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

Award No. 43628
Docket No. MW-42703
19-3-NRAB-00003-140385

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 Carrier violated the Agreement when it assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (clean ballast from tracks, switches, bridge walkways and other right of way locations) at various locations on the Blackhills Subdivision beginning on March 7, 2013 through March 19, 2013 (System File C-13-C100-272/10-13-0395 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. Huber and T. Hopson shall now each be compensated for seventy-two (72) hours at their respective 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 claim concerns the Carrier's decision to assign outside forces to clean ballast from tracks, switches, bridge walkways, and other right of way locations at various locations on the Blackhills Subdivision between March 7 and March 19, 2013. Claimants established and hold seniority in the Carrier's Track Subdepartment. The Organization filed a claim on April 19, 2013, which was progressed on-property, but not resolved by the parties. It is now properly before this Board for final adjudication.

The Organization contends that this work is reserved to the Carrier's Maintenance of Way forces and should have been assigned to Claimants, rather than outside forces, pursuant to Rules 1, 2, 5, and the Note to Rule 55. The Organization contends that Maintenance of Way forces ordinarily clean materials such as ballast, oil, dirt, mud, rocks, coal pieces, coal dust, spilled grain, snow, ice, tie pieces, and OTM from tracks. Here, the Organization contends that the track cleaning work took place in rail yards and was unambiguously reserved to and has been performed by Maintenance of Way forces.

The Organization contends that the Note to Rule 55 and Appendix Y demand that the Carrier give notice of anticipated contracting out so that the parties may make a good-faith attempt to reach an understanding regarding the contracting. The Organization contends that the Carrier failed to provide proper advance notice of its intent to contract out the work. Here, the Organization contends that the notice contained no specific dates for the work to occur, was dated 2011 although the work did not occur until 2013, and listed ten subdivisions including over 1,150 track miles and one rail yard. As such, the Organization contends that the notice was insufficient.

The Carrier contends that the disputed work was properly contracted out, as the Agreement permits work that is ordinarily performed by Maintenance of Way employes to be contracted under specific exceptions. The Carrier contends that the Organization has failed to demonstrate that this work has been assigned exclusively to Maintenance of Way employes. The Carrier contends that at best, the Organization has demonstrated a mixed practice on the property.

The Carrier contends that it provided sufficient advance notice of its intent to contract out this work. The Carrier contends that it did not have the proper type of equipment necessary for its employes to perform the work. The Carrier contends that it has the managerial right to lease, rather than purchase, the equipment needed. The Carrier contends that the material is a contaminating material that requires special handling. The Carrier contends that its notice informed the Organization that it lacked the equipment necessary to contract out the work in question, so it fulfilled any alleged obligation under the Note to Rule 55 or Appendix Y.

Finally, the Carrier contends that even if the Organization's claim has merit, Claimants are not entitled to any damages, as they were fully employed during the claim period. Further, the Carrier contends that Claimant Huber was absent from work (on vacation) for a portion of the claim period.

On January 20, 2011, the Carrier provided this notice to the Organization:

"As information, BNSF plans to contract for a vacuum truck, as it has done in the past, to perform the necessary cleaning and maintenance on switches, including removal of coal dust, coal mud, coal-impacted ballast, and debris at the following locations on the Powder River Division:

<u>Powder River West</u>

Orin Sub-Division:	**MP 0 to MP 127.3**
Valley Sub-Division:	**MP 0 to MP 90.4**
Canyon Sub-Division:	**MP 90.4 to MP 133.2**
Black Hills Sub-Division:	**MP 476 to MP 599.9**
Casper Sub-Division:	**MP 133.2 to MP 204.5**
Campbell Sub-Division:	**MP 0.0 to MP 9.8**
Big Horn Sub-Division:	**MP 599.9 to 829.3**

Powder River North
Sand Hills Sub-Division: MP 128 to MP 364.1
Butte Sub-Division: MP 366 to MP 475.2
Angora Sub-Division: MP 0 to MP 115.1
Alliance Yards

The Carrier does not possess the specialized vacuum trucks necessary to perform this work.

It is anticipated this work will begin on approximately February 7, 2011."

The Organization requested a conference. The parties discussed the work on February 11, 2011 but were unable to reach agreement.

As the moving party, the Organization bears the burden of proving all elements of its claim. The record clearly demonstrates that the work claimed was performed by outside forces on the Blackhills Subdivision between March 7, 2013 and March 19, 2013. The Carrier does not dispute these facts.

The next question is whether the work in question is "customarily performed" by the Organization's members. The Note to Rule 55 provides that if the work at issue is customarily performed by bargaining unit members, the Carrier may only contract out the work under certain specified circumstances: (1) the work requires "special skills, equipment, or material" (2) the work is such that the Carrier is "not adequately equipped to handle (it)" or (3) in cases of emergencies that "present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

There is a split in the precedent from prior Boards addressing this phrase. One line of Awards finds that "customarily performed" means "exclusively performed throughout the entire system," and the other finds that it means "historically and traditionally performed." In Third Division Award 40563, this Board wrote,

"After reviewing and considering the Awards submitted, the Board is of the opinion that the better interpretation is that "customarily" has its ordinary meaning, that is, "historically and traditionally." For one thing,

> **it is a basic principle of contract interpretation that language should be given its ordinary meaning, in the absence of any indication from the parties that they intended some different meaning.…The reasoning set forth in Public Law Board No. 4402, Award 20 is persuasive, particularly in noting that "Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so." As the PLB pointed out in that case, the word "exclusive" is used extensively throughout the industry. The parties' failure to use it in the Note to Rule 55, using "customarily" instead, "supports the conclusion that the parties did not intend to apply the exclusivity principle to contracting out issues."**

The disputed work is routine maintenance activity customarily performed by the Carrier's BMWE-represented employes. *See, e.g.,* Third Division Award 40765. In order to have this work performed by outside forces, the Carrier was required to provide proper notice to the Organization. Such notice contains enough specificity to allow the parties to have a meaningful dialogue regarding the intent to contract out. Third Division Award 42542. Suffice to say that a notice that fails to provide a time frame, specific location, and/or the nature of the work to be contracted will generally be found insufficient.

The Carrier argued that the notice dated January 20, 2011, provided sufficient notice of its intent to contract out the disputed work. However, because the work claimed did not occur until March 2013, the Organization contends that it essentially received no notice of the work. This Board finds that the notice provided in January 2011 stating that "this work will begin on approximately February 7, 2011," but having no further limits on the time frame cannot serve as notice for work which began more than two years later. This open-ended notice, if found sufficient, could ostensibly serve as notice of any necessary cleaning and maintenance done with a vacuum truck at any time in the future. Clearly, that sort of vague notice is essentially no notice, at least with respect to the time the work will be performed. Certainly, when the parties met in February 2011, the Organization was not made aware that it was discussing outside forces using a vacuum truck to perform necessary cleaning and maintenance for any time in the future.

Where notice of contracting out is insufficient, it prohibits a meaningful contracting conference from taking place. "The contracting conference established by the Note to Rule 55 is not intended to be merely a pro forma stop en route to the Carrier's doing what it wants." Third Division Award 40798. Under similar circumstances, this Board has held that a claim should be sustained where the notice is insufficient. This Board finds the reasoning of those awards to be persuasive.

With respect to the remedy requested, we find that Claimants are entitled to relief claimed, except to the extent that Claimant Huber was on vacation during the claimed period, as he was not available to perform the disputed work. Accordingly, we award Claimant Hopson 72 hours at his straight-time rate of pay and award Claimant Huber 64 hours at his straight-time rate of pay.

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 17th day of May 2019.