AWARD NO. 20
CASE NO. 20

PUBLIC LAW BOARD NO. 4402

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to perform track undercutting work at Guersney, Wyoming, beginning May 12, 1986 (System File WE/Gr. DMWA 86-7-29).

2. The Agreement was violated when the Carrier assigned outside forces to perform track undercutting work at Rozet, Wyoming, beginning May 19, 1986 (System File WE/Gr. DMWA 86-7-30).

3. Because of the violation referred to in Part (1) hereof, Group 2 Machine Operators B. G. Kutschara, A. H. Magnason, L. L. Haines and T. L. Anderson shall each "... be paid eight (8) hours each day at their respective rate of pay beginning May 12, 1986 and continuing until the machine positions have been bulletined and assigned to Roadway Equipment Operators. Claim to include any overtime worked by the contractor's employes on the machines in question."

4. Because of the violation referred to in Part (2) hereof, Group 2 Machine Operators D. K. Liberg, D. A. Olbricht, G. L. Griffie and W. L. Kudera shall each "... be paid eight (8) hours each day of their regular work week plus overtime, if any, at their pro rata rate of pay beginning May 19, 1986 and continuing until said machine positions have been assigned to roadway equipment operators."

OPINION OF BOARD

Claimants are Group 2 Machine Operators in the Carrier's Roadway Equipment Sub-Department. By letter dated March 13, 1986, the Carrier's Chief Engineer J. G. Wood advised the Organization's General Chairman E. J. Torske of the Carrier's intent to contract out certain undercutting work as follows:

> This is to advise that Denver Region will be contracting track undercutting with Plasser American Corporation for the 1986 undercutting program. Undercutting will be done with four (4) machines beginning May 12, and ending June 24, on locations on the Third, Sixth, and Ninth Subdivisions of the Alliance Division.
>
> If a conference is desired, please advise.

The parties met on April 4, 1986 to discuss the substance of the Carrier's letter without reaching agreement. On May 12, 1986 Plasser American Corporation commenced performing track undercutting work utilizing two Plasser Undercutters beginning at Guernsey, Wyoming with each machine requiring the services of two machine operators employed by Plasser. Plasser commenced similar work on May 19, 1986 beginning at Rozet, Wyoming again using two Plasser Undercutters with the same compliment of non-Carrier machine operators. Through statements presented by the Organization, the Organization asserts that undercutting work has always been performed by Carrier machine operators using Carrier-owned equipment or equipment leased from other firms. The Carrier does not dispute that its employees have performed undercutting work, but asserts (without disagreement from the Organization) that it has long contracted out this specific type of undercutting work.

The Note to Rule 55 states:

> 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' force. 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 fifth 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.

Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible.

Also applicable is the Letter of Agreement dated December 11, 1981 providing:

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carrier's forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

* * *

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 employees.

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.
>
> * * *

First, we agree with the Organization that track undercutting work in general falls within the scope of the Agreement. As set forth in the Agreement, Group 2 Machine Operators operate undercutters (Switch and Gopher). The Note to Rule 55 also specifically designates coverage for employees who "perform work in connection with the construction and maintenance or repairs of ... tracks". Moreover, it is not contested by the Carrier that in the past, covered employees have performed track undercutting functions.

Second, we disagree with the Organization that the Carrier's March 13, 1986 letter violated the notification requirements of the Note to Rule 55 and the December 11, 1981 letter. Under those two provisions, the Carrier is obligated to give the Organization the required advanced notice of its intent to contract out work and then, if requested, the Carrier is obligated to engage in good faith discussions concerning "matters relating to the said contracting transaction" with the design "to reach an understanding concerning said contracting". We do not read that carefully drafted language to mean that *prior* to entering into a contracting arrangement the Carrier is obligated to negotiate over the basis for its decision to contract out. Had the sophisticated negotiators who assembled these provisions intended such a result, they could have clearly expressed such an intent. If, in the ensuing discussions, the Organization can convince the Carrier not to continue with its plans to contract out, so be it. But, we do not read these provisions to require the Carrier to bargain about the decision to contract out prior to its making the contracting arrangements. Therefore, the fact that the Carrier may have made prior commitments in this case to contract out before giving the notice to the Organization in and of itself does not require a sustaining award.

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:
>
> > ... 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.
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> * * *
>
> Third Division Award No. 27012 (Marx) states as follows:

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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.

> 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]

Fourth, we disagree with the Organization that the Carrier did not act in good faith in this matter as contemplated by the Note to Rule 55 and the December 11, 1981 letter. The Organization misplaces the burden of demonstrating the existence of good faith or lack thereof. This is a contract dispute. As such, before the burden is shifted to the Carrier to demonstrate that its actions were in good faith, the initial burden is upon the Organization to make a showing that the Carrier acted in bad faith. All that has been shown by this record is that prior to discussing the matter with the Organization the Carrier (as in the past) may have decided to contract out work now claimed by the Organization. While that conduct may ultimately violate the limitations upon contracting out as the factors in the Note to Rule

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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.

55 are applied, those facts alone do not establish that the Carrier acted in bad faith.

Fifth, we disagree with the Organization in this case that a sustaining award is required because exclusivity and alleged lack of qualification of the employees were not mentioned in the March 13, 1986 notice by the Carrier as "reasons" for the contracting under the provisions of the December 11, 1981 letter. While lack of exclusivity may be a defense that the Carrier argues in these kinds of cases, that defense is not a "reason" for contracting out work as contemplated by the parties December 11, 1981 letter. Those negotiated "reasons" concern the factors in the Note to Rule 55 regarding special skills, equipment or material, not being adequately equipped to handle the work and emergency time requirements. Similarly, in this matter, an alleged lack of qualification of the employees (while required as a reason in the December 11, 1981 letter) has not been the designated primary basis before this Board for the Carrier's contracting out the work in this matter. Rather, while the Carrier did raise the question on the property (*see* Carrier Exh. 6), before this Board the Carrier has focused upon the assertion that the Plasser Undercutter is "special equipment not owned by the Company" as set forth in the Note to Rule 55.[3]

Sixth, having previously found that the employees have "customarily performed" undercutting work, we next turn to the factual questions that these cases will hinge upon as set forth in the enumerated factors in the Note to Rule 55. The dispute centers around the use the Plasser American Undercutter which is described by the Carrier (Carrier Exh. 4) as

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3 While the special equipment factor was also not specifically designated in the Carrier's notification, the record shows that this reason was discussed in the parties' April 4, 1986 conference and in subsequent correspondence. *See* Carrier Exhs. 4 and 6. Given the extent of discussion on the special equipment factor, we are unwilling to sustain this claim on the sole basis that the Carrier did not specifically identify that particular "reason". The requirement in the December 11, 1981 letter to give reasons is in "the interest of improving communications". While we certainly can envision a scenario where a carrier's failure to give reasons could effectively handcuff the Organization in its ability to address the issues raised after receiving notification of a contracting out of work, given the extent of discussions on the special equipment factor demonstrated by this record, the intent of the December 11, 1981 letter to improve communications has been satisfied. We cannot say that such an omission - which is, at best, technical violation - requires a sustaining award in this case. In the future, the Carrier should specify its reasons for contracting out as required by the December 11, 1981 letter - indeed, that is what it is required to do when giving notification. But, given the totality of the circumstances, the Carrier's failure to do so in this case is not fatal to the Carrier's position.

"a large machine which is designed for high speed out of face production" when compared to the switch undercutter and gopher undercutter listed in Rule 5g. Descriptive material from Plasser (Carrier Exhs. 1 and 2) describe the Plasser American Undercutter as a machine that:

> ... performs both on heavily fouled ballast and on modern high speed lines. An alternative to sledding operations due to the savings generated by reclaiming cleaned ballast. The unit is equipped with a lifting and slewing device to reduce the excavation depth or to avoid obstacles and hold the line. A second slewing device toward the rear of the machine is used for any additional lining corrections needed. Available with a switch cutting capability which increases its usefulness as switches may be cut during other undercutting operations by inserting additional cutting links.

On the other hand, the Trac-Gopher, owned by the Carrier and operated by the employees (Carrier Exh. 2) has a more limited clearing function than the Plasser Undercutter in that it:

> ... is designed to undercut and remove ballast at crossings, bridge approaches, and in cemented ballast areas. The GO-4's digging wheel trenches through ballast or asphalt to a depth of 41-in. below the rail. Advance excavation is eliminated. Cutter bars of 9-ft. or 12-ft. length loosen ballast which is removed on 13-ft. or 21-ft. conveyors. The GO-4's can operate in tunnels, at switches and in double track areas. It also cuts pipe or cable trenches. The compact size allows for unrestricted highway travel on flat beds or Tamper's highway trailers.

Here, the Carrier asserts that "The reason for the contracting was that the Carrier did not own or desire to purchase this type of specialized equipment. In addition, this undercutter cleaner machine was not available for lease from any of the three construction companies that own/operate this type of equipment." Carrier Submission at 2. The Organization responds claiming that the Plasser Undercutter is doing exactly what Maintenance of Way forces have done since rock was first used as ballast in tracks with men using shovels, sled or the Cribex, Ballastex or Screenex machines covered by Rule 5 of the Agreement. *See* letter of January 9, 1987 (Carrier Exh. 10) and supportive employee statements. The Organization further points out that undercutting positions have been bulletined.

The Carrier, in turn, replies by stating (Carrier Exh. 12) in its February 7, 1987 letter:

> ... [T]here is a vast difference between the undercutter ballast cleaner involved in these claims and the undercutter machine listed in Rule 5G which only removes the dirty ballast from under the track which then requires total replacement of the ballast with new material. However, the undercutter ballast cleaner machine removes the old fouled ballast from under the roadbed, then cleans the ballast and places the cleaned ballast back under the track. Undercutter ballast cleaners are not listed under Rule 5G as the Carrier does not own such machines. Undercutter ballast cleaners have been use don the Chicago and Denver Regions since 1957 and at all times such machines have been leased with an operator furnished by the contractor who owns the machine.

To further support its position, the Carrier points to its letter of February 13, 1987 (Carrier Exh. 13) which states that "out-of-face undercutting of track requires large specialized equipment not available among the normal complement of railroad equipment" and its letter of July 6, 1987 (Carrier Exh. 14) attaching statements from Plasser American Corp., Knox Kershaw, Inc. and R. J. Corman Railroad Construction Company which indicate that their machinery is unavailable to the Carrier under any circumstances for operation by other than contractors' employees (due in part to the limited number of these machines available in the United States).

Considering the above evidence regarding the type of machinery at issue and its function, we find that the Plasser Undercutter is not owned by the Carrier; is not the precise type of machinery that is ordinarily operated by the Machine Operators; performs more complex functions in the cleaning of ballast than the machinery owned by the Carrier and operated by the employees - particularly the cleaning and replacement of the ballast as opposed to the mere removal of the ballast; and such machinery is not available for lease without use of contractor forces. Under the facts of this case, we therefore find the Plasser Undercutter to fall under the "special equipment not owned by the Company" factor set forth in the Note to Rule 55. We further find that by using an outside contractor in these circumstances where these machines were unavailable for leasing without the contractor's

forces, the Carrier did not violate the terms of the December 11, 1981 letter which requires "the use of ... maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees".[4]

We must caution the Carrier, however, that should circumstances change and the present unavailability of this type of undercutting equipment which has caused the lack of a leasing market also change so that in the future this type of equipment is more readily available for rental, we cannot say that the outcome of a similar future claim will be the same. We are satisfied by this record that the Carrier's employees are capable of being trained to operate this type of equipment and, as such, the provisions of the December 11, 1981 letter requiring "the procurement of rental equipment and operation thereof by carrier employees" will become operative.

Therefore, limited to the particular facts before us, we shall deny this claim.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Denver, Colorado
January 15, 1991

[4] The fact that in October 1985 the Carrier leased the kind of equipment at issue in this case without contractor operators does not dictate a different result. The record establishes that such a leasing arrangement occurred on one occasion only and, as a result of that leasing arrangement, the lessor was sued and enjoined for violating a non-competition agreement. *See* Carrier Exh. 14. If anything, this ill-fated attempt at leasing this kind of equipment for use by Carrier employees underscores the lack of availability of this equipment for lease.

Concurrence to Award 20 of Public Law Board 4402

Even though there is much in this Award that is of value in clarifying the issue of what constitutes a valid notice of contracting out, and the right of the Carrier to take advantage of modern equipment, some aspects of the Award are very problematic and should not pass without comment.

The Award properly found that the Carrier served a valid notice of contracting (p. 4), that there was sufficient proof of the presence of one of the specified criteria under which contracting out is appropriate (p. 9), and that the requirements for discussion with the general chairman were met (p. 4). Having thus found that all possible Carrier obligations and employee rights under the Note to Rule 55 had been satisfied, there were no more issues concerning that Rule to deal with. Therefore, since the question of whether the Carrier could have elected to contract out the work without notice to the Organization was not in issue, the entire discussion of whether the "exclusivity" standard governs the determination of when contracting out notices are or are not required, must be considered *obiter dictum.*

It may be that inclusion of the discussion concerning "exclusivity" was influenced by the Carrier's extensive argument on the subject. Nevertheless, we believe that the argument, no matter how inelegantly presented, should have been recognized as an argument in the alternative made necessary by the Organization's technical attacks on the validity of both the notice and the criteria. (Indeed, the Award seems to recognize the nature of the argument in the second full sentence at the top of page seven.) We would make no further comment on that subject if the practical effect of eliminating the exclusivity standard from contracting was not a radical alteration of the respective parties scope rule rights and obligations, and if the Award had not treated the matter as if it were a controlling issue, with the resulting wrongful implication that the discussion is authoritative and final. As Referee William M. Edgett cautioned in Third Division, NRAB Award No. 18773, *BMWE v. N & W*:

> "Questions should be determined by the Board on a case by case basis and not by broad general pronouncements. In other words the Board should decide the case actually before it. It should not attempt to lay down rules or propositions as to possible or probable issues, for the guidance of parties not before it, on issues which may arise in the future under a different state of facts."

To conclude as the Award does on page 6, that exclusivity applies only to jurisdictional disputes between crafts and not to contracting out, involves a radical alteration in the scope rule with serious consequences which are not apparent

without a careful walk through the practical outcomes. It must be kept in mind, that at the time in 1952 that the contractual language which now appears as the Note to Rule 55 was originally negotiated,[1] the parties were, and had always been, governed by the exclusivity doctrine for all scope rule purposes, including both inter-craft jurisdictional disputes and contracting out. Applying the alteration of that situation adopted by the Award to the types of track work involved in the instant case, results in notice of contracting having to be served in many cases that the parties had not bargained for. While contracting out can almost always be justified in this type of work because one of the criteria justifying contracting is almost always present, there is still a serious problem for the Carrier, because it creates the potential for both technical violations if serving of notice is inadvertently overlooked, and where notices are actually served, it creates an opportunity for the very type of technical attacks made by the BMWE in the instant case.

However, those problems pale compared to the mischief created by altering the scope rule interpretation for types of work, such as right of way fencing (before this Board in another case), where the work is sometimes performed by maintenance of way employees, but a substantial percentage of the work has also been traditionally performed by a variety of outside parties, for compelling reasons having nothing to do with the criteria set out in the Note to Rule 55. Since such work had always been interpreted as being outside the scope rule under the exclusivity standard, the parties did not expect such types of work to fall under the contracting notice requirements, (unless, of course, by some future mutual agreement), and no provision was made for an exception or additional criteria when the language of the Note to Rule 55 was negotiated. When a requirement for notice of contracting is imposed on such types of work by arbitral interpretation, the contracting out is no longer possible in any

1. The text and negotiating history of the original 1952 Northern Pacific agreement, which was readopted verbatim in 1962, were included in Exhibit 16 attached to the Carrier's submission. The BMWE exercised its option to retain that agreement in lieu of Article IV of the May 17, 1968 National Agreement. After the 1970 merger, the text of the Northern Pacific letter agreement, with only a few insignificant changes in wording and punctuation, except for the addition of specific language concerning the amount of time for notice, was adopted as the Note to Rule 55 in the BN agreement. (The understanding of the negotiating parties was that, unless otherwise specified, the interpretations applicable to each rule prior to merger were adopted with the rule.) The addition of the notice language was not a further restriction on the Carrier, because the previously existing conference requirement obviously included an implied requirement for notice. In fact, the specific time of 15 days was insurance against the potential of receiving an interpretation that the agreement implied a longer advance notice to allow time for negotiations. The addition of that language can in no way be construed as adoption of Article IV of the May 17, 1968 National Agreement, as the BMWE has contended.

circumstances where one of the criteria justifying contracting is not present, so the scope rule has been radically expanded in favor of the Organization just as surely as if the language of the rule were amended. In either of the examples, the result is beyond the jurisdiction conferred upon this Board by the Railway Labor Act.

The Award justifies its conclusion concerning the exclusivity standard, by citing a small sample of the many awards on this subject, and the proposition that the parties "could have easily said so," if they intended that contracting out was to be governed by the exclusivity doctrine. Addressing the second proposition first, its superficial logic is deceptively attractive until we are reminded that, an observation more consistent with the principles of contractual construction, would be that the parties "could have easily said so" if they intended to adopt a radical change in the scope rule application, such as that found in the Award. However, in the instant case we are not left to glean the intent of the parties by mere reasoning and deduction, for only one month after negotiating the original 1952 letter agreement, the parties disavowed any intent to change the application of the scope rule, by entering into another letter agreement of interpretation reading as follows:

> "Practices concerning the performance of work in connection with construction, maintenance or repairs, or dismantling of, tracks, structures or facilities in the Bridge and Building Sub-department and in the Track Sub-department of the Maintenance of Way Department, are not changed by the agreement effective April 1, 1952."

The Award's assumption that the word "exclusive" was the only word in the language available to the parties to indicate an intention to leave the scope rule undisturbed, is rationalized on two grounds stated by the Award in the footnote on page 5. The first observation in that footnote, finds a critical distinction between a certain dictionary definition of the words "customarily" and "exclusive." Ignoring for the moment that such a distinction is directly contrary to the 1952 letter of interpretation quoted above, there is simply no evidence to believe that the parties who negotiated the rule in question were laboring under any such dictionary definitions. In fact, we are still in possession of the copy of the dictionary, *Websters New International Dictionary, Unabridged* (2nd ed.), which was used in the Northern Pacific labor relations office where the original language in question was negotiated. That universally accepted authority defines "customarily as "1 agreeing with, or established by custom;" and it defines "custom" as "1 a form or course of action characteristically repeated under like circumstances; a usage or practice... 3 *law,* long-established practice considered as unwritten law and resting for authority on long consent; a usage that has by long

continuance acquired a legally binding force . . ." The latter definition, of course, places the parties' use of the term "customarily performed" squarely consistent with an intent to retain the "exclusivity" doctrine.

The second observation in the Award's footnote concludes that the parties use of the term "customarily" indicates an intent not to apply the exclusivity principle to contracting out issues, "given the prior extensive use of the word 'exclusive' in this industry." That observation was obviously made uninformed of the fact that the only such extensive use of the word "exclusive" was in arbitration awards interpreting general scope rules, none of which actually contained the word "exclusive." Because of that history the word "exclusive" in a scope rule context became anathema to the vocabulary of railroad union representatives. Therefore, the proper conclusion is exactly the opposite of that stated in the footnote, because the parties had to find a word other than "exclusive" in order to reach a mutually acceptable agreement.

To close the discussion on the exclusivity subject, the Award ignores the line of arbitral authorities which have interpreted the Note to Rule 55, in situations where the notice question was actually in issue, and singles out as its guiding authority Third Division NRAB Award 20633 (Lieberman) and Award 20338, issued by the same arbitrator on similar facts. It is most interesting that the discussion of the exclusivity issue in both of those awards is even more clearly *dicta* than the discussion in the instant case. Both of those awards involve the former SP&S territory where, as the awards somewhat vaguely point out, language of a very unusual rule (which the parties clearly intended to supersede in adopting the BN Schedule Agreement), have been held to give BMWE exclusive scope rule coverage over the work in question. In addition, in both cases, evidence of exclusive practice was held to be undisputed, and that was sufficient to require a notice under any definition of the term "customarily performed." The fact that those awards went on to speculate about whether or not notice would have been required had there been evidence of mixed practice, renders the discussion totally without authoritative standing. See also the criticism of those two awards on additional grounds in Award No. 8 of Public Law Board No. 2206, BMWE v. BN, (Eischen).

Only one of the other awards cited, Award 1 of PLB 4768, involves the Note to Rule 55. There is no justification for following that award, even though the the notice requirement was in issue, because without any rational basis it rejects settled authority on this property to apply the standards from awards on other properties which, correctly or incorrectly, interpret a different rule entirely. It should be noted

that the foreign carrier awards followed by Award 1 of PLB 4768, as well as those followed by the instant Award, involve a rule which contains additional language which could arguably support a more stringent notice requirement, and which doesn't carry the unique history, years of practice and the line of local arbitral authority applicable to the Note to Rule 55. Therefore, those awards are not in point in the least, and they are not valid authority to support either Award 1 of PLB 4768, or the conclusion of the instant Award on this subject.

Another matter which was properly in issue in the case and correctly decided, but for the wrong reason, was the Organization's contention that the December 11, 1981 Hopkins-Berge National Letter of Agreement creates some kind of good-faith test which the Carrier must meet in each contracting out transaction. While the Award properly holds that there was no evidence of bad faith on the part of the Carrier in this case, the Award unfortunately appears to accept the underlying test theory--again, I fear, due to confusion caused by the manner in which the issue was argued. We will not attempt to present a fully comprehensive explanation of this issue, but we must point out that the quotation of the Hopkins-Berge letter in the Award omits the vital fourth, fifth and sixth paragraphs of the letter, in which the parties provide a process by which existing agreements were to be modified in order to provide the consideration for the undertakings outlined in the other paragraphs of the letter. These omitted paragraphs provide for a joint committee to be impanelled to recommend changes in existing agreements to provide, among other things, "more flexibility in the utilization of such employees," to facilitate the utilization of railroad employees instead of contractors. Even though this commitment for enabling work rule changes is repeated three times in the letter, the BMWE refused to cooperate in creating the joint panel, and the contemplated work rule changes to enable a reduction in contracting out were never delivered. Therefore, the entire 1981 Hopkins-Berge letter is null and void and unenforceable by the BMWE under either the principle of failure of consideration or estoppel.[2]

2. Proof that the parties themselves considered the 1981 Hopkins-Berge letter a dead issue, is Article VIII of the October 17, 1986 National Wage Agreement, in which the parties provided a special exception to the moratorium on progressing Section 6 notices, by allowing local notices concerning contracting to be served by the BMWE, conditioned upon concurrent handling of carrier notices "that would achieve offsetting productivity improvements and/or cost savings." Failure of the parties to settle such a dispute in mediation was to be followed by a different type of joint Advisory Fact-Finding Panel including two public members appointed by the NMB. (Not surprisingly, no carriers achieved any work rule changes in the resulting local negotiations.)

Even if the Hopkins-Berge letter could be considered to have any continuing life, the Organization's attempts to enforce their good-faith test could and should be rejected for one or more of the following additional reasons:

(1) The Organization's good-faith test amounts to an invocation of equity which requires the Organization to have clean hands. The Organization's duplicity in handling its commitments under the Hopkins-Berge letter is disqualifying.

(2) The notification requirements of the eighth paragraph of the letter specifically applies only to Article IV of the May 17, 1968 National Agreement, which was not in effect in the instant dispute.

(3) The good-faith assurances contained in the seventh paragraph of the letter obviously describe the totality of a carrier's treatment of the contracting situation, and there is no basis for invoking a good-faith test on an individual transaction basis.

This brings us to the final problem with the Award, the warning on page 10, which states, "We are satisfied by this record that the Carrier's employees are capable of being trained to operate this type of equipment . ." if it should become available for rental without contractor operators. Contrary to the statement in the Award, the conclusion is totally uninformed by any relevant evidence in the record, since it was not in issue. If this matter had been in issue, we would have presented evidence proving that the existing seniority and assignment rules would make it impossible to assure the availability of trained operators for the small number of machines of this type which would be used at any one time, even if hundreds of employees were sent to training, and that the Organization has refused to alter the existing seniority and assignment rules in any way. Since the Organization made clear commitments in the sixth paragraph of the 1981 Hopkins-Berge letter agreement to change existing seniority and work rules to accommodate the reduction of dependence on outside contractors, this is an excellent example of why the BMWE has no basis to invoke any of the provisions in the 1981 Hopkins-Berge letter agreement until it begins to honor its own commitments.

Eino J. Kallinen

Eino J. Kallinen, Carrier Member