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

Award No. 43566
Docket No. MW-42849
19-3-NRAB-00003-150035

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 to perform Maintenance of Way and Structure Department work (haul and dump gravel) into a pile north of the Peoria connection track and east of the Scale Track in the Galesburg Yard on the Chicago Division on July 11, 2013. (System File C-13-C100-378/10-13-0648 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 aforesaid 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 E. Allen, K. Kane, J. Mudd and D. Easley shall each now be compensated for eight (8) hours at their appropriate 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 dispute involves the Carrier's alleged assignment of outside contractors to haul and dump gravel into a pile in the Galesburg Yard on the Chicago Division on July 11, 2013.

The Organization argues that the work at issue is contractually reserved to, and has customarily, historically and traditionally been performed by, Maintenance of Way employees. 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 arbitral precedent establishes that new construction projects of the magnitude and type at issue are not performed by BNSF forces and were properly contracted out. In addition, 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. Further, the Carrier argues that it did comply with the notice and meeting requirements of the Note to Rule 55 and Appendix Y. 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.

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.

> **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. On-property, the Carrier did not dispute that BMWE-represented forces customarily do this work, and the Organization introduced statements from each of the four Claimants that provide sufficient evidence that BMWE-represented forces customarily operate dump trucks to haul and dump gravel. These statements also provide sufficient evidence to establish that the contractors performed the work at issue on July 11, 2013.

When the type of work to be contracted has customarily been performed by Organization-represented employees, the Carrier is obligated to comply with the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. The Note to Rule 55 identifies the "criteria" or "reasons" that may justify contracting, and Appendix Y states that those reasons must be included in the notice. Among those reasons are that the contracted work involves special skills not possessed by the Carrier's employees and that the Carrier is not adequately equipped to handle the work. After a notice is received by the Organization, it may request a meeting with the Carrier to discuss the contracting transaction, and if requested, the parties are obligated to promptly meet and make a good faith effort to reach an understanding concerning the contracting.

In this case, the Carrier contends that its June 2, 2011 letter to the Organization put the Organization on notice of the Carrier's intent to contract the work in question. That letter stated, in relevant part:

> **"As information, BNSF plans to contract all work associated with the capacity expansion project located near the existing AMTRAK Depot in Galesburg Yard on the Chicago Division. This multi-phase project will include extensive track, utility, and dirt work. BNSF is not adequately equipped to handle all aspects of a project with this magnitude, nor do BNSF forces possess the specialized dirt work skills necessary for this portion of the project. The contractor will provide all the necessary heavy equipment, with operators, to perform the specialized dirt work for this capacity expansion. The work to be performed includes, but is not limited to, install necessary erosion-control and SWPPP (including silt fencing); necessary excavation for embankment of 3-new yard tracks; furnish/haul/unload necessary sub-grade material for 3-new yard tracks and third main track; furnish/haul/unload necessary sub-ballast material for 3 yard tracks and 1 new main track; grade/build-up/compact 3-approx. 8,200 l.f. yard tracks; necessary reconfigure 2-interlocker plants (Knox St. and A-Plant West); grade/build-up/compact approx. 8,400 l.f of 3rd Main; install new No. 24 X-over plant to Mendota Sub; install/extend necessary trench drains, manholes, and culverts; assist with placement of necessary turnout components; necessary horizontal boring of new drain lines; modification of necessary utility lines; install necessary landscaping; and debris removal.**
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> **It is anticipated that this work will begin on approximately June 21, 2011."**

That letter put the Organization on notice that the Carrier intended to contract all work associated with the capacity expansion project located in Galesburg Yard. Previous on-property awards have held that the Carrier did not violate the Agreement when it contracted out such projects. Third Division Awards 37433, 37434, 38383, and 41222. Furthermore, the Carrier is not required to piecemeal the project to give the work to existing Maintenance of Way forces. Third Division Awards 43258 and 43259. The rationale behind these awards is that large scale construction or capacity expansion projects that ordinarily involve unit work cannot realistically be performed by Carrier forces. As concluded in Public Law Board 4768, Award 22:

> **"After reviewing all the circumstances, the Board concludes that this project was of a nature which would have prevented the use of Carrier equipment and forces on any practical basis. While there is no doubt that elements of the work are regularly performed by carrier forces, this does not therefore determine that such major projects could have been undertaken other than by outside forces. More significantly, however, is that the organization has failed to demonstrate that such projects are "customarily performed" by Maintenance of Way forces. This is the necessary element for consideration of the application of the Note to Rule 55."**

This rationale is persuasive, and these precedents shall be applied in this case. The Carrier determined that it would need additional forces to contract all work associated with the capacity expansion in Galesburg Yard because it was not adequately equipped with the necessary equipment to perform all aspects of the project and that its forces did not have the necessary skills to perform specialized dirt work. Although it appears that a conference took place between the parties following receipt of the Carrier's letters of intent, there is no evidence in the record that the Organization contested the reasons the Carrier identified for the Galesburg Yard contracting prior to the submission of this claim. There is also no allegation or evidence that contractor forces were being used to replace Organization-represented employees.

As to the issue of whether the disputed work was identified in the June 2, 2011 letter, that notice states that the contractor will perform dirt work and haul and unload sub-grade and sub-ballast material as part of the capacity expansion project at the Galesburg Yard. Thus, the notice addresses hauling of gravel. However, the Organization claimed that the disputed work occurred after the completion of the capacity expansion project at Galesburg yard. Specifically, the Organization alleged in its appeal of the Carrier's denial of the claim that the Carrier's June 2, 2011 letter "had nothing to do with the Capacity Expansion Project mentioned in the Carrier's June 2, 2011 notice, due to the fact that all of the work mentioned in the Carrier's notice was over two (2) years old at the time the claimed work took place, as well as, the fact that all of the work mentioned in the Carrier's notice has been completed prior to the claimed work taking place." The Organization did not provide any evidence in support of that allegation. After the parties' claims conference, the Organization followed up with another letter to the Carrier that set forth the Organization's position on the claim, and it included statements from the Claimants in support. The Organization did not repeat its allegation that the work described in the Carrier's notice had been completed

prior to the claimed work taking place in that letter, and only one of the Claimants' statements addressed the issue of the scope of the Carrier's June 2, 2011 letter of intent to contract the capacity expansion project. In that statement, the Claimant stated, "I don't know if this rock is ever going to be used for this project but I know it is not in the letter of intent." This is the best evidence in the record regarding whether the capacity expansion project was completed prior to the performance of the disputed work, and it suggests that the project had not been completed. Thus, the Carrier's June 2, 2011 letter complied with the requirements of the Note to Rule 55 and Appendix A, and the Organization failed to prove that the disputed work was not covered by that letter.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2019.