

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43956
Docket No. MW-43079
20-3-NRAB-00003-190389**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 Agreement was violated when the Carrier assigned outside forces (Railworks) ' ... to unload, rebuild, replace, weld, and surface during a complete turnout replacement project at or around MP 140.3 on the New Westminster subdivision in district 100.' between December 8, 2013 and January 13, 2014 (System File 11.1409/17-14-0001 BNR).**
- (2) The Agreement was violated when the Carrier failed to notify the General Chairman, in writing, in advance regarding the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (2) As a consequence of the violations referred to in Parts (I) and/or (2) above, Claimants R. Cameron, G. Smart, E. Arneson, G. Avery, R. Lapka, D. Miles, R. Drake, K. Scobie shall now each be allowed an equal share of nine hundred fifty-three (953) hours straight time and ninety-nine (99) hours at the overtime rate and all benefits that the Claimants did not receive because of these violations.”**

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.

The Organization alleges that from December 8, 2013 through January 13, 2014, the Carrier assigned outside forces (Railworks) to perform Maintenance of Way and Structures Department work (unloading, rebuilding, replacing, welding and surfacing during a complete turnout replacement project) at or around Mile Post 140.3 on the New Westminster Subdivision in District 100. It contends the work in question is typical Maintenance of Way work which has customarily and traditionally been assigned to and performed by the Carrier's Maintenance of Way forces. It cites the following provisions in support of its position:

“RULE 1. SCOPE

- A. These rules govern the hours of service, rates of pay and working conditions of all employees not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department, including employees in the former GN and SP&S roadway equipment repair shops and welding employees.
- B. The Maintenance of Way and Structures Department as used herein means the Track Sub-department, the Bridge and Building Sub-department, the Welding Sub-department, the Roadway Equipment Sub-department and the Roadway Machinery Equipment and Automotive Repair Sub-department of the Maintenance of Way Department as constituted on date of consummation of this Agreement. * * *

RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

- A. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.**
- B. Seniority rights of all employees are confined to sub-department in which employed, except as otherwise provided in this Agreement.**

RULE 5. SENIORITY ROSTERS

- A. Seniority rosters of employees of each sub-department by seniority districts and rank will be compiled. Two (2) copies will be furnished foremen and employees' representatives, and foremen will post a copy in tool house and outfit cars, or at convenient places for inspection of employees affected. Copies will also be made available to employees not working under the supervision of a foreman.**
- B. Seniority rosters will show names, employee numbers, seniority dates, occupations and locations of employees. [Letter of Agreement 4/13/98]**
- B. Seniority rosters will be revised and posted in March of each year and will be open for correction for a period of sixty (60) calendar days from date of posting. Employees on leave of absence or on furlough at the time roster is posted will be granted sixty (60) calendar days after their return to active service in which to make protest as to seniority dates. Protests on seniority dates for correction will be confined to names added since posting of previous annual roster. Erroneous omission of names from the seniority rosters, or typographical errors on such rosters, may be corrected at any time.**

TRACK SUB-DEPARTMENT

Roster 1

- | | |
|---------------|--|
| Rank A | Track Inspector, Foreman-General Section Foreman, Maintenance Crew Foreman, Section Foreman, Grouting Crew Foreman, Cropping Crew Foreman, Extra Gang Foreman |
| Rank B | Assistant Foreman |

Rank C Sectionman, Fire Patrolman, Track Watchman, Track
Patrolman, Track Lubricator Maintainer, Tunnel Watchman,
Fence and Tile, Gang Laborer, Stock Yard Laborer, Lampman,
Yard Cleaner, Car Cleaner, Crossing Watchman, Gateman and
Flagman, Extra Gang Man
Roster 2 Truck Driver * * *

WELDING SUB-DEPARTMENT

Roster 1
Rank A Welding Foreman, Head Welder
Rank B Welder, Frog Welder
Rank C Grinder
Rank D Welder Helper
Roster 2
Rank A Foreman, Continuous Rail Welding Plant
Rank B Welder, Continuous Rail Welding Plant
Rank C Grinder, Continuous Rail Welding Plant
Rank D Helper, Continuous Rail Welding Plant
Rank E Laborer, Continuous Rail Welding Plant * * *

G. In each of the five (5) seniority districts indicated in Rule 6 A,
seniority rosters for the Roadway Equipment Sub-department shall
be maintained as indicated below, with separate seniority dates only
for each rank contained in each roster:

ROADWAY EQUIPMENT SUB-DEPARTMENT (5 Districts)

Roster 1 Machine Operator Group 1
Roster 2 Machine Operator Group 2
Roster 3 Helper, oiler, pitman and miscellaneous employe
Roster 4 Machine Operator Group 3, Machine Operator Group 4,
and Helper, oiler, pitman and miscellaneous employee. * * *

RULE 55. CLASSIFICATION OF WORK

A. 1. Track Inspector.

An employe assigned the responsibility for the proper inspection of the tracks, roadway and right-of-way on his district(s). * * *

B. Foreman.

An employe assigned to direct the work of men and reporting to officials of the railroad shall be classified as a foreman.

C. Assistant Foreman.

An employe assigned to assist a foreman in directing the work of men shall be classified as an assistant foreman. * * *

K. Welder.

An employe assigned to the operation of any welding device used in the performance of such work as repairing, tempering and cutting rails, frogs and switches, welding and cutting in connection with construction, maintenance and dismantling of bridges, buildings and other structures, and any other welding and cutting in Maintenance of Way Structures Department shall be classified as a maintenance of way welder.

L. Grinder Operator.

An employe assigned to the operation of a grinding device, performing all grinder operations, either preparatory or finishing, and including the use of the cutting torch, shall be classified as a grinder operator. * * *

N. Machine Operator.

An employe qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5. * * *

P. Truck Driver.

An employe assigned to primary duties of operating dump trucks, stake trucks and school bus type busses, except trucks having a manufacturer gross vehicle weight of less than 16,000 lbs. or any vehicle of the pick -up, panel delivery or special body type. The term special body refers to trucks such as those used by welder gangs and equipment maintainers with special bodies designed to transport mechanics, tools, equipment and supplies. When vehicles equipped with snowplow blades are used for

plowing snow or moving dirt, the truck driver rate will apply in accordance with Rule 44. Truck Driver will perform such other work as may be assigned to him when not engaged in driving a truck. * * *

“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.”

It also references December 11, 1981 Letter of Agreement (Appendix Y), which reads:

“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 which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event that 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.

“APPENDIX Y December 11, 1981 * * *

Dear Mr. Berge: * * *

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. Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.”

The Carrier denies that any contract provision applies. It contends the Organization’s listed rules (2, 5, 6, 29, 30, 55 and Appendix Y) do not apply: Rule 2 is a general rule that limits itself to the "rules as hereinafter provided;" Rule 5 is a general rule limited to the compilation and maintenance of Seniority Rosters and nothing more; Rule 6, titled Basic Seniority Districts, sets the boundaries of the various seniority districts; Rule 29 outlines when employees are considered to be in an overtime capacity and how they are to be compensated; Rule 30 on Calls states employees must be notified or called to perform work and Rule 55 only identifies a classification of work and is not

a reservation of work rule. In the Carrier's assessment, Appendix Y does not require BNSF to concede any particular contracting work or project to Maintenance of Way employees. Nor is Appendix Y a restriction on contracting as the Organization contends. Rather, Appendix Y set forth the parties' intentions to establish a vehicle to discuss reduction in contracting. It concludes there is no explanation or evidence of how any of these rules were violated and denies any violation.

In this instance, Transport Canada required BNSF to take immediate remedial action to repair an unsafe switch. Transport Canada also informed BNSF that its failure to take immediate action would result in the main line being taken out of service. At that time, BNSF did not have the necessary forces available nor did it have the needed surfacing equipment, cranes and loaders to perform this work in Canada. Attempts to get BNSF personnel into Canada with visas were unsuccessful due to the processing timelines. And the equipment owned and/or leased by BNSF was not readily available in Canada.

To substantiate its position, the Carrier provided an email from Division Engineer C. Scherwinski who confirmed that if BNSF failed to address the problem, the main line would be pulled from service. It also provided payroll records showing that eight employees took vacation or personal time in December and early January totaling 63 total days of service lost.

It is well established that the Organization carries the burden of establishing that contracting out has occurred and that the work at issue has customarily been performed by Maintenance of Way employees. The Note to Rule 55 specifies that "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." There is a split in the precedent; one line of cases holds that "customarily performed" means "exclusively performed throughout the entire system." We are not persuaded by this argument. In contract interpretation, it is presumed that the parties intend the words used to have their ordinary and popularly accepted meaning unless context or evidence indicates the words were used in a different sense.

"§2.5 Ordinary and Popular Meaning of Words"

When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. When an agreement uses technical terms, however,

arbitrators give preference to the technical or trade usage, unless there is evidence that the parties intended a nontechnical meaning. [National Academy of Arbitrators, *The Common Law of the Workplace*, (Theodore St. Antoine, BNA Books 1998).]”

We do not believe the term “customary” conveys the concept of exclusivity, but rather refers to what is usual or ordinary. In accordance with this interpretation, Third Division Award 40558 has articulated the applicable standard:

“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 defeat for initially failing to provide information almost always in the Carrier’s possession.”

To this analysis we would add that conflict within an agreement is disfavored in contract interpretation, as it effectively voids the meaning of terms the parties have used to express their intent. Enforcement of the Carrier’s proffered interpretation would mean that any time the Organization ever agreed to contracting out a certain type of work, that work would lose “exclusivity” and be forever lost to the unit. We strongly disagree that the parties intended any such result. Rather, they carefully created a mechanism for discussion between the parties regarding proposed contracts with outside forces. We unequivocally find the term “customary” to reflect usual but not exclusive practices. This interpretation accords with the authoritative and commanding consistency of the more recent 35 awards rendered on the subject.

Once the Organization has met the burden of establishing that the work was indeed contracted out and that it was work customarily performed by the unit, the burden of proof shifts to the Carrier. The first question to be answered is whether the

Carrier has provided the Organization with sufficient notice under Rule 55. This is to allow the parties an opportunity to make a good faith effort toward reducing the amount of subcontracting. This concept was well articulated in Award 43704:

“What is the purpose of advance notice under Rule 55? It is not simply to give the Organization a “heads-up” that certain work is going to be contracted out, but to give it an opportunity to object and to request a conference during which the parties are required to engage in good-faith efforts to reduce the amount of subcontracting. To that end, a proper notice must be sufficiently specific for the Organization to be able to make an informed judgment whether it believes the proposed contracting out is permissible under Rule 55 and then engage in meaningful discussions on alternatives to contracting out during conference.”

When the Carrier is able to show proper notice, it must then also demonstrate that the work falls within one of the negotiated exceptions enumerated in Note to Rule 55. This provision limits permissible contracting out of customarily performed work to situations where the Carrier’s employees lack special skills needed for the work, where the Company does not own the special equipment required, where necessary special materials are available only through a supplier, where the Company is not adequately equipped to handle the work or where an emergency time requirement exists which is beyond the capacity of the Company’s forces. Each of the contractually negotiated exceptions carries a consistent theme: inability to solve the problem without outside help. Third Division Awards 43345, 43393, 43567, 43628, 43664, 43667 and 43668 all follow the above-described allocation of the burden of proof between the parties.

The evidence of record establishes that a substantial number of MOW employees were out at the time the Canadian crisis occurred, and that the main line would be shut down if the problem were not handled with expedition. Significantly, the parties have agreed to the following:

“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.”

In this case the movement of traffic was imminently threatened and additional force or equipment was required to address the problem. We find the Carrier's evidence does establish that an emergency existed within the meaning of the parties' Agreement, and that as a result, no contract violation occurred.

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 5th day of March 2020.