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

Award No. 43392
Docket No. MW-42694
19-3-NRAB-00003-140300

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**
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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 (Casper Industrial Lubricants) to perform Maintenance of Way and Structures work (remove and install curve greasers onto concrete pads and related work) at various Locations on the Orin Subdivision of the Powder River Division on September 13, 19, 20, 21 and 24, 2012 (System file C-13-C100-52/10-13-0073 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 (2) above, Claimant A. Case shall be compensated for forty (40) hours at his applicable straight time rate and Claimant M. McDonald shall be compensated for thirty-two (32) hours at his applicable straight time rate and one (1) hour at his applicable overtime rate."

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 removal and installation of curve greasers onto concrete pads and related work on September 13, 19, 20, 21 and 24, 2012 to Casper Industrial Lubricants and to forgo notice of intent to subcontract to the Organization. The 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, progressed on the property without resolution, and is now 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.

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". The Organization has a presented *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 contention that the curve oiler position went unbid for three bid cycles before the subcontracting has no merit because there is no proof that this happened or that there were no qualified employees. 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 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 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 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.

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 the Claimant Case and four other employees documents the outside forces at work on September 13, 19, 20, 21 and 24, 2012 and the locations where they were working. Moreover, the Carrier has not denied that outside forces were used. Rather they have

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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.

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. Not only has the Organization asserted during the on-property processing of this claim that the disputed work was customarily, traditionally and historically performed by Maintenance of Way forces, a statement written by Mr. R. J. Arnold sets forth dates and times in March, April and June 2006 that he and Foreman Benzel worked on greasers. Mr. Arnold wrote that "Mr. Benzel has installed oilers for 20 years & I have for the last 6 years." The information provided and the statement about length of time each employee has worked on greasers is sufficient proof that these Maintenance of Way employees have customarily, traditionally and historically performed the disputed work which, rather than exclusive, system-wide, is the appropriate standard, consistent with the use of "customarily" in the Note to Rule 55 and Appendix Y.

Even assuming that greaser work has been a mixed practice, a notice of intent to contract out and a conference, if requested by the organization, are required. See Third Division Awards 32629, 31483, 312786 and 32629, in which the Board found that "the Carrier has the right . . . to contract outwork where advance notice is given and the Carrier has established a mixed practice of contracting out work similar to that involved in the dispute." In the claim under consideration herein, notice and conference were required as the Organization's proof establishes the disputed work as within the scope of the Agreement. The Organization has alleged that no notice was provided and the Carrier has not shown otherwise.[3] The Board can only find that there was no notice. Consequently, the Carrier violated the requirement in the Note to Rule 55 and Appendix Y that both parties must "make a good faith effort to reach an understanding concerning said contracting."

The Carrier's violation requires consideration of damages. There are competing awards. The Carrier contends that no damages are due because the Claimants were fully employed at times relevant. See Third Division Awards 29330, 29202 and 28311. The Organization contends that damages are due because of lost work opportunities

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[3] This is one (1) of nineteen (19) contracting out cases on this docket. In each of the cases where the Organization has claimed that no notice was given or that an inappropriate notice was given, the notice was provided by the Carrier during the progressing of the claim if a notice actually had been issued.

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 18th day of January 2019.