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

Award No. 43963
Docket No. MW-43190
20-3-NRAB-00003-190396

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 Agreement was violated when the Carrier assigned outside forces (Hulcher) to perform Maintenance of Way and Structures work (blowing and sweeping snow from switches) at various locations in the Galesburg Yard on March l and 2, 2014 instead of Claimants E. Allen, E. Johnson, J. Mudd, L Pendegrass, G. Kuberski, S. Zetterberg, J. Gibb, K. Kane and D. Easley (System File C-14-Cl00-139/10-14-0223 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, ' ... each of the 9 Claimants be paid 12 hours straight time on 3/1/2014 and 8 Claimants be paid 12 hours of straight time on 3/2/2014 each at the 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 contends that on March 1 and 2, 2014, the Carrier assigned outside contractor forces (Hulcher, Inc.) to perform the Maintenance of Way and Structures work of blowing and sweeping snow from switches at various locations in the Galesburg Yard. On March 1, nine employes of the outside contractor each worked a total of twelve straight time hours. On March 2, eight contractor employes worked a total of eight straight time hours. The Organization alleges that in contravention of contractual mandates, the Carrier did not assign all of the snow removal work to the Claimants even though they were qualified, available and would have performed all of the claimed work.

Applicable language states 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 the 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. * * *

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. * * *

Q. Sectionmen.

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

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

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 N 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."**

The Organization notes the Carrier did not notify the General Chairman in advance of its intent to contract out the snow removal work involved here. It contends the Claimants were readily available and fully qualified to perform all aspects of the work involved during regular work hours, overtime hours or on weekend rest days, and

suffered a loss of work opportunity when the Carrier contracted the work to outside forces.

The Carrier contended that the work in question was not reserved to Maintenance of Way forces by an *exclusive* past practice. It notes the Organization has provided no evidence whatsoever to support its contention that there was no emergency.

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.**
>
> **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 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 means of discussion regarding proposed contracts with outside forces. We unequivocally find the term "customary" to reflect usual but not exclusive practices. Our interpretation of 'customary performance' accords with the authoritative and commanding consistency of the more recent 35 awards rendered on the subject.

The Carrier provided a packet of statements from Company officers, past and present, attesting to the practice of using contractors for snow removal. As articulated in Third Division Awards 43146 and 43392, it is well established that past practice is not the applicable contractual standard. The Carrier's evidence fails to show that unit employes have not customarily performed this work. Indeed, Third Division Award 43394 plainly recognizes snow removal as a customary maintenance of way duty.

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.

According to Roadmaster Kenneth Pickens, "there was an emergency snow event and BNSF employees were all being utilized when the contractor came into the claimed location." It is the Carrier's burden to prove that an emergency existed. The evidence is insufficient to establish that an emergency existed. The Carrier failed in its requirements to provide the Organization with notification and to engage in a good faith effort to avoid subcontracting.

Claim sustained. The case is remanded to the parties for calculation of the remedy.

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.