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

Award No. 43347
Docket No. MW-42687
19-3-NRAB-00003-140267

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 (Casper Industrial Lubricants) to perform Maintenance of Way and Structures work (remove and install curse greasers at Mile Posts 101.30 and 72.50 on the Powder River Division, Orin Subdivision on December 5 and 6, 2012 (System File C-13-C100-154/10-13-0216 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, Claimant D. Tipton shall be compensated for thirteen (13) hours at his respective rate of pay and Claimants M. McDonald and T. Mills shall each be compensated for eight and one-half (8.5) hours 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 arose from the Carrier's decision to contract out the replacement and servicing of curve greasers on December 5 and 6, 2012 to Casper Industrial Lubricants and to forgo an advance notice to the Organization of intent to subcontract. The Claimant held seniority in their respective classifications within the Maintenance of Way Department. The claim was timely advanced and progressed and is properly before 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 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

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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.

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'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." While the Carrier alleged a lack of equipment and employee skills, were this true it would not waive the notice and meeting requirements. However, the Carrier never identified equipment and skills that were lacking. The contention was simply an attempt to shift the burden of proof to the Organization. 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'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 Organization work that was contracted out. 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. 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, because it is unrefuted that the bargaining unit has done the work, which is reserved to it, and because the Carrier presented no proof of the contention.

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 two self-serving statements "suspect as to . . . accuracy and veracity" 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 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."

The Board finds a *prima facie* case that Maintenance of Way work has been contracted out without the required notice of intent. The Organization has provided a detailed statement of the outside forces used, the work performed, the hours involved and the locations of the work, with the statement signed by employees Case, Mills, Jr., Tipton and two others whose signatures are illegible. The Carrier not only has not disputed the assertion and detail provided by the Organization, but also in essence, has confirmed the outside forces' work, offering defenses but not denials.

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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.

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 offered a total of three defenses across the initial and final declinations: 1) there was an FOB Destination Freight collect contract with Casper Industrial Lubricants; 2) there were insufficient qualified employees to do the work; 3) the mixed-practice nature of the work allowed the contracting to outside forces. The FOB contention, made in the initial declination, was seemingly abandoned in the final declination and was never supported with a copy of the contract, requested by the Organization, or any other evidence. The defense fails for lack of proof. The defense that qualified employees were lacking, also seemingly abandoned in the final declination, fails because the Carrier did not show that the relevant positions were ever bulletined, let alone in three different cycles as stated in the initial declination. More critically, the Carrier has not contended that Claimants Tipton, McDonald and Mills were not due damages because they were unqualified to do the disputed work.

The mixed-practice defense, raised in the final declination, is based on a November 5, 2012 e-mail from Scott Smith to Duane Maier that states:

> **"In response to you (sic) question about the Industrial Lubricant technician working on the Hiline Sub: I have taken Tom Miller, the technician for Industrial Lubricant, out several times to work on both gage face greasers and top of rail greasers.**
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> **I have worked with him installing carpet on several face greasers.**
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> **I have also signed his work orders each time. He has been to Essex and worked extensively on our tanks that fill the wayside greasers.**
>
> **Industrial lube has worked on the Hiline for quite some time, and Tom Miller is now the "local" representative that works on all of the lubricators on both the Hiline and the Kootenai.**

He recently went to Texas to pick up a hyrail truck that will be used for filling wayside greasers."

Also included in the on-property correspondence is a December 10, 2012 letter from General Chairman Bruce Glover to General Chairwoman Staci Moody-Gilbert that states as follows:

> **"This concerns your inquiry and the assertion by BNSF that our claim file B-M-2573-M, including the statement from our Track Inspector Scott Smith, somehow suggests that an outside contractor had historically filled, repaired and maintained track side rail lubricators. That is a misrepresentation of our claim and Track Inspector Smith's statement.**
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> **Our initial claim was generated when the Carrier assigned the outside contractor, Industrial Lubricants, to go, independently, instead of assisting the employees, and perform the required service on the track side track lubricators in lieu of, and without, the employees. Prior to the claim period, as plainly stated by Track Inspector Smith's statement, outside contractor, Industrial Lubricants, serviced as a "technician" and exclusively only rode along with the BNSF employees and assisted us with technical advice and provided assistance as a "local representative" helping us trouble shoot and repair the rail lubricators.**

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The documents quoted above constitute the only evidence bearing on the Carrier's mixed practice assertion. The Board finds it insufficient to prove the Carrier's affirmative defense.

None of the exceptions set forth in the Note to Rule 55 have been found to exist. The Carrier has defaulted in its obligations to give notice of the intent to subcontract Maintenance of Way work and to make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces. Thus, damages must be considered. 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.