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

Award No. 43343
Docket No. MW-42683
19-3-NRAB-00003-140257

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 to perform Maintenance of Way and Structures Department work (building maintenance and repair work) on the depot building in Streator, Illinois beginning on October 18, 2012 and continuing (System File C-13-C100-146/10-13-0195 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 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 L. Stockdale, J. Byrnes, J. Featherlin, D. Kinzer, P. Meehan, J. Larkin and H. Arnold shall each now '… be paid all hours worked by the contractors doing this work at this location, each at their 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 from the Carrier's decision to contract out building maintenance and repair work beginning October 18, 2012 and continuing and the alleged failure to give proper advance notice to the Organization of the intent to subcontract. The resulting claim was not resolved on the property and was advanced for hearing before the Board. The Claimants held seniority in various groups and classes of the Bridge and Building Sub-department of the Maintenance of Way and Structures Department and 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.

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 support will not be noted in the summary of the Organization's contentions and in the analysis, as appropriate.**

inform the Organization of the intent to contract out and discuss this if asked. The notice of intent to contract out listed some details of contemplated work and location but also said the notice was "not limited to" the detail provided. Moreover, there was no conference before the disputed work began. The Organization alleges that the disputed work fell within Rule 1 Scope and had been customarily and historically performed by Carrier forces. 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 reject "the Carrier's defenses outright because of the Carrier's failure to comply with the advance notice and meeting provisions of the Agreement." The Organization has a presented a *prima facie* claim that shifts the burden of proof to the Carrier to show that the claim is not valid. However, the disputed work, detailed by the Organization during the processing of the claim, obviously was contracted out. The Carrier has not proved that outside forces have been used before to perform the disputed work and if they had, that would not invalidate the current claims. There has been no discussion of specialized equipment and no proof, which the Carrier must present, to justify an exception. Regarding the need for specialized training and certification, there is no evidentiary support for the Carrier's position. Carrier forces have previously done roofing work without additional training. Moreover, the Carrier must "see that Maintenance of Way forces are properly qualifies and possess such training, licenses and certifications as may be required to perform scope work . . ." The Carrier has provided for training in the past. No evidence of a warranty was produced. 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 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 disputed work, even if leave had been approved, as the work could have been rescheduled. It is settled that the Organization gets to name the Claimants when a claim is filed. Two earlier claims do not establish the

Organization's agreement that the Claimants are not entitled to compensation if they were on vacation status.

For reasons summarized below, the Carrier asserts that the claim should be denied.[2] The Organization has not met its burden of proof by providing photos that do not show a contractor performing the disputed work, prove that Maintenance of Way employees have done the work in the past or evidence the times and hours that the contractor allegedly performed the disputed work. 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 "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 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 a previous case the Organization "removed a claim date from an employee for the sole reason that he was on vacation and therefore was unavailable for work."

Despite the assertion in (2) of the Claim of the System committee, the on-property correspondence, specifically the March 19, 2013 appeal by General Chairwoman Staci Moody-Gilbert, acknowledges receipt of the Carrier's notice of intent to contract out building and maintenance repair work on the Streator, IL

[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.

depot. The notice was specific as to the work to be done and the justification that "BNSF forces do not possess the necessary training necessary required for the warranty application." The on-property record makes clear that the conference requested by the Organization did not take place until after outside forces began work on the Streator depot. While the timing of the conference would in some instances fatally flaw the Carrier's case, it does not in this instance for reasons set forth below.

It is well settled that as the moving party, the Organization must prove every element of its claim to avoid having the claim denied. See Third Division Awards 32351, 26219, 38338, 30414 and on-property Award 36208. The Organization's only evidence of the work performed is a series of photographs presumably of the Streator depot. No workmen are shown and there is no way to ascertain from the copies of the photographs in both submissions whether they were taken before or after the work was completed. No approximate dates and hours are associated with the photographs. The Board concludes that the work was done only because the Carrier has not contended that it was not and has in general justified the work by asserting that 1) the Organization has not met its burden of proof and 2) that the Carrier had the right to contract out the work.

Even if this suffices to establish the work of the outside forces, the Organization has not provided any probative evidence whatsoever to support the assertion that Maintenance of Way forces have customarily, traditionally and historically done the disputed work. An unsupported assertion is not probative evidence. Moreover, even if the Organization had established that its forces had customarily performed the work, information included in or appended to the Carrier's May 9, 2013 denial of Ms. Moody-Gilbert's appeal shows that since the 1920s, building construction and maintenance has been contracted out. Because the Organization has not shown that its forces have customarily performed the disputed work, it cannot show either that the work has been reserved to the Organization or that the Note to Rule 55 and Appendix Y apply.

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.