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

Award No. 43961
Docket No. MW-43145
20-3-NRAB-00003-190394

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 Carrier violated the Agreement when it assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (remove water from low switches) at various locations within the Galesburg Yard and at other locations on February 18, 19, 20 and 21, 2014 (System File C-14-CI00-130/l0-14-0221 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification of its intent to contract out the aforesaid 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, J. Gibb, J. Louck and E. Curl shall now each be compensated ' ... the equivalent 26 straight time hours and 26 overtime hours to the contracted employees at each man's 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.

From February 18, 2014 through February 21, 2014, the Carrier assigned outside contractor Hulcher to remove water from low switches. Hulcher utilized a vacuum truck to remove the water. The Carrier categorizes the incident as an emergency due to severe winter weather. It also notes this type work is not exclusive to Organization members. The Organization maintains this work had historically and routinely been performed by Maintenance of Way employes, and the assignment of an outside contractor to do it was in violation of Rules 1, 2, 5, 55, and Appendix Y.

Applicable provisions of the parties' Agreement state as follows in pertinent part:

"RULE 1. SCOPE

A. These rules govern the hours of service, rates of pay and working conditions of all employes not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department, including employes in the former GN and SP&S roadway equipment repair shops and welding employes.

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 employes 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 employes are confined to sub-department in which employed, except as otherwise provided in this Agreement.

RULE 5. SENIORITY ROSTERS

A. Seniority rosters of employes of each sub-department by seniority districts and rank will be compiled. Two (2) copies will be furnished foremen and employes' representatives, and foremen will post a copy in tool house and outfit cars, or at convenient places for inspection of employes affected. Copies will also be made available to employes not working under the supervision of a foreman.

B. Seniority rosters will show names, employe numbers, seniority dates, occupations and locations of employes. [Letter of Agreement 4/13/98]

C. 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. Employes 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**
Roster 3	**Small Machine Operators, Group 5 Machines,** **Adzing Machine-such as Nordberg CZ,** **Anchor Applicator-such as Racine AP,** **Bolt Tightener-such as Raco C** **Cribbex-such as Nordberg AX** **Track Gauger-such Nordberg AT (Dunrite)** **Cribbing Machine-such as Kershaw 6A-C** **Tractor mounted self propelled, air compressor-such as LeRoi 125-T A** **Spike Puller-such as Nordberg AP** **Spike Driver-such as Nordberg AH** **Tie Plug Setter and Driver-such as Fairmont W-104** **Rail Oiler-such as Fairmont W61-A** **Tie Borer-such as Raco** **Creosote Sprayer-such as Fairmont W-71** **Multiple Rail Drill (like Hydrotool)** **Stationary Abrasive Saw, like O'Bear** **Power Track Jack-such as Nordberg BJ** **Schramm Pneumatractor** **Crawlair Truck Mounted Compressor**

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RULE 55. CLASSIFICATION OF WORK

B. Foreman.

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

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.

Q. Sectionmen.

Employes assigned to constructing, repairing and maintaining roadway and track and other work incident. * * *

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 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 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."

"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 employes.

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. 1n 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 I 1, 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 assesses the Organization's position as nothing more than unsubstantiated allegations devoid of evidence. It dismisses Public Law Board 6204, Award 33 as distinguishable:

> **"Award 33 is nothing more than a placebo promising relief but providing nothing. First, this award only refers to B&B Department work and not Track Department work. Second, this award recognized legitimate reasons for contracting work out to third parties. One of which was that "[s]pecial equipment was needed for a project that was not possessed by the BNSF." Third, as highlighted in BNSF's dissent (see attached), Public Law Board 6204, Award 33 is so fatally flawed that it holds no precedential value."**

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.

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 the Note to Rule 55. This provision limits permissible contracting out of customarily performed work to situations where the Carrier's employes 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. 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 Organization's initial burden was to prove that the Carrier contracted out work customarily performed by unit members. It met this burden by entering Hulcher Services Invoice as an exhibit; it identifies rail maintenance and truck driving as tasks to be performed. As found in Third Division Awards 43261, 43282, 43344, 43346, 43347, 43393, 43567, 43570, 43572, 43664, 43704 and 43708, this work is of the type routinely assigned to members.

The evidence of record establishes that in the Galesburg yard, hump operations were shut down with two group retarders under water, in addition to an unidentified number of switch locations and signal houses shut down due to water. The only witness statement in the record was from B. Klein who only said he worked alongside the contractors. In support of the Carrier's position, K. Pickens has provided an email stating "This work was performed under emergency conditions without time to bid, also our employees worked with the contractors to clear water and ice."

It is significant that the parties agreed that:

> **"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."**

We find it more likely than not that the Carrier was unable to deal with the water and ice in Galesburg Yard "in the shortest time possible" without the assistance of a contractor. With hump operations shut down, in addition to multiple switch locations and signal houses out of service, the movement of traffic was most certainly affected and the situation was dire. The Organization challenges the finding of an emergency, pointing out that equipment was submerged after a snow storm, and it should not have been a surprise that when the weather warmed, the snow melted. This point is logical, however, predictions of snow melt can be inexact. More importantly, the Agreement focuses on the impairment of operations, and in this case, operations were seriously impaired. As a matter of contract, the critical inquiry is not the foreseeability of the arrested traffic problem, but the Carrier's ability to address it "in the shortest time possible." We find the situation in the Galesburg Yard to constitute an adequate basis for declaring an emergency under Appendix Y. As such, no notice was required and the situation falls within a recognized exception for contracting out.

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.