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

Award No. 43344
Docket No. MW-42684
19-3-NRAB-00003-140258

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
(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 (United Railroad Services) to perform Maintenance of Way and Structures Department work (cut up and remove mainline track) between Mile Posts 73.4 and 74.4 in Fort Collins, Colorado on the Colorado Division beginning on July 23, 2012 and continuing through July 25, 2012 (System File C-12-C100-458/10-12-0695 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (United Railroad Services and Connell) to perform Maintenance of Way and Structures Department work (cut up and remove mainline track) between Cherry Street and Maple Street between Mile Posts 74.3 and 74.5 in Fort Collins, Colorado on the Colorado division on August 7 and 8, 2012 (System File C-12-1C100-457/10-12-0693)

(3) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out the work described in Parts (1) and (2) above 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.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants E. Johnson, D. Gutierrez, J. James, A. Carlson, J. Conn, M. Baker, T. Wilhelm, J. Willey, C. Wischhusen, H. Miller, A. Mitchell, C. Stuerke and B. McGinnis shall each '… be paid 17 ½ hours of straight time, 23 ½ hours of

(5) overtime, and 10 hours of double time as their appropriate rate of pay as settlement of this claim.'

(6) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants H. Miller, A. Mitchell, C. Stuerke, B. McInnis, T. Tracy, T. Wilhelm, J. Gallegos, M. Hilliker, E. Johnson, D. Gutierrez, J. Wiley and C. Wischhusen shall each '… by paid 16 hours of straight time and 4 hours of overtime 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 involves a claim resulting from the Carrier's decision to subcontract the work of cutting up and removing track on July 23-25 and August 7-8, 2012 to United Railroad Services, allegedly without providing advance notice to the Organization. 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 timely filed claim was progressed on the property without resolution and advanced to the Board.

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 have historically 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 the 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 inform the Organization of the intent to contract out and discuss this if asked. The Carrier contends that the June 5, 2012 notice covered the disputed work and that the requested conference was held on June 26, 2012. However, the Organization's understanding of the agreement reached at the conference is that the bargaining unit forces would perform the disputed track removal work. 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 shifts the burden of proof to the Carrier to show that the claim is not valid. The disputed work obviously was contracted out. The mention of alleged scheduling difficulties is a red herring that has no justification. 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 disputed

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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.

work to the Claimants. Nor was an effort made to bulletin new positions. The Carrier failed "to have sufficient numbers of new employees to perform the regular and predictable work of the bargaining unit." There is an obligation to increase the work force before contracting out.

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. The Carrier could have rescheduled the work had it chosen to do so. The Organization has the right to designate the Claimants who would receive remedies should the claim be sustained.

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 two self-serving statements, with the first suspect as to accuracy and the second containing unfounded and irrelevant assertions. 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.

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[2] Carrier references to NRAB 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.

On June 5, 2012 the Carrier sent a notice of intent "to contract all work and heavy equipment with operators necessary for the pavement and drainage improvements located at Fort Collins between MP 73.00 and MP 75.00 on the Front Range Sub-Division. BNSF is not adequately equipped to perform all aspects of this project." The notice further indicated that BNSF forces lacked skills to do the "necessary specialized dirt work, hot-mix asphalt or reinforced concrete paving skills for all aspects of this project." Among the tasks listed for the outside forces was "excavate/remove approx. 11,833 s.y. existing pavement and inserted track." The notice stated that "BNSF forces will be on-hand to perform associated track work (including track panels, welding and surfacing. It is anticipated that this work will begin on approximately June 22, 2012." Based on the subsequent claims, the Board assumes that the disputed work was performed on July 23-25 and August 7-8, 2012 so that the notice was issued more than the minimum required fifteen (15) days prior to commencement of the work.

The Organization requested a conference, held on June 26, 2012, that was followed by a letter from Vice General Chairman Roy L. Miller to Khoury Farrar, Carrier Labor Relations, confirming the agreement reached. That letter states in relevant part that "we have an understanding that company forces will perform all track work on this project. Such as, but not limited to, track removal and replacement, welding work, ballast work and surfacing. The contracts will perform the dirt work, concrete work and hot-mix asphalt work. If this is not your understanding, please advise immediately." The above-noted claims indicate the Organization's belief that the agreement reached in conference was breached.

The Organization, as the moving party, must prove all elements of the claim. See on-property Third Division Awards 32326, 32208 and 34226. Record evidence establishes a *prima facie* that outside forces did the disputed work. Local Chairman Davenport's November 2, 2012 statement below, characterized as self-serving by the Carrier, is viewed as probative evidence despite the characterization.

I Patrick Davenport saw United Railroad Builders removing tracks between Cherry and Maple Streets in Ft. Collins, Co on the Front Range Sub. Just 3 weeks prior, our Roadmaster Neubauer had the Ft. Collins Section and Mtce Gang remove the portion of track that goes through Cherry St. so why weren't we capable of removing this track too.

The statement is accompanied by photos seemingly showing the disputed work in progress. The Carrier has not denied that the disputed work was done by outside forces and has not contested the dates and times noted on the various parts of the claim filed by the Organization.

As for the question of whether the disputed work was within the scope of the Agreement between the parties, the Board acknowledges the split between prior awards the require the Organization to show that the disputed work has been done exclusively system-wide (see on-property PLB 2206, Awards 8 and awards that require the Organization to show that the disputed work has been "customarily performed" meaning "historically and traditionally." See on-property Third Division Award 40785, a more recent award. The Board finds Award 40785 more persuasive, including the following: "The work in dispute here, track cutting, is routine track work, ordinarily performed by Carrier forces. In fact, in its February 6, 2006 notice, the Carrier suggested as much when it stated that it needed to contract for specialized equipment 'to assist Carrier forces' in doing the work. Accordingly, the disputed work is subject to the Note to Rule 55." This applies to the claim now under consideration.

The notice of intent to contract in this case did not identify skills lacking that are associated with traditional track work and, indeed, stated that "BSNF forces will be on hand to perform associated track work (including track panels, welding, and surfacing)." The notice of intent to contract, like the notice in Award 40785, suggest that the disputed work "is track work ordinarily performed by Carrier forces." Moreover, the Carrier has not disputed the recap of the contracting conference stating that "company forces will perform all track work on this project." These understandings are consistent with Local Chairman Davenport's observation, never disputed, that three weeks prior to the appearance of the outside forces, Maintenance of Way employees removed "the portion of the track that goes through Cherry St. . . ." The record evidence clearly establishes that the disputed work is within the scope of the parties' Agreement and is subject to the Note to Rule 55.

The Note to Rule 55 allows the Carrier to use outside forces when 1) special skills equipment or material are not available, 2) "where work is such that the Company is not adequately equipped to handle the work" or 3) when emergency time requirements exist that prevent undertakings not contemplated by the Agreement and are beyond the capacity of the Company's forces. With the disputed work established as that "ordinarily performed" by Carrier forces, the burden of

persuasion shifts to the Carrier to show that one of the exceptions applies, thus legitimizing the use of outside forces. The Carrier has not met the burden. The notice of intent to contract explains the need to contract out "pavement and drainage improvements" but seemingly reserves the track work for Maintenance of Way forces. The recap of the conference also indicates reservation of the track work to Maintenance of Way forces. And, nowhere in the on-property Carrier responses to either the initial Organization's claim or its appeal of the initial declination has the Carrier provided justification for the use of outside forces for the track work. Furthermore, there has been no explanation for the lack of compliance with the undisputed agreement reached during the contracting conference. This leaves only the question of damages since the claim must be sustained.

Here again, there are competing awards. The Carrier contends that no damages are due because the Claimants were either fully employed, some with overtime, at times relevant, or were unavailable because of approved vacation or formal training. See Third Division Awards 29330, 29202 and 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 the right o 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 (Knapp) 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 violated the terms of the parties' agreement with impunity."

AWARD

Claim sustained.

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 14th day of December 2018.