

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43570  
Docket No. MW-42890  
19-3-NRAB-00003-150121**

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

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it assigned outside forces (United Specialty Services and Bodine Services) to perform maintenance of Way and Structures Department work (clean excess ballast from Group 1 and Group 2 retarder switches) in the Galesburg Yard on the Chicago Division on September 10, 11, 12 and 13, 2013 (System File C-14-C100-13/10-14-0027 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. Easley, G. Kuberski, K. Kane, J. Mudd, J. Gibb and E. Allen shall now each be compensated for twenty-seven and one-half (27.5) hours at their respective straight time rates of pay, thirty-two (32) hours at their respective time and one-half rates of pay and seventeen (17) hours at their respective double 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 United Specialty Services and Bodine Services to clean excess ballast from Group 1 and Group 2 retarder switches in the Galesburg Yard on the Chicago Division on September 10, 11, 12 and 13, 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 meet its burden of proof on the elements of the claim and 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 employees in the Maintenance of Way and Structures Department:**

**Employees included within the scope of this Agreement--in the Maintenance of Way and Structures Department, including employees in former GN and SP&S Roadway Equipment Repair Shops and welding employees--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 employees 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 employees 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 employees, 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 employees 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 BMW-represented forces

**“customarily performed” the work at issue. The Carrier argues that the Organization must prove that BMW-employees represented forces “customarily performed the work” and that BMW-employees 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 BMW-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 through 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 BMW-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 BMW-represented forces customarily do this work, and the

**Organization introduced statements from each of the six Claimants that provide sufficient evidence that BMW-represented forces customarily operate equipment to dig up excess material and operate the vacuum trucks. These statements also provide sufficient evidence to establish that the contractors performed the work at issue on September 10, 11, 12 and 13, 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 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.**

In this case, the evidence establishes that the contractors staffed two vacuum trucks with a driver and two laborers, so that each shift had six workers. The trucks were operated on two shifts, working around the clock beginning at noon on September 10, 2013, and ending at midnight on September 13, 2013. This means that the evidence supports a conclusion that the contractors' employees worked a total of 84 hours each, not counting lunch and breaks. The Claimants have sought compensation for a total of 76.5 hours, which, according to Claimant E. Allen, was the number of hours the vacuum trucks were in the yard. Thus, the number of hours of compensation sought by the Claimants is reasonable and supported by the evidence.

The claim seeks compensation for Claimants D. Easley, G. Kuberski, K. Kane, J. Mudd, J. Gibb and E. Allen for twenty-seven and one-half (27.5) hours at their respective straight time rates of pay, thirty-two (32) hours at their respective time and one-half rates of pay and seventeen (17) hours at their respective double time rates of pay. These calculations assume that the six Claimants would have worked 76.5 hours straight themselves over four days, when the actual work was performed by twelve of the contractors' employees – six workers on each shift. The reason that claimants otherwise under pay are awarded compensation for violations of the Agreement is to compensate for lost work opportunities for Organization members. Because the work in this case was performed with two crews on two shifts, the loss of work opportunity is for twelve Organization-represented employees, not six. Because compensation will be awarded to only the six Claimants, it is not reasonable to compensate them on an overtime or double-time basis, when other members who lost work opportunities could have been compensated at straight-time rates. For that reason, the compensation awarded to each Claimant shall be 76.5 hours at their straight-time rates.

### **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.**