that work to BMWE employees under Rule 1, nor to bring to bear the notice and consultation requirements of the Note to Rule 55. See Award 3-21844. As we explained in detail in our Award No. 8 (Case No. 14), involving virtually the same issue, in order to prevail the Organization must show that it owned the work in question by a custom, practice or tradition of system-wide performance to the virtual exclusion of others. The following analysis from Award No. 8 applies in equal measure herein:

> An additional element distinguishes the present case from Award 21844, however, and that is the Organization's additional and alternative theory that Carrier violated the Note to Rule 55 by contracting this car cleaning work. The critical question presented in that connection is whether the Organization can prevail under the Note by showing a point practice rather than the system-wide exclusivity required under the general Scope Rule. Stated differently, does the concept of system-wide exclusivity also apply to the rights protected under the Note to Rule 55 or may a practice at a particular point establish an exclusive right to work under that Note? There is a split of authority on this issue and each of the parties has cited awards favoring its view. The Organization insists that the former practice at Darling Pit (which it equates to Staples) is enough to establish exclusive entitlement to the work under the Note. See Awards 20338 and 20633. Carrier, on the other hand, cites Awards 12952 and 16640, both of which construed and applied Letter Agreements between the former NP and the BMWE, which are the historical bases for the Note to Rule 55. We have read and analyzed carefully each of the cited conflicting authorities. In our considered judgement, Awards 12952 and 16640 are soundly reasoned and based upon historical analyses and construction of the Letter Agreements which form the genesis of the Note. We find these authorities much more persuasive than Award 20633 which touches on the critical point only in passing and which apparently relies upon a non sequitor from Award 20338 to support its ultimate conclusion. At bottom line we find ourselves in agreement with the Board in the earlier awards and conclude that rights encompassed under the Note to Rule 55 are coextensive with the rights encompassed by the Scope Rule of the particular controlling Agreement. The Scope Rule of the parties' Agreement, like that of the NP, is a general Scope Rule. In such circumstances the Organization, to prevail under the Note to Rule 55, must show reservation of the disputed work to Maintenance of Way Employees by exclusive system-wide practice.

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We find no critical differences upon which to distinguish the present case from that decided in Award No. 8. For reasons developed fully therein, this claim likewise is denied. See also Award 3-22465.

FINDINGS:

Public Law Board No. 2206, upon the whole record and all of the evidence, finds and holds as follows:

1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was not violated.

AWARD

Claim denied.

Dana E. Eischen, Chairman

F. H. Funk, Employee Member

L. K. Hall, Carrier Employee

Date: Jan 8/80