

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43967  
Docket No. MW-43194  
20-3-NRAB-00003-190400**

**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 Agreement was violated when the Carrier assigned outside forces (Gandy Dancer, LLC and Hulcher) to perform Maintenance of Way and Structures Department work (haul machines and materials) from Santa Rosa, New Mexico to Vaughn, New Mexico in connection with the operations of Regional System Gang RP-17 on March 4, 5, 6, 7, 18, 19, 20, 21, 25, 26, 27, 28 and 31, 2014 (System File C-14-C100-133/10-14-0240 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, Claimant M. Smith shall now ' ... be paid one hundred and four (104) straight time hours and fifty-four and one-half (54.5) overtime hours for the work performed by the outside contractors on the above-cited claim dates, at the Grapple Truck Driver 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 alleges that on March 4, 5, 6, 7, 18, 19, 20, 21, 25, 26, 27, 28 and 31, 2014, the Carrier assigned outside forces (Gandy Dancer, LLC and Hulcher) to haul machines and materials from Santa Rosa, New Mexico to Vaughn, New Mexico on the Clovis Subdivision of the Southwest Division in violation of the parties Agreement. Pertinent provisions of the parties' Agreement state as follows:

**“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**

\* \* \*

**N. Machine Operator.**

An employee qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5. \* \* \*

**P. Truck Driver.**

An employee 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.\* \* \*

**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 maintains the work of transporting machines and materials used in the construction, repair and maintenance of tracks is typical Maintenance of Way work. It argues this work has customarily and traditionally been assigned to and**

performed by the Carrier's Maintenance of Way forces and is reserved to them under the above cited provisions. But even before the Board reaches this issue, the Organization notes that the Carrier failed to notify its General Chairman as contractually required.

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 BMW-E-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 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 whether the contractor was hired by Division forces or the supervisor of the regional system gang. 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) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of March 2020.