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

Award No. 43346
Docket No. MW-42686
19-3-NRAB-00003-140266

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 (Industrial Lubricant Company) to perform Maintenance of Way and Structures Work (install wayside rail lubricators) between Mile Posts 227 and 240.8 between Wheatland, Wyoming and Wendover, Wyoming on the Colorado Division, Front Range Subdivision on August 8, 2012 (System File C-12-C100-456/10-12-0692 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 Maintenance of Way forces as required by Rule 55 and Appendix Y.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants D. Harvey and A. Hixson shall each be compensated for eight (8) hours' straight time pay and for four and one-half (4.5) hours overtime at their respective 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 was triggered by the Carrier's decision to contract out the August 8, 2012 installation of wayside rail lubricators to Industrial Lubricant Company without providing the Organization advance notice of the 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 filed and progressed on the property without resolution and was then 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 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 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.

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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.

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 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 Carrier's "purchase" or FOB defense is without merit. How the material was purchased is irrelevant as the work was scope covered, notice was still required and no contract with Casper Industrial Lubricants was ever produced. This was clearly the Organization work that was contracted out and so who delivered the material is irrelevant as the work fell within the scope of the Note to Rule 55. 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 contention that the disputed work has been a mixed practice fails because a past practice of contracting out is not a listed exception in the Note to Rule 55 or Appendix Y. It is unrefuted that the bargaining unit has done the work, which is reserved to it. The Carrier cannot show that when rail lubricator installation was contracted out in the past it was because an exception was met or it was after proper notice was given.

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. 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] The Organization has not met its burden of proof by providing three suspect statements by two individuals to show that the disputed work was that of Carrier 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 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."

As the moving party, the Organization must prove all elements of its claim. See on-property Third Division Awards 43147 and 36208 as well as Third Division

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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.

Awards 32351, 20745, 24975 and 26219. There is no question that some so-called self-serving statements do not constitute probative evidence. For example, in Award 26219 the Organization asserted that it had a relevant statement from the Claimant but failed to produce the statement. In Award 24975 the Claimant asserted support for his contention that others could place him at home to receive calls that did not come, but failed to produce that support in the form of additional statements. Mr. Arnold's statement, written to support a claim filed six (6) years earlier, cannot be considered probative evidence bearing on whether the disputed work contested herein was done by outside forces. The statement signed by Section Foreman Dale Harvey and listing a second witness not only supports the detail included in the initial claim and appeal from the initial declination, but also provides eyewitness evidence that outside forces, Industrial Lubricant Company, performed the disputed work, something that the Carrier has never denied and, indeed has implicitly confirmed. The *prima facie* case has been made.

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's initial declination contains the assertion of an FOB Destination Freight collect arrangement covering purchase, delivery and installation of the concrete pads and steel poles, with installation being the work claimed by the Organization. The Carrier's ultimate declination omits mention of any FOB arrangement, but advances a mixed-practice defense to justify the contracting out of the disputed work. The two affirmative defenses require proof, but remain unsupported assertions, as there is no documentation for either in the on-property correspondence.

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 as part of a good faith effort to reduce the incident of subcontracting and increase the use of Maintenance of Way

forces.[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 at times relevant, or were on approved vacation. 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 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.

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[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).