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

Award No. 43569
Docket No. MW-42889
19-3-NRAB-00003-150120

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 (LG Pike Construction Company) to perform Maintenance of Way and Structures work (install switches) at Carling tower in the Hobson Yard in Lincoln, Nebraska on September 9, 10, 11 and 12, 2013 (System File C-14-C100-7/10-14-0022 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 R. Brennan, S. Hrenchir, J. Francke and R. Hetherington shall each now be compensated for thirty-two (32) hours at their respective straight time rates of pay and eight (8) hours at their respective overtime 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 contractor LG Pike Construction Company to install switches at Carling tower in Hobson Yard, in Lincoln, Nebraska, on September 9, 10, 11, and 12, 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 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.**
>
> **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.**
>
> **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 Board finds that the Organization has established that the installation of switches at issue has been customarily performed by its members. On-property, the Carrier did not dispute the BMWE-represented forces customarily do this work, and the Organization introduced a statement from a Claimant that provides sufficient evidence to establish that BMWE-represented forces customarily performed the installation of switches. There is also sufficient evidence in the record to establish that the contractor installed the switches on the days alleged.

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 it met its obligation to provide the Organization with advance notice that the work at issue would be performed by contractors though a series of three letters of intent. The letter most relevant to this dispute is dated October 23, 2012, and it states, in part:

> **"As information, BNSF advised by letter dated October 20, 2011 of its plans to contract for the necessary heavy equipment, such as excavators (track-hoes), F/E loaders, graders, compactors, dumps, and hot-mix asphalt paving equipment with operators to assist BNSF forces with the yard improvements at Hobson Yard located in Lincoln, NE. This is a multi-year, multi-phase project requiring installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this project. Moreover, BNSF forces do not possess the necessary specialized dirt work or hot-mix paving skills for this project. That earlier letter is hereby amended to include the following work and for**
> **the same reasons stated on October 20, 2011: install erosion-control measures; remove/excavate existing switches (Nos. 113 and 114); necessary sub-grade prep; load/haul/set 2-No 11 switches (including necessary leading/trailing track panels); and debris removal.**
>
> **BNSF forces will be on-hand to perform associated track work (welding turnouts; switch in-service, and surfacing). It is anticipated that this work will begin immediately to take advantage of the existing track/yard windows being currently used with the multi-phase, multi-year improvements addressed in the October 20, 2011 letter.**
>
> **If you or your designee, wish to discuss this work, please contact Khoury Farrar at (817) 352-0162."**

That letter put the Organization on notice that the Carrier was continuing with a multi-year, multi-phase yard-improvement project in the Hobson 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 complete a multi-year, multi-phase project in the Hobson 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 or hot paving. 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 Hobson 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 October 23, 2012 letter, that notice stated that existing switches will be removed and that new switches will be set during the yard improvements at Hobson Yard. Thus, the notice addresses the work at issue. During the on-property processing of the claim, the Organization alleged that the disputed work occurred after the project identified in the notice was completed, but it presented no evidence in support of that allegation. Under these circumstances, the Carrier has met its obligations under the Note to Rule 55.

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.