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

Award No. 43962
Docket No. MW-43146
20-3-NRAB-00003-190395

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 (R. J. Corman, Inc.) to perform Maintenance of Way and Structures Department work (hauling, dumping and spreading rock) for right of way roads between Mile Posts 119 and 122 near Centralia, Illinois on February 22, 24 and 25, 2014 (System File C-14-Cl00-129/l0-14-0213 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. Schmidt, D. Boyd, R. Wolff, J. Bennett, J. Parker, K. Nadler, S. Withrow, T. Cripps, A.Hensley, A. Adams, C. Branson and R. Hopkins shall '* be paid eight hours of overtime and eight hours of straight time at a Truck Driver's rate of pay. ***' Claimants K. Hoover, T. Pruett and C. Hall '*** should be paid for eight hours of overtime pay and sixteen hours of straight time at their respective 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.

The Organization asserts that on February 22, 24 and 25, 2014, the Carrier assigned an outside contractor (R. J. Corman) to perform ordinary Maintenance of Way work (hauling, dumping and spreading rock) between Mile Posts 119 and 122 near Centralia, Illinois.

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

> **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 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 this allocation of the burden of proof between the parties.

The Organization has shown that the work was subcontracted and that it was work ordinarily and customarily performed by unit employes. Indeed, Third Division Awards 43146, 43261, 43282 and 43572 each recognized that hauling and delivering materials and equipment is work traditionally and customarily performed by the Maintenance of Way Employes. It follows that the Organization has met its burden.

The Carrier defends by arguing that there was an emergency. It maintains the roads were wet due to snow, and fuel trucks could not get to the locomotives. However, the evidence on the record is not adequate to support this conclusion. The Organization has provided weather reports from the time in question that are inconsistent with the Carrier's position. Without sufficient evidence of an emergency, the Carrier is left with

an obligation to provide notice to the Organization and afford discussion regarding the contracting in question. They have failed to meet this obligation.

AWARD

Claim sustained.

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.