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

Award No. 43395
Docket No. MW-42698
19-3-NRAB-00003-140328

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 (Industrial Lubricants) to perform Maintenance of Way and Structures work (perform removal, replacement and maintenance of wayside greasers and related work) at various locations between Mile Posts 477 and 544.7 on the Blackhills Subdivision of the Powder River Division on January 24, 30, February 14 and March 4 and 11, 2013 and continuing (System File C-13-C100-229/10-13-0323 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 its 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, furloughed Claimants S. Partusch and M. Frankhauser shall each be compensated for '… all straight and all overtime due them at the end of this continuing claim. I am requesting all claimants be paid at their appropriate 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 case arose from the Carrier's decision to contract out the removal, replacement and maintenance of wayside greasers and related work on the above-noted days to Industrial Lubricants and to forgo giving advanced notice of the intent to subcontract to the Carrier. The resulting claim, not resolved on the property, was advanced to this Board. The Claimants both held seniority in the Maintenance of Way Department and both were on furlough at relevant times.

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

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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 where appropriate in the analysis that follows.

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. Moreover, because the Carrier did not provide the required notice of intent to contract out, the Board should not consider the defenses. The Carrier's contention that special equipment and skills were 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 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 "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 has been made without evidence.

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. The Claimants were furloughed at the time the subcontracted work was performed. 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 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. 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".

It is well settled that the Organization must prove all elements of its claim. See Third Division Awards 24975, 26219 and 36208. Statements by Local Chairman J. Varner and Mr. P. Kenagy show that outside forces performed work on greasers

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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.

respectively on January 24 and 30, 2013, but on none of the other dates included in the claim are mentioned in these two statements. However, the Carrier has defended the contracting out of the entire project rather than deny that only some of the work or even any of the work was done by outside forces. Weak as it is, there is a *prima facie* case that Industrial Lubricants performed the disputed work.

In her May 13, 2013 declination of the claim considered herein, Director, Maintenance Support Tripp writes, "The greasers are a vital part of the track structure and had to be removed and installed properly, which BNSF employees are not trained for." Yet, in a December 10, 2013 letter from General Chairman Bruce Glover, attached by General Chairwomen Staci Moody-Gilbert to her February 18, 2014 letter confirming the January 16, 2014 claims conference held for the current claim, Director Tripp is quoted as writing, "BNSF employees, fill, maintain and repair track side lubricators." Director Tripp's two statements are obviously contradictory, with the contradiction never commented on or explained by the Carrier. The Board cannot overlook an admission by a knowledgeable Carrier manager that the work disputed in the claim considered herein is scope covered, even though the admission pertained to a different claim.

While is possible that work on the greasers at times has been contracted out, the Organization must establish only that they have customarily, traditionally and historically performed the work. See on-property Third Division Awards 39685, 40563, 40670, 40798 and corrected award 43146. In Award 43146 the Board noted the Carrier's assertion that the Organization must show that the disputed work in the past has been performed system wide, to the exclusion of others. In response the Board states, "However, it is now well established that this is not the contractual standard at this Carrier."

Because there was no notice of intent to contract out issued by the Carrier, it is the Carrier's burden to show that one of the exceptions set forth in the Note to Rule 55 or Appendix Y made such a notice unnecessary. It has not met the burden. The assertion in the first declination that the work was done on an FOB basis was abandoned in the final declination and never supported by documentary evidence. There has been no showing of a lack of qualified employees or of the necessary equipment.

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.