

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43964
Docket No. MW-43191
20-3-NRAB-00003-190397**

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 Carrier violated the Agreement when it assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove excess water, ballast and coal) from tracks, switches and right of way at various locations within the Alliance Yard, Alliance, Nebraska on March 3, 4, 5, 10, 12, 13, 17, 24, 27, 28 and April 2, 3, 4, 7, 8 and 9, 2014 (System File C-14-C100-134/10-14-0241 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 T. Eck and R. Larsen shall now each' ... be paid one hundred twenty-eight (128) straight time hours at their respective rates of pay, for the hours worked by the outside contractors on the above cited claim dates, 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 alleges that on March 3, 4, 5, 10, 12, 13, 17, 24, 27, 28 and April 2, 3, 4, 7, 8 and 9, 2014, the Carrier assigned outside contractors (R. J. Corman) to perform Maintenance of Way and Structures Department work, i.e., remove excess water, ballast and coal from tracks, switches and the right of way at various locations in the Alliance Yard in Alliance, Nebraska. On the claim dates involved herein, the outside forces utilized one (1) foreman, one (1) sectionman and one (1) vacuum truck to remove this excess water, ballast and coal. The Organization asserts this was in contravention of the terms of the parties' Agreement. 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 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 the 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]**
- 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. 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. * * ***

RULE 55. CLASSIFICATION OF WORK * * *

B. Foreman.

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

Q. Sectionmen.

Employees 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 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.

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 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 employees. 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 calculates that contractor employees each worked a total of one hundred twenty-eight (128) straight time hours, all to the exclusion of Claimants. It asserts work of this character has customarily and traditionally been assigned to and performed by the Carrier's Maintenance of Way forces for decades, and the Carrier never disputed that fact during the handling on the property.

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 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. 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 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. Third Division Awards 43345, 43393, 43567, 43628, 43664, 43667 and 43668 all follow the above-described allocation of burden of proof between the parties.

The Carrier argues that the Organization has provided no proof that the work in question even took place. However, the Organization provided statements from five employees (T. Lyons, L. Brugman, D. Worster, F. Fankhauser (Bridge Foreman) and R. Musil) affirming both the contracting out as well as the capacity and experience of the unit to perform the work in question. Furthermore, Third Division Awards 43570, 43628, 43664 and 43665 all confirm that work of this nature (removing excess water, ballast and coal from switches and the right of way) is work historically and customarily performed by Maintenance of Way employees. Given these facts, the Organization has met its burden of establishing a *prima facie* case.

The burden shifts to the Carrier to establish notice and which of the exceptions applies. The Carrier provided the following notice:

“As information, BNSF is expanding its bridge capacity at MP 160.76 near Tecumseh, NE on the St. Joseph Sub-Division. BNSF plans to build a new 300 l.f. single-main bridge and approaching mainline, with drilled shafts and thru-plate girder spans to improve bridge capacity on this Sub-Division. BNSF will contract for all associated heavy equipment with operators such as, excavators (track-hoes), F /E loaders, graders, earthmovers, compactors, dump trucks, with operators. In addition, BNSF will contract for specialized equipment such as, off-track cranes, with drilling attachments, and concrete pumpers, all with operators. BNSF does not possess all the necessary equipment for this project, nor do BNSF forces possess the specialized skills necessary to perform the dirt work, off-track crane, and foundation auger drills. The turnkey work to be performed by the contractor includes but is not limited to the following:

install/ maintain erosion-control/ environmental measures; install construction site, and access areas; install necessary crane and heavy equipment pads; drive sheet piles and install framing for multiple cofferdams; construct all false-work for river installations; drill multiple

shaft/rock sockets in water; drive H-piles in rock sockets (including backfill with concrete); install multiple piers in water (including foundations and concrete-work); drive all H-pile for East/West bridge approaches; install drill shaft/ rock sockets on East/West approaches (including H-pile and backfill with concrete); install concrete abutments; excavate existing materials; grade/build-up/compact new approach embankment;; set/attach approx. 300 l.f. new bridge components (including approx. 157 l.f. through-plate girder spans, approach spans); grade/compact right-of-way roads); construct mainline approach embankment; necessary some testing of all shaft/rock sockets and piers; and debris removal.

It is anticipated that this project will begin on approximately February 12, 2014.”

This notice was dated January 24, 2014 and was received by the Organization. The Carrier maintains the project was large scale, and cites precedent to support the position that large scale construction projects exceed the manpower and equipment available to the Company.

By letter dated April 30, 2014, the Organization advised the Carrier of the following utilization of subcontractor forces and equipment:

“The facts surrounding this case are that on the above-cited dates, the Carrier contracted with R. J. Corman for one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess water, ballast, and coal at various locations in the Alliance, Nebraska Yards on the Angora Subdivision of the Powder River Division.

On March 3, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess water in the Pit Lead Switches in the Alliance, Nebraska Yards.

On March 4, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess water out of the East Gate Switch in the Alliance, Nebraska Yards.

On March 5, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess water out of the Diesel Lead in the Alliance, Nebraska Yards.

On March 10, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess coal out of the South 202, 201, and 501 Tracks in the Alliance, Nebraska Yards.

On March 12, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess coal out of the South D Crossover Switch and the South 207 Track in the Alliance, Nebraska Yards.

On March 13, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) foreman, and one (1) Laborer to vacuum up excess water in the 216 road and to clean up excess coal in the West 503 Track in the Alliance, Nebraska Yards.

On March 17, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess coal in the South Storage Lead Switch and in the 216 Lead Switch in the Alliance, Nebraska Yards.

On March 24, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to work with the Section in the Alliance, Nebraska Yards.

On March 27, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess ballast in the South Alliance OS in the Alliance, Nebraska Yards.

On March 28, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess coal in the Lead between the 219 Lead and the 230 Lead on the north end in the Alliance, Nebraska Yards.

On April 2, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess coal on the south end of the 210 Track in the Alliance, Nebraska Yards.

On April 3, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to vacuum up excess coal in the North 230 Switch, South Storage Lead Switch, and on the Decker Track in the Alliance, Nebraska Yards.

On April 4, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to perform work on the north end of the Storage Lead Crossover and in the South Yards in the Alliance, Nebraska Yards.

On April 7 and 8, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to perform work on the 234 Track in the Alliance, Nebraska Yards.

On April 9, 2014, the outside contractors utilized one (1) Vacuum Truck, one (1) Foreman, and one (1) Laborer to perform work on the Crossings on the 160 Track and at Whitlock in the Alliance, Nebraska Yards.”

This information is precise and specific. One truck and two people were generally used to perform the work in question. The Carrier should have been in possession of invoices from the contractor which could disprove any false allegations. Yet, these facts were not rebutted by the Carrier. The paucity of equipment and personnel listed completely debunks any notion of a huge project that would be unmanageable with only the Carrier’s resources. Further, the Organization has provided information regarding resources for rental of the same type trucks used by the contractor to perform this work. Based on these facts, the Carrier has failed to meet its burden of proof required under the Note to Rule 55 and a contract violation has occurred.

The Carrier maintains that the Claimants were fully employed, rendering a remedy in inappropriate. It is extremely well established in applicable precedent that remedy is warranted in the event of contract violation, even when employees were fully employed during the time of the contracting. The analysis provided in Third Division 43395 is enlightening:

“The Carrier’s violation requires consideration of damages. There are competing awards. The Carrier contends that no damages are due because the Claimants were fully employed at times relevant. See Third Division Awards 29330, 29202, 28311. The Organization contends that damages are due because of lost work opportunities and the need to protect the integrity of the Agreement and further asserts that it has been the right to name the Claimants, who should not be deprived of remedies because they were fully employed or properly excused. See Third Division Awards 13832, 15497, 24897, 30185, and 35975 as well as on-property Third Division Awards 21678, 40565, and 40567. The Board agrees with the view expressed in Award 40567 that “While it may seem unfair to compensate an individual who already received pay for the time claimed, it would be even more of a miscarriage of justice to permit an employer to violate the terms of the parties’ agreement with impunity.”

We agree with this analysis to a point. It must be acknowledged that the entity seeking protection under the contract here includes not only Claimants who may have lost overtime opportunities, but also the Organization itself. The essential goal of minimizing subcontracting negotiated by the parties mandates a remedy as the primary and essential means of enforcing contract terms. That said, we believe this can be accomplished by restricting the remedy to those employees who were actually available to work at the time of contracting.

Claim sustained in accordance with the Findings. The case is remanded to the parties for calculation of the remedy.

AWARD

Claim sustained in accordance with the Findings.

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

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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.