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

Award No. 43342
Docket No. MW-42649
19-3-NRAB-00003-140339

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 Agreement was violated when the Carrier assigned outside forces (American Fencing) to perform Maintenance of Way and Structure work (install right of way fence) along the right of way on the west side of Mainline Tracks 1, 2 and 3 from Baird Tower to 2nd Street in Lincoln, Nebraska beginning on February 25, 2013 and continuing (System File C-13-C100-247/10-13-0349 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance 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 D. Worster, J. Rickers, R. Bordeaux and K. Kildow shall each '… be paid for all labor costs associated with installing this fencing 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.

This case arose when the Organization became aware that outside forces, American Fencing, were constructing a fence in the vicinity of the Lincoln, NE railroad station beginning February 25, 2013 and continuing. The Carrier had not issued a notice of intent to contract. The resulting claim, not resolved on the property, was advanced to the Board. The Claimants all had seniority within their respective Maintenance of Way Department classifications and all were regularly assigned to their respective positions at times relevant.

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.[1] The evidence shows that Maintenance of Way employees with appropriate seniority in the appropriate classes historically have done this fundamental maintenance work which is reserved to the bargaining unit. 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.

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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 support will not be noted in the summary of the Organization's contentions. But will be referenced, as appropriate in the analysis that follows.

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 inform the Organization of the intent to contract out and discuss this if asked. Appendix Y is an applicable, binding agreement. 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 shit the burden of proof to the Carrier to show that the claim is not valid. The disputed work obviously was contracted out. The Carrier's lease defense has no merit as there was no assertion that the claimed work fell within the parameters of the lease presented by the Carrier. The work was performed on Carrier property for Carrier use and was within the Carrier's control and related to the Carrier's operations, as the lease shows. The Carrier's contention that special equipment was lacking should not be considered because there was no notice or conference and because the Carrier has not identified specific equipment or skills that were lacking. This contention simply attempts to shift the burden of proof to the Organization. The argument that there were scheduling difficulties is a red herring, as track windows would had to have been obtained regardless of who did the work. 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 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 had the Carrier elected to assign them to the fence project, 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] Because Amtrak paid the outside contractors for work not on Carrier property, the work was not covered by Rule 1 Scope. The Organization has not met its burden of proof, never disputing that the contracted-out work was not on Carrier property or contracted by the Carrier. Therefore, these must be considered material facts. Moreover, because this case involves a factual dispute, the Board must either dismiss the claim or rule against the Organization as the moving party. The Organization has not shown that it has done the disputed work "system wide, to the exclusion of others." At best there has been a mixed practice, which allows the work to be contracted out. Moreover, as this, too, is a dispute over facts, the "Board must either dismiss the case or rule against to moving party." Rules cited by the Organization do not reserve the work. 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.

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. In an earlier case, "the

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[2] Carrier references to Division Three 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.

Organization removed a claim date from an employee for the sole reason that he was on vacation and therefore was unavailable for work."

There are numerous reasons why the Board must deny the claim. It is well settled that the Organization bears the burden of proving all elements of its claim and that failure to do so will result in denial of the claim. See on-property Third Division Awards 38363, 36208 and other Third Division Awards 28338, 30414 and 26219. The sole supporting Organization statement in the record states: "I run the 6700 in Lincoln Yards. The surfacing gang has worked this area often. I have sent you pictures of this fence being put up." The Organization's assertion remains unsupported. The statement and one accompanying copy of a photograph do not show the fence in progress, identifiable workers, construction dates or hours. Nor has the Organization established that the disputed work has been "customarily, historically and traditionally" performed by employees of the Maintenance of Way and Structures Department. Therefore, the Organization has failed to prove that the disputed work has been contractually reserved to its bargaining unit. The Note to Rule 55 and Appendix Y do not apply because these provisions come into play only in cases of customarily performed work. Moreover, the Board finds the documents in the record supportive of the Carrier's assertion that the work was contracted for by AMTRAK on land leased to AMTRAK for the benefit of AMTRAK. A such, the Carrier had no obligation to provide a notice of intent to contract. See on-property awards PLB 4768, Awards 12 and 27 and Third Division, Award 36236 as well as Third Division Awards 26212, 26082 and 32308. Had the Organization shown that outside forces actually performed the disputed work and that the work has been customarily performed by Maintenance of Way forces, the work still would not have been reserved to those forces because it was contracted for by AMTRAK and the benefit of AMTRAK.

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.