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

Award No. 43567
Docket No. MW-42850
19-3-NRAB-00003-150036

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
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(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 (Hulcher) to perform Maintenance of Way and Structures Department work (unload switch panels out of gondola cars, remove old switches and grade ballast line and install switch panels) at Mile Post 334.6 on the Ottumwa Subdivision of the Nebraska Division on June 29, 2013 (System File C-13-C100-365/10-13-0644 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 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. Rogers, P. Dinneen, D. Judge, R. Rutledge, S. Palmer, W. Nielsen and W. Jones shall each now '… be paid all the straight time hours and overtime hours expended by the outside forces in performing of this work at their appropriate rate of pay as settlement of this claim. *'"**

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 contractor Hulchers to unload switch panels out of gondola rail cars and install into main line and remove old switches and grade ballast line at Mile Post 334.6 on the Ottumwa subdivision on August 19, 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 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 not violate Appendix Y, which is not a restriction on outside contracting. The Carrier also argues that the Organization has failed to prove 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:**
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> **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, the work performed by the contractor on June 29, 2013, was ordinary track work involving removing and installing switches that bargaining unit employees regularly perform. On-property, the Carrier did not dispute that BMWE-represented forces customarily do this work. Rather, the Carrier alleged that it had no record of the contractor performing this work. It also appears that there was a discussion at the parties' claims conference about an email from the contractor confirming that the contractor did not perform the disputed work; however, that

email is not in the record. On the other hand, statements from two of the Claimants provide sufficient evidence that the contractor performed the work at issue. Accordingly, the Organization met its burden to prove that work that is "customarily performed" by its members was performed by the contractor on June 29, 2013.

After the Organization has met its initial burden, as it has done here, the Carrier may defeat the claim by showing that the Carrier met the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. See Third Division Awards 32320, 39685 and PLB 2206 Award 57. Failure to provide such notice is grounds to sustain the claim because it frustrates the process of discussions contemplated by the notification language. See Third Division Awards 31280, 32862, 34216, and 36015. A careful review of the on-property record shows that the Carrier did not provide advance notice of its intent to contract the work at issue to the General Chairman of the Organization. For this reason, the 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 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.

In this case, the Organization seeks to have Claimants D. Rogers, P. Dinneen, D. Judge, R. Rutledge, S. Palmer, W. Nielsen, and W. Jones each be paid all the

straight time hours and overtime hours expended by the outside forces in performing of this work at their appropriate rate of pay. In its initial claim letter, the Organization sought six hours of compensation for the two Claimants who are Lowboy Operators and twelve hours of compensation for the other five Claimants. The evidence supports this claim for compensation. Given the possible difficulty in identifying the contractor's invoices for work at issue, the Claimants shall be compensated as requested in the initial claim letter, such that the Claimants who were Lowboy Operators on June 13, 2013, shall receive six hours of compensation at their appropriate rate, and the other Claimants shall receive twelve hours of compensation at their appropriate rate.

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.