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

Award No. 43970
Docket No. MW-43197
20-3-NRAB-00003-190403

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 (Edward Kraemer & Sons) to perform Maintenance of Way and Structures work in connection with the "construction of a bridge at Mile Post 160.760 on the St. Joe Subdivision, Line Segment 3000 at Tecumseh, Nebraska beginning on March 3, 2014 and continuing (System File C-14-C100-142/10-14-0246 BNR).

(2) The Agreement was further violated when the Carrier 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, Claimants F. Frankhauser, J. Lheureux, D. Gwinner, D. Worster, R. Kuwamoto, W. Brhel, P. Waldron, L. Watson, L. Gilpin, R. Reimers, J. Rickers, L. Brugman, C. Wilson, T. Lyons, R. Musil, T. Scott and M. Reynolds shall each ' ... be paid all labor costs associated with the repair work associated with this bridge 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.

On March 3, 2014 and continuing, the Carrier assigned outside forces (Edward Kraemer & Sons) to perform work that the Organization characterizes as routine Maintenance of Way work in connection with the construction of a bridge at Mile Post 160.760 on the St. Joe Subdivision, Line Segment 3000 at Tecumseh, Nebraska. The Organization asserts the work was customarily and historically performed by the Carrier's B&B. It further maintains that the work is contractually reserved to them under Rules 1, 2, 5, 55 and the Note to Rule 55 which provide as follows:

"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. * * *

BRIDGE OR BUILDING SUB-DEPARTMENT

Roster 1

Rank A	**B&B Foreman, B&B Tunnel Foreman, B&B Inspector, B&B Painter Foreman**
Rank B	**Assistant B&B Foreman, Assistant B&B Painter Foreman**
Rank C	**B&B Carpenter or Mechanic-1st Class, B&B Shop Carpenter, Painter-1st Class, Tinner**
Rank D	**B&B Carpenter or Mechanic-2nd Class, Painter-2nd Class, Drawbridge Tender**
Rank E	**B&B Carpenter or Mechanic Helper, Bridge Watchman, Coal Chute Laborer**

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. * * *

F. First Class Carpenter.
An employe assigned to construction, repair, maintenance or dismantling of buildings or bridges, including the building of concrete forms, erecting false work, etc. He shall be a skilled mechanic in house and bridge work and shall have a proper kit of carpenter tools sufficient to carry out the work employed upon, except such tools as are customarily furnished by the Company. * * *

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

P. Truck Driver.
An employe 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 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."**

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 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.

On January 24, 2014, the Carrier advised the Organization of the following:

> **"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 cofferdan1s; 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/rocl<: 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 sonic testing of all shaft/rock sockets and piers; and debris removal."

The Organization has alleged in its claim that when the Carrier contracted for the above described bridge construction project, work ordinarily, historically and customarily belonging to MOW employes was improperly subcontracted out in violation of the contract. In support of this claim, it has provided statements from five employes: T. Lyons, L. Brugman, D. Worster, F Fankhauser (bridge foreman) and R. Musil. This evidence is sufficient to meet the Organization's burden of establishing a *prima facie* case because the Carrier is the party in possession of the majority of information involved in such a claim.

The Carrier, in response, takes the position that it afforded the Organization adequate notice of the work to be done, however the Organization challenges this

assertion. It notes the only crane mentioned in the Carrier's notice was an off-track crane with drilling attachments. It maintains it is not disputed that a crane was used in the project, yet this item of special equipment was not specified in the Notice. We are not persuaded by this argument. The Notice clearly stated "BNSF will contract for all associated heavy equipment with operators such as, …." This list was non-exclusive, and did not have to be because it was made clear than if heavy equipment was to be used in the project, it would be contracted for. As a result, we find the Notice to be sufficient.

The Carrier also contends that the work involved in this project was not customarily performed by unit employees. However, it has provided us with little or no factual evidence to support this claim. Given the Organization's multiple factual statements, we cannot find this record to support the Carrier's position.

The Carrier maintains no remedy is warranted because the Claimants were fully employed. Further, BNSF objected to several Claimants who were in formal training or on vacation, personal leave or attending dental appointments during various portions of the claim period. It is extremely well established that remedy is warranted in subcontracting cases, even when employes are 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 the parties' Agreement mandates a remedy as the primary and essential means of enforcing contract terms. That said, we believe an appropriate remedy 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 to calculate 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 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.