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

Award No. 43387
Docket No. MW-42689
19-3-NRAB-00003-140285

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference
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(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 (Hulcher) to perform Maintenance of Way and Structures work (unload king retarder skates) in the Hobson Yard at Lincoln, Nebraska on February 8, 2013 (System File C-13-C100-200/10-13-0279 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures work (unload king retarder skates) in the Hobson Yard at Lincoln, Nebraska on February 13 and 14, 2013 (System File C-13-C100-199/10-13-0278).

(3) The Agreement was further violated when the Carrier failed to provide the General Chairman with proper notice of its intent to contract out the work referred to in Parts (1) and (2) 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 A. Ewolt, M Halpin, K. Kidlow, M. Porteneir, S. Thomas, D. Boyle, J. Covarrubias, H. Pelayo, E.

Delano, L. Snyder and J. Gotchall shall each now '… be paid eight (8) hours straight time and four (4) hour (sic) overtime at the appropriate rate of pay as settlement of this claim.'

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants A. Ewolt, D. Franke, D. Rockenbach, D. Ficke, D. Boyle, J. Covarrubias, H. Pelayo and J. Gotchall shall each now '… be paid sixteen (16) straight time hours and two (2) 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.

This case arose from the Carrier's decision to contract out the unloading of king retarder skates on February 8 and again on February 13 and 14, 2013 to Hulcher and allegedly failed to provide proper advance notice to the Organization of the intent to subcontract. The Claimants all held seniority within the Maintenance of Way Department and all were regularly assigned at times relevant. When the resulting claims were not resolved on the property, they were advanced for a hearing before this 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. 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 notice of intent to contract out listed some details of contemplated work and location but also said the that notice was "not limited to" the detail provided, making it open-ended and thus improper, precluding "any possibility or hope of the parties engaging in a good-faith attempt to reach an understanding concerning the matter" (Submission, pp. 25-26). 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 Board must reject . . . the Carrier's defenses . . . 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 disputed work was performed with ordinary, not special, equipment and the Carrier has not shown that a special equipment exemption existed. 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

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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.

perform the regular 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. 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 'form' statements with very similar generic language found in many 'statements' used by the Organization". 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 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

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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.

not submitted proof of damages and the negotiated agreement has no provisions allowing for liquidated or punitive damages. Moreover, 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".

It is well settled that the Organization must prove all elements of its claim. See Third Division Awards 24975, 26219 and 36208. However, while the claim indicates work by outside forces on February 8 and then again on February 13-14, 2013, a careful reading of the on-property correspondence indicates concern only with February 8, as the next two February dates are not mentioned. For that reason, the Organization has not provided probative evidence that outside forces performed work on February 13-14, 2013.

In addition to making a *prima facie* case that outside forces were used, the Organization also must provide evidence that the disputed work has been customarily, traditionally and historically—as opposed to exclusively, system-wide—performed by Maintenance of Membership forces. See on-property Third Division Award 40565. The above-noted statement includes the following: "In 1995 the hump was redone in Lincoln and at that time all work was performed by MOW employees with no contractors on sight (sic) . . ." All that this tells the Board is that whatever work was done in 1995 was done by Maintenance of Way forces. The sentence is not sufficiently detailed as to precisely the work that was done. The Board cannot assume that unloading king retarder skates was part of the 1995 workload. For that reason, the Organization has not provided proof that the disputed work was customarily, traditionally and historically performed by Maintenance of Way employees. Thus, the claim fails.

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 18th day of January 2019.