Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40563
Docket No. MW-40402
10-3-NRAB-00003-080206

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Pavers, Inc.) to perform Maintenance of Way and Structures work (clean up, remove trees, transport switch panels, remove/install track and switch panels and related work) at Baird, Carling and Lincoln, Nebraska on August 22, 23, 24, 25, 26, 29, 30 and 31, 2005 [System File C-06-C100-26/10-06-0043(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Francke and J. Francke and R. Frerking shall now each be compensated for thirty-seven and eight-tenths (37.8) hours' at their respective straight time rates of pay and Claimants D. Ficke and S. Conradt shall now each be compensated for fourteen and one-half (14.5) hours' at their respective straight time rates of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim was filed on October 15, 2005. It arises from the contracting out of work that was performed by Pavers, Inc., on August 22, 23, 24, 25, 26, 29, 30 and 31, 2005. According to the Organization, the work done was all bargaining unit work:

> "The work performed on August 22, 2005, was simple clean-up work and loading and hauling and unloading material. On August 23, 2005, the work was that of loading material onto a truck transporting that material and unloading the material. On August 24, 2005, the work consisted of installing a switch. On August 25, 2005, the contractor equipment and operators installed a switch. On August 26, 2005, the contractor removed trees. On August 29, 2005, the contractor equipment and operators removed a switch and replaced it with track panels, then the old material was loaded onto contractor trucks and hauled to a location where they were unloaded by contractor equipment. On August 30, 2005, contractor equipment and operators removed track panels and installed a switch. On August 31, 2005, the contractor equipment and operators removed track panels and installed a switch."

The Organization contends that the disputed work was not covered by any of the exceptions set out in Rule 55. Moreover, there was no notice, and the Carrier failed to seek an accommodation that would preserve the work to bargaining unit employees, as required by the Agreement. The Organization seeks compensation for the named Claimants for the hours of work performed by the contractor.

The record includes notices of proposed contracting out sent by the Carrier to the Organization on February 27, 2004, March 22, 2005, and July 27, 2005. The February 27, 2004, notice announced the Carrier's plan to make extensive improvements to Lincoln Yard and to contract out "the dirt work" while Carrier employees performed the track and signal work:

> "The Carrier will contract out the dirt work to include culverts and culvert extensions, and relocation of affected utilities. The dirt work will include but not be limited to grading, excavation, embankment work, removal, and placement of topsoil, soil compaction, and sub grade work. In conjunction with the dirt work, the Contractor will extend existing culverts and insert new culverts as required. The contractor will also reroute, remove, or replace utilities, to include oil or gas pipelines, water lines, sanitary sewers, and storm drain systems affected by the project. The contractor will be responsible for all asphalt work, the removal, and relocation of fencing as required, and the upgrading of road or bridge structures affected by the project, and may provide heavy equipment such as side booms or cranes to assist Carrier forces. Additionally, the contractor will be responsible for storm water management to comply with existing laws and regulations.
>
> Carrier forces will be responsible for the construction, realignment, and installation of the track structures associated with this project."

A second, more specific notice was sent on March 22, 2005, setting forth in more detail the different phases of the Lincoln Improvement Project and the breakdown of work between contractors and BNSF forces. In each of the six different phases, the contractor was to perform grading, sub-ballast work, "placement of some sub-grade drains (to be determined in field)" and "utilities other than BNSF owned." Throughout the project "Track and Signal work will be done by BNSF forces."

By letter dated July 27, 2005, the Carrier also sent a notice of proposed contracting out for the "R&R Switches - Baird Plant - MP 58.87 to MP 59.10 - Creston Sub-Division." The letter detailed the work to be done (remove nine switches, install seven new ones) and the equipment that would be contracted (with operators). The Carrier's rationale was "Currently, no Carrier equipment is available to support these

projects. Moreover, all Carrier forces are fully employed and are not available to perform this work even if the equipment were available to be rented or leased."

In response to the Organization's complaint, the Carrier responded that: (1) the complaint was untimely filed (2) the Organization failed to submit sufficient evidence to support its contentions (3) the Organization has not met its burden of proof that the work at issue was work "customarily performed" by Maintenance of Way employees, as that term has been interpreted by prior Boards, to mean "exclusively performed throughout the system" (4) the work fell under the exceptions to Rule 55, inasmuch as the Lincoln Yard Improvement Project was a huge renovation that the Carrier could not complete using solely its own workforce and it did not have the necessary equipment (5) it has no obligation to carve out, or piecemeal, work from a large project (6) it provided adequate notice of the work and (7) the named Claimants are not entitled to any compensation, because they were either fully employed or on paid time off when the work was done.

The threshold issue the Board must address is whether the claim was timely filed. Rule 42A requires that claims be filed ". . . within sixty (60) days from the date of the occurrence on which the claim or grievance is based." The Carrier contends that the claim is untimely because the Lincoln Yard Improvement Project started in 2004 and the instant claim was not filed until October 16, 2005. The disputed work took place during the period of August 22-31, 2005. The Carrier sent the Organization notice of proposed contracting on the Lincoln Yard Improvement Project by letter dated February 27, 2004. But that letter was generic in nature and really did not give the Organization sufficient detail to be able to engage with the Carrier in realistic and productive discussions about the possibilities of avoiding the contracting out of bargaining unit work, as required by Rule 55 and Appendix Y. Not surprisingly, the Carrier sent more specific notice on the Lincoln Yard Project on March 22, 2005. That letter detailed six phases of the work, but still did not specify when any work would be done, other than to say that "the work may begin as soon as April 6, 2005." The Carrier also sent a notice dated July 27, 2005, relative to work in Baird, which stated "It is anticipated that this work will begin approximately August 12, 2005." The Carrier's position appears to be that the clock begins to tick on the time limits for filing claims as soon as the Organization gets notice of the proposal. But the notice is not supposed to be the Carrier's final decision on contracting out; it is supposed to signal the start of an interactive process designed to avoid contracting out, if possible. If the parties are able to reach an understanding, the subcontracting might never happen, in which case a claim

would not be necessary, or might be changed from what the Carrier originally proposed, in which case a claim might or might not be filed, but would be different in scope from a grievance filed in response to the original proposal. Because it is impossible to know with any certainty ahead of time what the outcome of the discussion process will be, the first notice letter cannot serve as ". . . the date of the occurrence on which the claim or grievance is based." In fact, up until the disputed work actually commences, the proposed contracting out is just that - proposed. It is not a reality until the disputed work is done. Accordingly, the "trigger date" here would be August 22, 2005, the date the disputed work began. The claim was filed on October 16, 2005, which is well within the 60-day timeframe for filing claims. Hence, the claim was timely filed.

Next, the Carrier contends that the Organization has not submitted sufficient evidence to support its contention that contracting occurred. A review of the original claim establishes that the Organization was very specific about the disputed work: what it entailed and where it occurred, down to calculating to decimal levels how much work was involved. The complaint alleged facts sufficient not only to put the Carrier on notice, but also for it to be able to research its own records in order to respond. It is the Carrier, after all, not the Organization, that has the formal bookkeeping records of the work done on its premises. There is no indication in the record that the Carrier disputed that the work occurred when, where, and as claimed by the Organization. That being the case, the record before the Board is sufficient to conclude that the Organization met its burden to establish that the work took place as alleged.

Establishing that the subcontracting occurred brings us to the next stage of the analysis. The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. The threshold issue is whether the work under consideration is work "customarily performed" by bargaining unit employees. If it is, the Carrier may only contract out the work under certain exceptional circumstances: (1) the work requires "special skills, equipment, or material" (2) the work is such that the Carrier is "not adequately equipped to handle [it]" or (3) in cases of emergencies that "present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

Under this language, the Organization has the initial burden of establishing that the work at issue is work "customarily performed" by bargaining unit employees. On the meaning of "customarily performed," the parties submitted opposing precedent

from prior Awards: one line of Awards holding that "customarily performed" means "exclusively performed throughout the entire system," and another holding that "customarily performed" means "historically and traditionally performed." After reviewing and considering the Awards submitted, the Board is of the opinion that the better interpretation is that "customarily" has its ordinary meaning, that is, "historically and traditionally." For one thing, it is a basic principle of contract interpretation that language should be given its ordinary meaning, in the absence of any indication from the parties that they intended some different meaning. Dictionary definitions of "customary" include "in accordance with custom, usual" (Concise Oxford English Dictionary) and "based on or established by custom; commonly practiced, used or observed. Synonyms: see usual." (Webster's Dictionary) The reasoning set forth in Public Law Board No. 4402, Award 20 is persuasive, particularly in noting that "Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so." As the PLB pointed out in that case, the word "exclusive" is used extensively throughout the industry. The parties' failure to use it in the Note to Rule 55, using "customarily" instead, "supports the conclusion that the parties did not intend to apply the exclusivity principle to contracting out issues."

If the work at issue is work "customarily performed" by the bargaining unit, the Note to Rule 55 sets forth three limited circumstances under which the Carrier may contract it out:

> "[S]uch 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."

If the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases." The Organization may request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note to Rule 55 and Appendix Y.

The threshold issue is whether the disputed work is work "customarily performed" by Maintenance of Way employees. The work performed by Pavers, Inc., was removing track panels and installing switches; loading, hauling and unloading material; tree removal and general "dirt work." This is ordinary, routine track work regularly done by bargaining unit employees in connection with the maintenance or repair of structures or facilities located on the right-of-way. Accordingly, the work is covered by the Note to Rule 55, and the Organization met its initial burden of proof.

The analysis moves next to the question of notice. Although the Pavers' work that is the subject of this claim occurred in a single ten-day time span, it appears from the record that there were different jobs at two distinct locations. According to the original claim dated October 16, 2005, Pavers' performed work in and around the Baird Plant on August 22, 29, 30 and 31. From August 23 through 26, however, Pavers' worked at different locations in and around the Lincoln terminal. The Carrier points to three letters of notice to the Organization: a letter dated February 27, 2004; one dated March 22, 2005; and a third dated July 27, 2005.

As noted earlier, the February 27, 2004 notice, which stated the Carrier's intent to contract out work associated with the entire Lincoln Yard Improvement Project, was generic in nature. While it may have sufficed to provide general notice of the upcoming project, more specific notice would be required in order to fulfill the purpose of the notice provision in the Note to Rule 55: to give the Organization enough information that it could make an informed decision whether to request a meeting with the Carrier to discuss alternatives to contracting out. Particularly given the projected size of the Lincoln Yard Improvement Project, a single notice could not begin to provide the Organization with adequate information about the proposed subcontracting.

The Carrier did provide more specific notice in its letter dated March 22, 2005, which set forth six phases of the work on the Lincoln Yard Improvement Project and delineated what work contractors would perform and what work BNSF forces would do: contractors would do "the dirt work and related work," while all track and signal work would be done by BNSF forces. Work at Baird was included in Phase I.

The Organization maintains that the March 22 notice was inadequate because the work at issue in this claim was separate from, and not associated with, the Lincoln Yard Improvement Project. This argument must be rejected. The original claim stated the facts and argued that ". . . the Carrier failed to provide the General

Chairman a notice of their intent to contract out this work. Therefore the claim must be paid as presented." In its December 14, 2005 response to the Organization, the Carrier related the disputed work to the Lincoln Yard Improvement Project: "The work claimed is a continuation of two projects. For the Lincoln Yard Improvement Project, a Letter of Intent was issued February 27, 2004. . . ." In its February 7, 2006 response to the Carrier's denial, the Organization appears to acknowledge that the work was part of the Lincoln Yard Improvement Project:

> "As pointed out by Ms. Johnson in her declination, this project has been on going since 2004 and is a continuation of the Lincoln Yard Improvement Project. There are multiple phases of the project and these claims are for different types of work. This is merely a continuation of the violation of the Agreement between the BNSF and BMWED. This is an on-going project and the Organization cannot predict how long this violation of the Agreement will continue." (Emphasis added.)

The Board concludes that the Organization had adequate notice of the work that the Carrier intended to subcontract in the Lincoln Yard, which included the work done in Lincoln and Hall in this claim.

As for the Baird work at issue in this claim, the March 22, 2005 notice had included Baird as part of Phase I of the larger Lincoln Yard Improvement Project. According to that notice, all track, and signal work would be performed by BNSF forces. The Carrier's letter of July 27, 2005 was directed specifically to removal and replacement of switches at the Baird Plant. That notice stated that BNSF intended to hire an outside contractor ". . . to assist Carrier forces with this project. Carrier is not adequately equipped to complete this work in the timeframe dictated by operational demand." The notice specified that the job entailed removing nine switches and replacing them with seven others and new track panels. These letters provided the Organization with sufficient information that it could make an informed decision whether to protest the subcontracting, and the Board concludes that the notice was adequate.

We now reach the substance of the claim; that is, whether the Carrier properly contracted out the work under one of the three criteria set forth in the Note to Rule 55, pursuant to its notification to the Organization. The three criteria are (1) "special

skills, equipment, or materials" (2) the Carrier is "not adequately equipped" to handle the work and (3) emergencies.

The Carrier noticed the Lincoln Yard Improvement Project under the second criterion. "Not adequately equipped" is a broad and ambiguous term open to many interpretations - not all of them equally legitimate - and subcontracting claims based on it must be reviewed closely to ensure that the category has not been abused. Here, the Lincoln Yard Improvement Project was clearly a very large undertaking that could easily require the assistance of outside forces to complete. BNSF is a huge corporate entity, operating and maintaining some 30,000 miles of track, with a work force and equipment equal to almost any task. Even so, there will still be times when the Carrier needs to use outside resources to complete especially large projects in a timely manner. Lincoln Yard was clearly one of those projects: there were six different phases to the work, with notice first being given in February 2004 for work that would continue more than 18 months. The Organization provided no evidence whatsoever of how Carrier forces might have been able to do the work. The Board concludes that, in general, the Lincoln Yard Improvement Project, including the work at Baird, properly fell within the second criterion.

That is not the end of the matter, however. The Carrier gave notice that certain work would be subcontracted while other work would be reserved to its own forces. The final round of the Board's analysis must compare the work that was done by the contractor to ensure that it comported with the parameters of the Carrier's proposed subcontracting.

Given the number of dates and the variety of work done by the contractor at two locations, the Board made a chart showing the evidence. (See Attachment A.) The chart demonstrates that some of the subcontracting was appropriate while some of it was not.

On August 22, the contractor performed cleanup work and loading and hauling at Baird, assisting BNSF forces in their work. This falls within the scope of work noticed by the Carrier in its July 27 letter, and the Organization's claim is denied for this date.

On August 23, the contractor performed loading and hauling at Lincoln; this again appears to fall within the scope of the Carrier's notice regarding "dirt work," and the Organization's claim is denied for this date.

On August 24 at Lincoln and August 25 at Hall, the contractor did switch work. The March 22, 2005 letter clearly stated that all track and switch work would be done by BNSF forces. The Carrier exceeded the scope of its notice and the Organization's claims for these two dates are sustained.

On August 26, the contractor performed tree removal at Lincoln, which fell within the scope of the Carrier's notice. The Organization's claim for this date is denied.

On August 29, 30, and 31 at Baird, the contractor's forces did switch work. Again, the March 22, 2005 letter stated that track and switch work was reserved to BNSF forces. The later July 27 notice did not indicate any change in that reservation; it stated that the contractor's operators and equipment would be used "to assist" the Carrier's forces in their work, without any reference to expanding the scope of the contractor's work beyond the original division of labor. The Carrier exceeded the scope of its notice and the Organization's claims for these three dates are sustained.

The Organization filed this complaint on behalf of five named Claimants, all of whom were either working full-time or on paid leave or vacation when the work at issue was done. Because they suffered no monetary loss as a result of the subcontracting, the Carrier contends that none of them is entitled to any monetary relief. Again, there are competing lines of precedent that come down on both sides of the "compensation/no compensation debate" for Claimants who are either working or on paid leave. Neither of the parties' positions is entirely satisfactory: the Claimants were already fully employed or receiving paid time off when the work was done, so paying them for any violation amounts to double pay. At the same time, the Carrier's position - that no one is entitled to any compensation - is even more unsatisfactory. It is not only that the individual Claimants have lost work opportunities. Perhaps more important to the process of collective bargaining, if there were no penalty associated with a contractual violation, the Carrier would be free to violate the Agreement with impunity, knowing that there was no real cost associated with any violation. Such an outcome would make a mockery of the parties' undertakings in their Agreement, and for that reason must be rejected. There are numerous prior Awards that support awarding monetary damages to employees who were already working or on leave when the Carrier violated the Agreement. (See, particularly, Award 19899, which traces the development of these principles over time.) The Board finds the reasoning of these precedents compelling and will follow them. The Claimants are entitled to compensation as claimed, unless

(in the words of Arbitrator Marx in Award 1, Public Law Board No. 4768) ". . . the Carrier can demonstrate to the Organization that the requested number of hours' pay does not entirely conform to the amount of work performed by the outside contractor, and payment should be modified." Otherwise, the claim is sustained with respect to the dates earlier indicated; the Claimants who worked on those dates are entitled to compensation.

(See Attachment A.)

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of June 2010.

Attachment A

Summary of Record Evidence
Docket MW-40402:
NRAB-00003-080206

Date	Location	Work Done	Notice & date
August 22, (2005)	Baird	Clean up; load, haul, unload	—3/22/2005: Contractor: "dirt work" (grading, sub-ballast, some utilities); BNSF forces: Track and Signal —7/27/2005: Contractor's 4 track hoes, 2 dump trucks & 2 loaders with operators will "assist Carrier forces with this project."
August 23	Lincoln	Load, haul, unload	—3/22/2005: Contractor: "dirt work" (grading, sub-ballast, some utilities); BNSF forces: Track and Signal
August 24	Lincoln	Install switch	"
August 25	Hall	Install switch	"
August 26	Lincoln	Remove trees	"
August 29	Baird	Remove switch; replace track panels; load, haul, unload	—3/22/2005: Contractor: "dirt work" (grading, sub-ballast, some utilities); BNSF forces: Track and

			Signal —7/27/2005: Contractor's 4 track hoes, 2 dump trucks & 2 loaders with operators will "assist Carrier forces with this project."
August 30	Baird	Remove track panels; install switch	"
August 31	Baird	Remove track panels; install switch	"