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

Award No. 43394
Docket No. MW-42696
19-3-NRAB-00003-140307

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 (Lewis Equipment, LLC) to perform Maintenance of Way and Structures work (snow removal) between Mile Posts 116.3 and 137.2 and between Mile Post 97.4 and Mile Post 116.3 on the St. Joe Subdivision, Line Segment 3000 on February 21 and 22, 2013 (System File C-13-C100-210/10-13-0296 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (LG Pike Construction Company) to perform Maintenance of Way and Structures work (snow removal) at various locations in the Hobson Yard, Lincoln, Nebraska on February 20, 2013 (System File C-13-C100-212/10-13-0290.

(3) The Agreement was violated when the Carrier assigned outside forces (Hulcher Professional Services) to perform Maintenance of Way and Structures work (snow removal) at CP 50.5 and CP 60.3 on the Ravenna Subdivision on February 21 and 22, 2013 (System File C-13-C100-213/10-13-0295).

(4) The Agreement was violated when the Carrier assigned outside forces Hulcher Professional Services, Inc.) to perform Maintenance of Way and Structures work (snow removal) at CP

50.5 and CP 60.3 on the Ravenna subdivision on February 20, 21 and 22, 2013 (System File C-13-C100-216/10-13-0298).

(5) The Agreement was violated when the Carrier assigned outside forces (Hoy Excavating) to perform Maintenance of Way and Structures work (snow removal) at CP 666 on the Ravenna Subdivision on February 20, 21 and 22, 2013 (System File C-13-C100-217/10-13-0299).

(6) The Agreement was violated when the Carrier assigned outside forces Hulcher Professional Services, Inc.) to perform Maintenance of Way and Structures work (snow removal) in Havelock, Nebraska on February 20, 21, 22 and 23, 2013 (System File C-13-C100-218/10-13-0300).

(7) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out the work referred to in Parts (1), (2), (3), (40, (5) and/or (6) 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.

(8) As a consequence of the violations referred to in Parts (1) and/or (7) above, Claimants J. Close, K. Heusman, T. Benham, F. Aldana and B. Britt shall each '. . . be paid 12 hours of overtime plus the 11th hour meal period at their appropriate rate of pay as settlement of this claim.'

(9) As a consequence of the violations referred to in Parts (2) and/or (7) above, Claimants A. Ewolt and S. Hrenchir shall each '… be paid (8) eight hours straight time and 4 four overtime hours at the appropriate rate of pay as settlement of this claim.'

(10) As a consequence of the violations referred to in Parts (3) and/or (7) above, Claimants M. Lane, J. Butcher and M. Sailors shall each '… be paid four (4) hours straight time and seventeen (17)

overtime hours at the appropriate rate as settlement of this claim.

(11) As a consequence of the violations referred to in Parts (4) and/or (7) above, Claimants E. Delano and C. Zuhlke shall each '… be paid twenty four (24) hours straight time and forty eight (48) overtime hours at the appropriate rate of pay as settlement of this claim.'

(12) As a consequence of the violations referred to in Parts (5) and/or (7) above, Claimants T. Meyer and D. Ficke shall each '… be paid twenty four (24) hours straight time and forty eight (48) overtime hours at the appropriate rate of pay as settlement of this claim.'

(13) As a consequence of the violations referred to in Parts (6) and/or (7) above, Claimants S. Schrage, T. Doiel, M. Jakoubek, J. Suarez, J. Bartels, S. Thomas and D. Franke shall each be compensated as follows:

Foreman S A Schrage	**24 hours straight time, 19 hours over time, 8 hours double time**
Grp 2 operator T L Doiel	**32 hours straight time, 16 hours overtime**
Grp 2 operator M J Jakoubek	**31 hours straight time, 16 hours overtime**
Truck driver J J Suarez	**24 hours straight time,19 hours overtime, 8 hours double time**
Grp 2 lowboy SW Thomas	**32 hours straight time, 19 hours overtime, 8 hours double time**
Grp 2 lowboy D L Franke	**32 hours straight time, 19 hours overtime, 8 hours double time"**

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 involves six claims arising from the Carrier's decision to contract out snow removal work to various outside forces during the February 20-23, 2013 period without prior notification to the Organization.

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 minimum fifteen- (15) day advance 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. 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 and that the defenses should not be considered by the Board because there was no contracting out conference at which these defenses were advanced. The "emergency situation" defense is invalid because winter cold and snow in Lincoln, NE is not unexpected, because the Carrier presented no evidence of an emergency that disrupted train operations and because there is no evidence that

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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.

an emergency is listed as one of the exceptions in the Note to Rule 55 or Appendix Y. The snow removal work was performed using ordinary and readily available machinery and equipment that could have been leased or rented if unavailable within the Carrier's inventory. There is no evidence that equipment or necessary skills were unavailable. 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 snow removal work to the Claimants. Nor was an effort made to bulletin new positions. The 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 contention that snow removal 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. It is unrefuted that the bargaining unit has done the work, which is reserved to it, and because the Carrier cannot show that when snow removal 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 snow removal, even if leave had been approved. It is settled that the Organization gets to name the Claimants when a claim is filed.

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 several self-serving statements "prepared by the Claimants themselves" amounting to "unsubstantiated repetition" with no probative value 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

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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.

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. Moreover, evidence shows that a major snowstorm created a snow emergency, as the Carrier determined, and as such the contracts to outside forces were excluded from the notice provisions of the Note to Rule 55.

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. 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".

The Organization has made a *prima facie* case that the snow removal work that was contracted out has been customarily, traditionally and historically performed by Maintenance of Way employees and, therefore, is scope covered. That the snow removal work was performed by various contractors at various locations has been established by the statement of Brian Britt employees Hrencher, Ewolt and Sailors, Local Chairman Sailors alone and Track Inspector Suarez. Moreover, the Carrier has not taken issue with the various statements, but has defended the decision to contract out the disputed work.

Additionally, the statements of employees Hrencher, Ewolt and Sailors, Local Chairman Sailors alone and Mr. Ficke establish snow removal as Maintenance of Way work going back at least forty (40) years. The Carrier has provided conclusive evidence showing that as early as 1977, forty-one (41) years ago, snow removal has been contracted out. The Carrier-provided information does not indicate whether these contracts resulted in claims and if so, how such claims were resolved. The

information does support the Board's finding that a mixed practice exists where snow removal is concerned. The Board rejects the Carrier's contention that the Organization must show that the disputed work has been performed exclusively, system-wide rather than customarily, traditionally and historically. Both the Note to Rule 55 and Appendix Y, which the Board finds applicable, refer to work done "customarily" rather than "exclusively." See on-property Third Divisions Awards 40670, 40565 and 40563 supporting the use of "customarily" and on-property Third Division Awards 40777, 40677, 40558 and 40495 for the Board's reliance on Appendix Y.

In view of the Organization's *prima facie* showing, the Carrier was obligated to provide a notice of intent to contract out unless it could show reliance on one of the exceptions listed in the Note to Rule 55 or Appendix Y. See Third Division Awards 32629, 31483 and 31276 for the principle that the notice requirement exists for mixed practice cases. The relevant language in the Note to Rule 55 is as follows:

> **"However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the company, or special material available only when applied or installed through supplier, are required; or when work is such that the company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the agreement and beyond the capacity of the Company's forces."**

Of the above exceptions, it is the emergency exception cited in the Carrier's final declination during the on-property progression of the claim that is the relevant consideration. This is an affirmative defense that places the burden of proof on the Carrier.

The single definition of an emergency found in the prior awards accompanying the submissions to this Board lies within Third Division Award 24440, a case not involving snow removal: "an emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt." The Board finds the definition useful. However, even without reference to the definition, the Carrier has not met its burden of proof. Certainly, the record establishes that a major winter storm affected the Great Plains, that "the brunt of the snowstorm churned through Kansas," that Omaha

and Lincoln, NE were affected as Nebraska received 5"-9" of snow and that a snow emergency was declared in Lincoln, NE because of "imminent snowfall in the forecast." It is also true that winter snow in the Great Plains is not unusual and that the snowstorm that generated the claim considered herein had been predicted a few days in advance. The Board accepts the facts that the storm was disruptive and that highway driving was made more difficult and likely dangerous in certain locations. However, there is no showing in the record that Carrier operations were significantly affected either because its own forces could not get to their assigned posts or because rail traffic was halted or even significantly slowed. While Carrier management is due some leeway in determining when an emergency exists, with the first declination of the claim dated almost three months after the storm, the record includes no evidence of an emergency. Therefore, the lack of a notice of intent to contract out violated the Note to Rule 55 and Appendix Y and requires an award in the Organization's favor.

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 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.