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

Award No. 43388
Docket No. MW-42690
19-3-NRAB-00003-140296

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
(
(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 Services) to perform Maintenance of Way and Structures work (install concrete greaser pads for curve greasers and related work) at various locations between Mile Posts 103.4 and 127.00 on the Orin and Canyon Subdivisions of the Powder River Division on August 10 and 11, 2012 (System File C-12-C100/475/10-13-0010 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 violations referred to in Parts (1) and/or (2) above, Claimants L. Benzel, G. Hagen, R. Leeling, M. Gorsuch and R. Nason shall each be compensated for sixteen (16) hours at their applicable straight time rates of pay and eight (8) hours at their respective overtime 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 work of installing concrete greaser pads for curve greasers and related work on August 10 and 11, 2012 to Loram Services and to forgo advance notice of intent to subcontract to the Organization. Claimants held seniority within their respective classifications in the Maintenance of Way Department and were regularly assigned at times relevant. The claim was timely presented and progressed on the property without resolution and is properly 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.

---

[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. 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 reject "the Carrier's defenses outright because of the Carrier's failure to comply with the advance notice and meeting provisions of the Agreement". 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, detailed by the Organization during the processing of the claim, obviously was contracted out. 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 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 any of the outside forces was produced. This was clearly 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. 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 Claimants' 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 disputed work had the Carrier elected to assign them, 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 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 one self-serving statement from a Claimant, with that statement later altered for a different claim. 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

---

[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.

allowing for liquidated or punitive damages. Moreover, the Claimants unavailable for work at times relevant are not to receive damages. In a prior 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. The e-mail statement submitted by Claimant Benzel includes details about dates, locations and work done by outside forces, with listings for August 10, 2012 on the Orin Sub and for August 11, 2012 on the Canyon Sub relevant to the claim considered herein. Moreover, the Carrier not only has not denied that such work was performed, but also has provided justification for the use of outside forces. Thus, the Organization has made a prima facie case that the disputed work was contracted out.

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. In on-property Third Division Award 40564, the Organization's proof that the disputed work was customarily, historically and traditionally performed by Maintenance of Way employees was the Local Chairman's statement that Maintenance of Way forces had done similar work in the past. That Board found that the statement fell short of the required proof. In the claim under consideration herein, the on-property correspondence and the Benzel e-mail state that the disputed work has been done in the past by Maintenance of Way employees. Indeed, Mr. Benzel wrote that lubricator maintainers "do this work every day on the division." However, while the Organization asserts that the disputed work customarily has been done by the bargaining unit forces, these assertions come without supporting evidence. When was the work customarily done? At what locations? By whom? Where are the statements by those who performed the work or by those who saw the work being performed by Maintenance of Way forces. Unsupported assertions are not sufficient to carry the Organization's burden of proof. 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.