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

Award No. 43393
Docket No. MW-42695
19-3-NRAB-00003-140305

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 (LG Pike) to perform Maintenance of Way and Structures work (install retarders) at the Hobson Yard at Lincoln, Nebraska on January 28, 29, 30, 31 and February 1, 2013 (System File C-13-C100-191/10-13-0260 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (LG Pike) to perform Maintenance of Way and Structures work (install retarders) at the Hobson Yard at Lincoln, Nebraska on February 4, 5, 6, 7 and 8, 2013 (System File C-13-C100-192/10-13-0270).

(3) The Agreement was violated when the Carrier assigned outside forces (LG Pike) to perform Maintenance of Way and Structures work (install retarders) at the Hobson Yard at Lincoln, Nebraska on February 11, 12, 13, 14 and 15, 2013 (System File C-13-C100-193/10-13-0271).

(4) The Agreement was violated when the Carrier assigned outside forces (LG Pike) to perform Maintenance of Way and Structures work (install retarders) at the Hobson Yard at Lincoln,

Nebraska on February 19, 2013 (System File C-13-C100-211/10-13-0289).

(5) The Agreement was violated when the Carrier assigned outside forces (LG Pike) to perform Maintenance of Way and Structures work (install retarders) at the Hobson Yard at Lincoln, Nebraska on March 4, 5, 6, 7 and 8, 2013 (System File C-13-C100-220/10-13-0312).

(6) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out the work referred to in Parts (1), (2), (3), (4) and/or (5) above 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.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, Claimants R. Brennan, R. Hetherington, S. Hrencher, G. Stall, M. Lane, M. Perez, M. Sailors, J. Butcher, R. Bruha and D. Johnson shall each be allowed forty (40) hours' straight time pay and fifteen (15) hours' overtime pay at their respective rates of pay.

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, Claimants R. Brennan, R. Hetherrington, S. Hrencher, G. Stall, M. Lane, M. Perez, M. Sailors, J. Butcher, R. Bruha and D. Johnson shall each be allowed forty (40) hours' straight time pay and fifteen (15) hours' overtime pay at their respective rates of pay.

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, Claimants R. Brennan, R. Hetherrington, S. Hrencher, G. Stall, M. Lane, M. Perez, M. Sailors, J. Butcher, R. straight time pay and fifteen (15) hours' overtime pay at their respective rates of pay.

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, Claimants R. Brennan, R. Hetherrington, S. Hrencher, G. Stall, M. Lane, M. Perez, M. Sailors, J. Butcher, R. Bruha and D. Johnson shall each be allowed eight (8) hours' straight time pay and three (3) hours' overtime pay at their respective rates of pay.

(11) As a consequence of the violations referred to in Parts (5) and/or (6) above, Claimants, R. Brennan, C. Zuhlke, S. Hrenchir, G. Stall, M. Lane, M. Perez, M. Sailors, J. Butcher, G. Colombe and A. Ewoldt shall each be allowed forty (40) hours' straight time pay and fifteen (15) hours' overtime pay 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 arises from the Carrier's decision, allegedly made without proper notification to the Organization, to contract out the installation of retarders in the Hobson Yard, Lincoln, NE during late January, February and early March 2013. The Claimants held seniority in their respective classifications within the Maintenance of Way Department. The claim was timely filed, 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 have historically done this fundamental maintenance work. 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. What the Organization characterizes as letters from the Carrier telling of plans to contract out various types of scope covered work as well as the operation of machinery and equipment to perform such work did not refer to the disputed work and therefore did not comply with the Note to Rule 55. Nor was the disputed work discussed during the contracting out conference. Appendix Y is an applicable, binding agreement. 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. Outside forces performed the disputed work "using common ordinary machinery and equipment . . . which were also readily available for rent/lease in case the Carrier's inventory was inadequate" . 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 mention of alleged scheduling difficulties is a red herring that has no justification. 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 retarder work to the Claimants. Nor was an effort made to bulletin new positions. The

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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 referred to as appropriate in the analysis that follows.

Carrier failed "to have sufficient numbers of new employees to perform the regular and predictable work of the bargaining unit". There is an obligation to increase the work force before contracting out. The Carrier's piecemeal defense fails as there was no Organizational request that the work be done piecemeal. The work was "part of an overall track rehabilitation project to which Maintenance of Way forces were also assigned . . . "Piecemeal" is not one of the criteria allowing contracting out. Even if some contracting out was justified, contracting out the entire project was not. Nor was the project too large for the bargaining unit, thus there is no evidence to support the Carrier's "magnitude" contention. Economy is not a criterion that justifies subcontracting. "Economic consequences of an agreement are not to be considered by the Board".

The remedies set forth in the claims are appropriate as they 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.

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 employee 'statements' used by the Organization, as these statements have no probative value." 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 that 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.

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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.

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 an earlier 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 Organization has met the requirement that it prove the essential elements of its claim. The Board finds that the Organization has made a *prima facie* case that the disputed work has been performed by Maintenance of Way forces customarily, traditionally and historically and that in February and March 2013 the work was done by outside forces as stated in the claim. See on-property Third Division Awards 40565, 40563, 40558 and 36015. The statement signed by Claimants Brennan, Lane, Butcher, Stall, Hrencher, Hetherrington and Sailors that they witnessed the violation and that "the dates, hours and information in the claim are true" coupled with the Carrier's defense rather than denial established the contracting out considered herein.

The statement also notes that "This work is done by MOW employees every day." Local Chairman/Claimant Sailors' e-mail, employee Frankhause's statement and Welder Allen's detailed statement substantiate the disputed work as within the scope of the Agreement and done customarily, traditionally and historically. The Board finds customarily, not exclusively, system-wide, as the Carrier contends, to be the proper standard as it is consistent with the above-noted on-property awards and with the language of the Note to Rule 55 and Appendix Y.

The Carrier provided a notice of the intent to contract out, issuing the original notice on October 20, 2011, and amended notices on October 23, 2012 and January 15, 2013. In relevant part, the original notice states:

> **". . . The work to be performed by the contract includes but is not limited to, install erosion-control measures; install vehicular traffic control (including barricades, signage and flags); remove/excavate existing crossover; furnish/grade/compact approx. 800 c.y. new embankment; install approx. 100 l.f. new culvert (including inlet/outlet protection and drainage route); pave approx. 1,200 s.y. hot-mix**

asphalt; assist with pick/set cross-over and turnout plants; and debris removal.

BNSF forces will be on hand to perform associated track work (including install 1,300 t.f. new track; welding turnouts; install crossing planks; install 3-No. 11 turnouts; installing 1-No. 15 turnout; install 2-No. 9 turnouts; relocate existing turnout; and surfacing).”

The October 23, 2012 amended notice added contractor work and included the following: “BNSF forces will be on hand to perform associated track work (welding turnouts; switch in-service, and surfacing).” Neither the original notice nor the amended notices mentioned the installation of retarders.

The Board finds that the installation of retarders, which must be considered track work, falls within the work to be performed by BNSF forces rather than the contractor. The original notice and the amendments cannot be read to have alerted the Organization to an intent to contract out this work such that retarders needed to be discussed in the conference that was held. The detail lacking in the notice and the amendments that followed was insufficient, depriving the parties of the opportunity to make a good faith effort to find ways to retain the scope work for the Maintenance of Way forces. The insufficient notice and amendments violated the Note to Rule 55 and Appendix Y and require an Award in the Organization’s favor. See on-property Third Division Awards 41166, 40798, 40677, 40565 and 40495.

Thus, damages must be considered. 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 18th day of January 2019.