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

Award No. 43345
Docket No. MW-42685
19-3-NRAB-00003-140265

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 (Loram Maintenance) to perform Maintenance of Way and Structures work (install concrete pads and steel poles for top of rail lubricators and solar panels) at various locations on the Louisville and Ravenna Lines on the Creston Subdivision on June 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and July 1 and 2, 2012 (System File C-12-C100-383/10-12-0598 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 A. Martinez, S. Hrenchir, M. Sailors, J. Butcher and G. Stutzman shall '…be paid one hundred twenty (120) hours straight time and ninety-two (92) hours overtime 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.

The Carrier contracted out the above-noted work to five employees of Loram Maintenance, who worked on the days noted above. The Carrier admittedly did not give advance notice of the intent to contract out. 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 filed and progressed on the property, and when unresolved, referred to the Board.

The Organization asserts that Rules 1, 2, 5 and the Note to Rule 55 establish the disputed work as that of the Carrier's Maintenance of Way and Structures Department.[1] The decision to contract out the work deprived those "holding appropriate seniority within the appropriate classes . . ."defeating "the very intent and purpose of the collective bargaining process.". 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.

---

[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 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 subcontracted, but even when these conditions exist, the Carrier must still inform the Organization of the intent to contract out and discuss this if asked. Appendix Y is a binding agreement that has applicability. 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 no weight should be given to that document.

The Carrier has not presented a valid defense to the instant claim. 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. However, the disputed work obviously was contracted out. "The Carrier's 'purchase' defense is without merit" (Submission, p. 39). There was no hauled material and no evidence of FOB Destination Freight collect, but that designation, if it existed, would not invalidate the Organization's claim. This was Organization work that was contracted out and who delivered the material is irrelevant as the work fell within the scope of the Note to Rule 55. Loram contracted only to do installation work, not to deliver material. The Carrier has not provided a copy of the contract with Loram and thus has not proven an affirmative defense. Even if special equipment was required, advance notice of the intent to contract out also was required. The Carrier has not identified equipment that might have been lacking. The mention of alleged scheduling difficulties is a "red herring" that has no justification.

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 a remedy.

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 to show that the disputed work was that of the Carrier's employees. 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

---

[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.

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 the 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."

As the moving party, the Organization must prove the essential elements of its claim. See Third Division Awards 32351, 24975, 26219 and 36208. There is no question that some so-called self-serving statements do not constitute probative evidence. For example, in Third Division Award 26219 the Organization asserted that it had a relevant statement from the Claimant, but failed to produce that statement. In Third division Award 24975, the Claimant asserted support for his statement, but failed to produce that support in the form of additional statements. In the case considered herein, the Organization's evidence is weak, but the record supports the finding that the Organization has made a *prima facie* case that the disputed work was done by outside forces. While not evidence, the claim submitted on July 21, 2012 was specific as to dates and locations where the disputed work took place. Hours involved also were noted. Mr. Arnold's statement, written to support a claim filed six (6) years earlier, cannot be considered probative, supportive evidence bearing on the question of whether the disputed work was done by outside forces. Mr. Warner's statement simply verifies the truthfulness of the dates, hours and locations stated in the claim but also states that he "witnessed the violation." The Board takes that to mean that he witnessed some element of the violation, but certainly not the outside forces' work on all dates, at all mileposts and for all hours

detailed in the claim. Nevertheless, that statement still constitutes eyewitness evidence that outside forces were working on the property. Moreover, the Board notes that the Carrier has neither denied the use of outside forces nor provided any of its records or even an assertion that contradicts the details provided in the claim. The Board cannot turn a blind eye to the obvious—which is that the on-property record shows that the disputed work was done by outside forces.

Mr. Arnold's 2006 statement, while not supporting the claim that outside forces did the disputed work in 2012, does show that Maintenance of Way forces have at least customarily, traditionally and historically, as opposed to exclusively, system-wide, been assigned to work related to the installation and maintenance of greasers/lubricators. See on-property Third division Award 40563. Moreover, in on-property Third Division Award 41162, the Board found that the installation of wayside curve lubricators "is work 'customarily performed by employees described herein' under the Note to Rule 55."

The Carrier contends that at best the disputed work is a mixed practice that allows the work to be contracted to outside forces. This is an assertion that the Carrier must prove. See on-property Third Division Award 41162. As in the above-noted Award, the mixed-practice assertion comes without supporting evidence. A careful reading of the initial Carrier declination of the claim and the declination of the appeal that followed that response shows that the mixed-practice defense is nowhere to be found in either Carrier response, appearing for the first time in the Carrier's submission. For all of the reasons set forth above, the contention fails even if considered.

The Carrier had an obligation under the Note to Rule 55 and Appendix Y to issue a notice of intent to contract the disputed work.[3] No such note exists in the on-property record, nor has the Carrier provided an explanation for the absence of the notice. Failure to provide the notice violates the parties' Agreement, requiring consideration of damages. 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

---

[3] The Board notes the Carrier's assertion that Appendix Y is not relevant or applicable and rejects that assertion. It is referenced in on-property Third Division Awards 4077 (Halter), 40558 (Gordon), 40495 (Brent) and 39685 (Brown).

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 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."

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.