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

Award No. 43389
Docket No. MW-42691
19-3-NRAB-00003-140297

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 (Casper Industrial Lubricants) to perform Maintenance of Way and Structures work (fill wayside greasers) at various locations between Mile Posts 108.50 and 127.00 on the canyon Subdivision of the Powder River Division on August 9, 2012 (System File C-12-C100-477/10-13-0015 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 J. Hytrek and H. Henning shall each be compensated for eight (8) hours at their applicable straight time 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 after the Carrier contracted out the August 9, 2012 work of filling various wayside curve greasers to Casper Industrial Lubricants and did not give the Organization advanced notice of the intent to subcontract. When the resulting claim was not resolved on the property, it was advanced to the Board. The Claimants all held seniority within their respective classifications within the Maintenance of Way Department and all were regularly assigned to their positions at times relevant. The resulting claim was timely filed, progressed on the property without resolution and advanced for determination 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

---

[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.

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 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. However, 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 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, 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 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. 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, 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 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

---

[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.

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 eyewitness statement signed by Mr. H. Henning and two others, signatures illegible, documents the outside forces at work on August 9, 2012 and the locations where they were working. Moreover, the Carrier has not denied that outside forces were used. Rather they have defended that use. Therefore, the Organization has made the necessary *prima facie* case that the 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 (Knapp), 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. The above-noted statement signed by Mr. Henning and two others includes the following: The contractors in question simply refilled the containers with curve grease a job that has been historically done by Maintenance forces." Like statements in the Organization's on-property correspondence, the above-noted sentence is an unsupported assertion. The sentence is not sufficiently detailed as to precisely the work that was done. 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.