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

Award No. 43340
Docket No. MW-42636
19-3-NRAB-00003-140349

The Third Division consisted of the regular members and in addition Referee I.B. Helburn when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference**
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(BNSF Railway Company (Former Burlington Northern (Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (BNSF Logistics) to perform Maintenance of Way and Structures Department work (deliver concrete pads) in the Hobson Yards in Lincoln, Nebraska on April 12, 2013 (System File C-13-C100-243/10-13-0345 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out said 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 A. Ewolt, D. Franke, J. Gotchall, J. Covarrubias, A. Martinez, D. Fricke, M. Porteneir, D. Fierstein, B. Ruzicka, V. Havorka, J. Willey and J. Lyons shall now be compensated for eight (8) hours at their respective straight time rates of pay and for one (1) hour at their respective time and one-half rates of pay."

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.

This claim arose when the Carrier assigned outside forces (BNSF Logistics) to deliver concrete pads to the Hobson Yards in Lincoln, NE on April 12, 2013 and allegedly did not provide the Organization with the proper notice of intent to subcontract. All of the Claimants held seniority in various classifications within the Maintenance of Way and Structures Department and were regularly assigned in accordance with their seniority. The claim was timely presented and progressed on the property without resolution and is properly before the Board.

In its submission, the Organization asserts that Rules 1, 2, 5 and the Note to Rule 55 established the disputed work as that of the Carrier's Maintenance of Way and Structures Department. "(T)he Carrier did not and could not seriously dispute that the work claimed herein is basic, fundamental Maintenance of Way work that has ordinarily, customarily, traditionally and historically been performed by Maintenance of Way forces for decades throughout the Carrier's system[1]" The Organization does not have to establish the disputed work as exclusively that of the affected Claimants, but only that historically the work has been done by Maintenance of Way employees. There is no mutually recognized past practice that would allow the work to be contracted out.

The Carrier failed to provide the proper minimum fifteen- (15) day notice required by the Note to Rule 55 and Appendix Y or to act in good faith to reduce subcontracting. Both provisions specify the only conditions under which work may be contracted out, but even when those conditions may exist, the Carrier must still

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[1] All Organization contentions refer to support from previous Third Division and Public Law Board awards, many of them on-property awards. The awards are not specifically noted in this summary of the Organization's contentions but are included, where appropriate, in the analysis.

inform the Organization of the intent to contract out and discuss this if asked. "(T)rack construction, repair and maintenance work is Maintenance of Way work across the Board via all types of methods." The informational letter provided to the Organization about the Carrier's intent to subcontract contained no specific reference to the disputed work, nor did the conference that followed involve a discussion of the disputed work. The equipment used by BNSF Logistics "was not special or unusual to railroad work" and was available within the Carrier's inventory or via rental/lease. The Carrier's reliance on a BMWE/Northern Pacific Letter of agreement is misplaced. While there are similarities to Appendix Y, there are important differences so that the Board should give no weight to the document.

The Organization further contends that the Carrier has not presented a valid defense to the instant claims. Moreover, because the Carrier did not provide the required notice of intent to contract out, the Board should not consider the defenses. The Organization has presented a *prima facie* claim that shifts the burden of proof to the Carrier to show that the claim is not valid. The disputed work obviously was contracted out. This contention simply attempts to shift the burden of proof to the Organization. Also, the Carrier did not identify equipment or skills that were lacking. The argument that there were scheduling difficulties is a red herring. Dates were scheduled for the outside forces and could have been scheduled for Maintenance of Way employees as well. The Carrier contention based on the Claimant's unavailability is not persuasive as the Carrier must adequately staff and train the Maintenance of Way work force. The Carrier simply failed to make an effort to assign the installation work to the Claimants. Nor was an effort made to bulletin new positions. The Carrier did not acquire sufficient numbers of new employees to perform the regular work of the bargaining unit. There is an obligation to increase the work force before contracting out. The Carrier's piecemeal defense fails as there was no Organizational request that the work be done piecemeal. "Piecemeal" is not one of the criteria allowing contracting out. Even if some contracting out was justified, contracting out the entire project was not. Nor was the project too large for the bargaining unit, thus there is no evidence to support the Carrier's "magnitude" contention. The Carrier's assertion of an alleged duplicate claim is erroneous, unsupported in the record. The Organization has the right to name the Claimants and may include the same Claimant(s) on more than one claim. The above-noted claim has not been duplicated. Even naming a

Claimant in a separate, distinct claim with a concurrent date does not invalidate the current claim.

The remedy set forth in the claim is appropriate as it would make the Claimants whole for lost work opportunities and would protect the integrity of the Agreement. That the Claimants were fully employed on the days in question should not deprive them of remedies. They were available for the work even if leave had been approved. It is settled that the Organization gets to name the Claimants when a claim is filed.

For reasons summarized below, the Carrier asserts that the claim should be denied.[2] There is precedent allowing large-scale construction projects to be contracted out. Furthermore, "the Company does not have an obligation to piecemeal out small portions of more complex projects simply because its own employees might occasionally perform some of these peripheral work items in isolation." The Carrier properly contracted out the disputed work, which necessitated special equipment and skills not found in the Maintenance of Way compliment. Contractors possessed the necessary equipment. Nor has the Organization proved that the disputed work was reserved to its members. Rule 1 Scope is a general rule that does not in and of itself reserve work to Maintenance of Way forces. The Organization has not shown that it has done the disputed work exclusively system wide. At best there has been a mixed practice, which allows the work to be contracted out. Moreover, as this is a dispute over facts, the "Board must either dismiss the case or rule against to moving party." The Organization has not met its burden of proof by providing two self-serving statements to show that the disputed work was that of the Carrier's employees. The Carrier has not violated Appendix Y, which does not restrict contracting out, but "is a statement of the parties' intention to set up a vehicle to discuss reduction in contracting out." Appendix Y is not applicable unless the Organization shows that disputed work is reserved to Maintenance of Way employees. Appendix Y does not apply on the property and is not derived from Article IV of the May 17, 1968 National Agreement.

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[2] Carrier references to Third Division and PLB decisions, both on-property and off-property will not be referenced in this summary but will be referenced as appropriate in the analysis that follows.

Assuming, *arguendo*, that the claim is meritorious, no damages are due because the Claimants were fully employed at times relevant. The Organization has not submitted proof of damages and the negotiated agreement has no provisions allowing for liquidated or punitive damages. Moreover, the Claimants unavailable for work at times relevant are not to receive damages.

The Organization's April 13, 2013 claim indicated that BNSF Logistics "hired one foreman, one group 1 lifting crane operator, three laborers, and six Lowbody operators that worked eight (8) hours straight time and one (1) hour overtime on the day of this claim performing their work at the exclusion of the Claimants." The sole evidentiary support for the allegation comes from an August 16, 2016 statement, devoid of dates and times, that "I seen BNSF lagists (sic) bring these pad (sic) in and then hall (sic) them to the hump for the new hump. I have sent you a lot of maps for area of where these violations are Date hours are correct." But for the fact that in on-property correspondence, the Carrier stated that "it properly contracted out the disputed work," the claim would fail due to failure to prove the allegation.

The Board assumes, *arguendo*, that the disputed work has been customarily, as opposed to exclusively system-wide, performed by the Maintenance of Way forces. Thus, the Carrier was required by the Note to Rule 55 and the Hopkins-Berge December 1, 1981 letter, also referred to as Appendix Y, to give advance notice of the intent to contract out the work and to conference about the work if requested. The Carrier gave proper notice on October 20, 2011, with October 23, 2012 and January 15, 2013 amendments consistent with the requirement to give notice. Conferences followed. As noted in the claim, the work took place in the Hobson Yards in Lincoln, NE.

As stated in the initial notice of intent to contract out, this was part of a "multi-year, multi-phase project requiring installation of new track, crossovers, crossings and pavement." There is a history of Third Division on-property awards supporting the principle that major projects such as the Hobson Yards project are beyond the reach of Carrier forces and do not have to be piecemealed. In other words, the Note to Rule 55 applies, set forth in relevant part below:

(S)uch 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 prevent undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.

The scope of the Hobson Yards project clearly places it "beyond the capacity of the Company's forces." The Carrier is not required to piecemeal the project and assigning parts of the project to Maintenance of Way forces does not result in a waiver of the Carrier's right to manage the project. See Awards 41222, 41223, 43258 and 43259, the last two, in which the claims were denied, involving the Hobson Yards project. The Board sees no reason to depart from existing on-property precedent.

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 14th day of December 2018.