Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43565
Docket No. MW-42848
19-3-NRAB-00003-150023

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference (BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Holland Welding) to perform Maintenance of Way and Structures Department work (welding and grinding work) on tracks at various locations on the Noyes and Grand Forks Subdivisions beginning on June 3, 2013 through June 21, 2013 (System File T-D-4269-M/11-13-0317 BNR)].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out the work described in Part (1) above 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 J. Mozinski and K. Siebels shall now each be compensated for an '* equal and proportionate share of all hours worked by the subcontracted employee, beginning June 3, 2013 until June 21, 2013.'**

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 dispute involves the Carrier's alleged assignment of outside forces from contractor Holland Welding to perform flash butt welding at various locations on the Grand Forks and Noyes subdivisions.

The Organization argues that the welding work at issue is reserved to Maintenance of Way employees under the Agreement because such employees have customarily performed such work, and that the contractor's employees performed welding work beyond what was permitted under the parties' EFB Welding Agreement. Further, the Organization argues that the Carrier failed to comply with the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. Based on these arguments, the Organization submits that the Claimants are entitled to the remedy requested in Paragraph (3) above.

The Carrier argues that the Organization did not prove that the alleged violation occurred or that Maintenance of Way forces had customarily performed this work on a system-wide basis to the exclusion of others, and that Appendix Y is not applicable. The Carrier also argues that the Organization has failed to prove actual damages.

In contracting cases, the Organization bears the initial burden to demonstrate a claim to the work under the Agreement and to produce sufficient evidence to establish a violation of the Agreement. See Third Division Awards 36208. The parties'

respective arguments concerning whether the Organization may establish a claim to the work are based on different interpretations of the Note to Rule 55. That Rule provides, in relevant part:

> **"NOTE to Rule 55: 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.**
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> **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' 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.**
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> **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. (emphasis supplied).**"

Also relevant to this dispute is Appendix Y, the December 11, 1981 Letter of Understanding, which states in relevant part:

> **"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.**
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> **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."**

The Organization argues that for the Note to Rule 55 to apply when the Carrier contracts with outside forces, it must only prove that BMWE-represented forces "customarily performed" the work at issue. The Carrier argues that the Organization must prove that BMWE-represented forces "customarily performed the work" *and* that BMWE-represented forces had done so "on a system-wide basis to the exclusion of others." Thus, it is necessary to determine whether the "customarily performed"

standard or the "exclusivity" standard applies to this dispute. Both parties provide significant support for their respective arguments on this issue.

In support of its "exclusivity" argument, the Carrier cites to several awards. See e.g. Public Law Board 2206, Award 8; Third Division Awards 16640, 20640, 20920, 20841, 37947 and 40213. These awards expressed the view of many boards over the years that the Organization has the burden of proving that the disputed work had traditionally and customarily been performed by claimants on a system-wide basis to the exclusion of others, including outside contractors. This view was based, in part, on the rationale that Rule 55 is a classification rule only, that, standing alone, does not reserve work exclusively to employees of a given class. See Third Division Awards 33938 and 37947. Other boards took a different view. For example, in 1991, Public Law Board 4402, Award 20, rejected the exclusivity doctrine and held that "[t]he negotiated language governs work "which is *customarily* performed by the employees" – not work that is "exclusively" performed." See also Third Division Awards 20338 and 20633. The Board's holding in Public Law Board 4402, Award 20, drew a vigorous dissent from the Carrier member on the grounds that it was a radical alteration in the parties' scope rule rights and obligations. Nevertheless, the number of awards adopting the "customarily performed" standard have become more commonplace. See e.g. Third Division Awards 37435, 40558, 40670, 40785, 40788, 40798, 41162 and 43394.

A rationale for the "customarily performed" standard was articulated in Third Division Award 40558:

> **"The Board adopts the "customary" criterion for at least three interrelated reasons. First, the Note to Rule 55 repeatedly references work categories "customarily performed." Nowhere is "exclusivity" mentioned. Given the history of prior disagreements, it is very unlikely experienced negotiators arrived at this articulation by accident and without an intended meaning fundamentally consistent with the Organization's reading.**
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> **Second, the less demanding "customary" test is consistent with the spirit of Appendix Y to reduce subcontracting and increase the use of BMWE-represented forces. Finally, "exclusivity" creates proof problems that**

> **make it almost impossible for the Organization to ever make out a prima facie case. Without evidence to the contrary, it is illogical to assume the Organization would have agreed to a standard that would result in its defeat for initially failing to provide information almost always in the Carrier's possession."**

This rationale is persuasive. Many paragraphs within Rule 55 simply identify classifications within the bargaining unit and do not reserve the work performed by those classification to the unit; however, the Note to Rule 55 is an agreement with respect to contracting certain types of work "customarily performed" by unit members. As such, the plain language of the Note to Rule 55, supports the "customarily performed" standard. In addition, the carriers' assurance in Appendix Y "to assert good faith efforts to reduce the incidence of subcontracting and increase the use of maintenance of way forces," would be undermined under an exclusivity standard that would remove restrictions on subcontracting and possibly relieve the Carrier from the notice requirements of the Note to Rule 55. See e.g. Third Division Award 37947 ("Authoritative precedent dictates that the requirements of the Note to Rule 55 are not triggered unless the work at issue is work belonging exclusively to the Organization's members."). Contra Third Division Awards 20920, 26174, 26212 and 27012. Further, the exclusivity standard not only presents proof problems for the Organization, but under circumstances where the Organization could prove exclusivity, the Carrier could prospectively relieve itself from the requirements of the Note to Rule 55 by simply letting a contract – either though an understanding with the Organization, meeting the contracting criteria in the Note, or in an emergency – and thus undermine any future claim that the work has been reserved to BMWE-represented forces. This result would run contrary to the obligations and assurances of the Carrier. For these reasons, the threshold issue in contracting cases is whether the work at issue is "customarily performed" by bargaining unit employees.

In this case, we find that the Organization has established that the work at issue has been customarily performed by its members. To begin, the Organization alleged in its claim and its appeal of the claim denial that its members had customarily performed the welding work in dispute, and the Carrier did not deny that allegation. In addition, Rule 55 K specifically classifies welding work under the scope of BMWE-represented forces, and the parties have entered into an agreement concerning

electric flash butt welding ("EFB Welding Agreement") that establishes that this type of work is customarily performed by BMWE-represented forces.

The Organization also contends that the EFB Welding Agreement specifically applies to this claim. The EFB Welding Agreement was entered into by BMWED and BNSF on December 9, 2009, and it was amended on December 11, 2009, and November 2, 2010. It provides, in relevant part:

> **"We agree that the Company currently leases electric flash butt welding trucks from various vendors, and that these vendors, require at this time one of its supervisors to accompany each welding truck; and we agree that this Agreement is not intended to eliminate that practice. It is agreed that the vendors' supervisors primary functions are 1) to perform maintenance of the in-track electric flash butt welder with the assistance of the assigned employees; 2) to train BNSF employees in the operation and maintenance of the in-track electric butt welder; and 3) to assist in the operation of the in-track electric flash butt welder, but not in lieu of the assigned employees."**

During the on-property processing of this claim, the Organization took the position that the Carrier violated the EFB Welding Agreement, and the Carrier suggested that the Agreement was only intended to outline a bulletin correction to be issued on December 9, 2009. Following the on-property processing of this claim, the parties submitted an issue concerning the staffing requirements of the EFB Welding Agreement to Special Board of Adjustment. In deciding that issue, the Board considered a preliminary issue of whether the EFB Welding Agreement was limited to the work season following its enactment. In an Award from that Board issued on September 27, 2017, Referee VanDagens concluded:

> **"The Board finds that the clear and unambiguous language of the EFB Welding Agreement establishes that the parties intended to do more than simply correct previously bulletined gangs; they also provided for the operation of in-track EFB welding units going forward."**

In establishing that Special Board of Adjustment, the parties agreed that the claims decided by that Board would be deemed "lead" cases and control the resolution

of the dispute for all future similar cases. Under these circumstances, the Board's holding that the EFB Welding Agreement was intended to provide for the operation of in-track EFB welding units going forward shall be applied to his case.

Another significant part of the EFB Welding Agreement, as interpreted by the Special Board of Adjustment, is that it provides that each EFB welding unit truck will have a Welding Foreman, EFB Welder, and Grinder Operator. Thus, under the EFB Welding Agreement, it is permissible to have one of the contractor's supervisors performing the limited functions permitted under that Agreement with each three-person gang.

Because the Organization has met its burden to prove that BMWE-represented forces customarily perform the welding work at issue here, and that the EFB Welding Agreement applies, the Organization must also prove that the Carrier hired contractors that performed EFB welding work that exceeded the scope of their permitted work under the EFB Welding Agreement. The Carrier argues that the Organization failed to provide evidence that the contractor's employees performed such work.

The Claim Letter filed by the Organization on behalf of the Claimants states that "[a]n outside contractor (Holland Welding) was hired by the Company to perform the work of flash butt welding." Further, that letter stated that this violation occurred from June 3, 2013, until June 21, 2013. In support of this allegation, the letter refers to an attachment containing a "detailed report from J. L. Mozinski about Holland's welder's activities." This report contained hand-written entries on a calendar for all the weekdays during this period and one Saturday. All of the weekday entries included reference to activities of Holland, with many noting locations and hours.

In its response to the Claim letter, the Carrier did not present any evidence to rebut J. L. Mozinski's report about Holland's activities or deny that such welding work had been performed by Holland during the claim period. Several months after this claim was submitted to a claims conference, and four days before the Organization submitted a Notice of Intent on the claim to the NRAB, the Organization sent a letter to the Carrier urging the Carrier to reconsider the Carrier's denial of the claim. Attached to that letter was a typed statement signed by

J. L. Mozinski, providing a more detailed description of his earlier hand-written report of the work performed by the contractor and the Claimants. J. L. Mozinski's letter concluded that neither he nor his grinder "ever performed a single weld with the Holland Welding Truck" and that when he and his grinder were not doing thermite welds or frog welds, they operated as sectionmen.

There is a concern that J. L. Mozinski's more detailed letter was submitted so close in time to the Organization's submission of the claim to the NRAB that the Carrier did not have sufficient time to reconsider the claim. Nevertheless, the initial hand-written report was sufficient to place the Carrier on notice of the name of the contractor, and the dates, location and work performed by the contractor. Where the Carrier did not present any evidence to rebut that initial report, and the follow-up letter simply provided greater detail than the initial report, the Organization has met its burden to produce sufficient evidence of an alleged violation.

Once it is determined that a subcontract is covered by the Note to Rule 55 and the EFB Welding Agreement, the Note to Rule 55 requires that the Carrier provide advance notice of the work to be contracted. The Organization argues that prior to beginning the contacted work, the Carrier failed to comply with these advance notice and meeting requirements. During the on-property processing of this claim, the Carrier contended that it gave notice of intent to contract the work in question. The notice, dated January 30, 2013, states, "consider this notice that BNSF proposes to contract for 4 2-man thermite welding crews for thermite welding at various joint locations." Listed among those locations were certain locations on the Grand Forks Subdivision, but the Noyes Subdivision was not listed. This notice is defective in at least two respects. First, it refers only to an intent to contract for thermite welding, and it does not address the electric flash butt welding at issue in this dispute. Second, it does not address the Noyes Subdivision, where some of the work in this dispute was performed. Thus, the work in dispute here was not covered in this notice. Accordingly, parts (1) and (2) of the Organization's claim shall be sustained.

Turning to the issue of a remedy, the Carrier argues that the Organization has failed to prove damages because the Claimants were fully employed and worked overtime during the claim period. It is an axiom in the law that there is no right without a remedy. Consistent with that principle, compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the

Claimants may have been paid at the time of the violation. See Third Division Awards 20633, 21340, 35169, 37470 and PLB 2206, Award 52. As the Board opined in Third Division Award 21340:

> **"With regard to compensation, numerous prior authorities have held that an award of compensation is appropriate for lost work opportunities notwithstanding that the particular claimants may have been under pay at the time of violation."**

Compensation awarded should be reasonable in view of the record evidence and realistically related to the amount of work actually contracted that represents the loss of work opportunity for the members of the craft. Public Law Board 6204, Award 32.

The claim seeks compensation for the Claimants in an "equal and proportionate share of all hours worked by the subcontracted employee, beginning June 3, 2013 until June 21, 2013." To calculate this amount, the claim is remanded to the parties for a determination of the number of hours the assigned contractor worked during this period. In making this determination, the parties are to review the records submitted on behalf of the contractor's employee. Each Claimant shall receive payment at their respective rates for half of the total hours worked by the contractor's employee.

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 27th day of March 2019.