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

Award No. 43959
Docket No. MW-43142
20-3-NRAB-00003-190392

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
(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 (United Specialty Services) to perform Maintenance of Way and Structures work (plow and remove snow) around various buildings in the Galesburg Yard on January 6 and 21, 2014 (System File C-14-C100-138/10-14-0210 BNR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing of its intent to contract out the aforesaid work and failed to 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 G. Kuberski, S. Kessler, J. Mudd, T. Flynn, E. Johnson and D. Easley shall each ' ... be paid 16 hours of straight time 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.

The Organization maintains that on January 6 and 21, 2014, without notifying the General Chairman in advance in writing, the Carrier assigned outside forces (United Specialty Services) to perform Maintenance of Way and Structures Department work of removing snow around several buildings in the Galesburg yards on the Chicago Division. It argues the work of construction, repair and maintenance of track, including the cleaning of tracks and switches of snow, has customarily, historically and traditionally been performed by Maintenance of Way forces. It insists such work is reserved to Maintenance of Way forces under Rules 1, 2, 5, 55 and the Note to Rule 55.

The Carrier asserts the Organization has nothing beyond an opinion to support its position. It notes Rule 1 is a general rule that simply discusses the scope of the Agreement; Rule 2 is also a general rule that limits itself to the "rules as hereinafter provided;" and there is no rule reserving the work to any class of employee. Rule 5 is a general rule limited to the compilation and maintenance of Seniority Rosters, and nothing more. It insists Rule 55 is not a reservation-of-work rule, but rather a classification of work rule which does not reserve work exclusively to employees of a given class or serve as a Scope Rule.

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 employes. 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 employes 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**
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> **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.**
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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 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 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 this was the intent of the parties in carefully creating a mechanism for discussion 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.

The Organization is not able to make a *prima facie* case in this instance. There is an irreconcilable factual controversy regarding the contracting out of the work. It follows that the Organization cannot establish that the work was actually contracted out within the meaning of the applicable provisions. As a result, the Board has no choice but to deny the claim.

AWARD

Claim denied.

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 5th day of March 2020.