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

Award No. 43969
Docket No. MW-43196
20-3-NRAB-00003-190402

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 (Logistics) to perform Maintenance of Way and Structures Department work loading and hauling Gangs RP 13 and RP 16 equipment and carts from Willow Springs, Missouri to Cape Girardeau, Missouri on February 22 and 23, 2014 (System File C-14-Cl00-146/10-14-0243 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 S. Garcia, C. Green, M. Naylor, D. Ficke, M. Portenier, M. Semande, R. Tucker, T. Snelling, D. Pegelow, B. Davis and D. Bressler shall now each ' ... be paid at their respective rates of pay thirty (30) hours at time and one half 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 claims that on February 22 and 23, 2014, the Carrier assigned outside forces (Logistics) to load and haul equipment and carts from Willow Springs, Missouri to Cape Girandeau, Missouri. It asserts such work has customarily, historically and traditionally been performed by Maintenance of Way forces such as the Claimants, and is contractually reserved to them in accordance with Rules 1, 2, 5, 29, 55 and the Note to Rule 55 of the Agreement which, in pertinent part, reads:

"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 Subdepartment, the Welding Sub-department, the Roadway Equipment Subdepartment and the Roadway Machinery Equipment and Automotive Repair Subdepartment of the Maintenance of Way Department as constituted on date of consummation of this Agreement.

C. This Agreement does not apply to employes in the Signal, Telegraph and Telephone Maintenance Departments, nor to clerks. The sole purpose of including employes and sub-departments listed herein is to preserve pre-existing rights accruing to employes covered by agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S railway companies prior to date of merger; and shall not operate to extend jurisdiction or Scope Rule coverage to agreements between another organization and one or more of the merging companies which were in effect prior to the date of merger.

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.

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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.

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.

D. On each seniority district as indicated in Rule 6 A, four (4) separate seniority rosters shall be maintained for Track Sub-department employes as indicated below, with separate seniority dates only for each rank contained on the roster: [8/12/99 District Consolidation-Related Agreement, Article E, Attachment 1] * * *

G. ln each of the five (5) seniority districts indicated in Rule 6 A, seniority rosters for the Roadway Equipment Sub-department shall be maintained as indicated below, with separate seniority dates only for each rank contained in each roster:
Roster 1
Roster 2

ROADWAY EQUIPMENT SUB-DEPARTMENT (5 Districts)
Machine Operator Group 1
Machine Operator Group 2 * * *

Group Two Machines
Caterpillar Tractor (Bulldozer) such as Models D-6, D-7 and D-8.
Front End Loader (Rubber Tired and Crawler), Such as Michigan 85-A, Cat 966, Cat 977.
Traxcavator, Hough and Scoopmobile.
Tournatractor.
Burro-Crane-Such as Models 15, 30 & 40.
Pettibone speed swing-such as 441
***Tractor-Lowboy.**
Motor Grader (motor grader, Galion) such as Austin Western 200 &300.

Track Cleaners-such as Athey & Kershaw.
Austin Western Hydro Crane- such as 210 and 410.
4-Wheel Tractor with both front end loader with at least one-yard bucket or scoop, and backhoe.
Switch Undercutter, Gopher Undercutter.
Brush Cutter-Kershaw rubber tired off-track, Model 10-3.
Boom Trucks-such as BN 8874-BN8877.
Car Top Material Handler.
Crawler Excavator
Brandt RoadRailer (See Appendix SS)

***It is understood that if a Tractor-Lowboy is used to deliver work equipment machines from one district to another, the operator from the district where the trip commences may handle the equipment to its destination without penalty. * * ***

RULE 29. OVERTIME

A. Except as otherwise provided in this Agreement, time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on actual minute basis and paid for at time and one-half rate, with double time computed on actual minute basis after sixteen (16) "continuous hours of work in any twenty-four (24) hour period computed from starting time of employe's regular shift.

B. Employes required to work continuously from one regular work period into another regular work period shall be paid for the second or succeeding period at rate of time and one-half for the first sixteen (16) hours of work commencing with the starting time of the regular work period and thereafter at double-time rate until the beginning of the next regular work period, except that when a majority of employes affected desire to continue to work the remaining hours of their regular work period instead of being released for rest, such remaining regular work period hours will be paid for at straight time rate. * * *

C. An employee notified or called to perform work after the expiration of his regular work week and prior to the commencement of his next work week, or after his assigned quitting time on one day and prior to his assigned starting time on his next week day with a holiday intervening, and required to work continuously into the next regularly assigned work period, will be paid therefor on the actual minute basis at time and one-half rate with double time after sixteen (16) continuous hours of work in each twenty-four (24) hour period, or portion thereof, computed from the time the employe is required to report for work, or from the time called, as the case may be, to the commencement of the regularly assigned work period. Except as otherwise provided for in Section D of this rule, such an employe will be paid at straight time rate for work performed during the regularly assigned work period. * * *

RULE 55. CLASSIFICATION OF WORK * * *

N. Machine Operator.

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

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."

When the Carrier plans to contract out work coming within the Scope of the Agreement, it is required to notify the General Chairman in writing as far in advance as is practicable, but in any event not less than fifteen (15) days prior thereto. This requirement is embodied in the Note to Rule 55, which states:

> **"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. 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. 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."**

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.**
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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 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 taking such care to create 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 the 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.

What is clear in this case is that the system gang was being relocated. Four similar cases have been arbitrated recently: 43667, 43668, 669 and 43572. However, there is a distinction as to the actual work that occurred. In the instances addressed by precedent, the relocation took place by way of lowboys. However, in this case, supervision provided a statement saying the gang was relocated using flat cars. The Organization claimed remedy for both relocations encompassing the entire project. However, under the circumstances, the Board finds that only those relocated by lowboy are eligible for remedy. Eleven Claimants have lost 30 hours. Based on the record, Garcia, Green, Naler, Fyke and Portenier were lowboy operators eligible for remedy.

Claim sustained in accordance with the Findings. The matter is remanded to the parties for an assessment as to how many of the 30 hours were worked by the contractor, and calculation of a remedy accordingly.

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 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.