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

Award No. 43396
Docket No. MW-42699
19-3-NRAB-00003-140347

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
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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 (Lewis Construction and Buel/Pavers) to perform Maintenance of Way and Structures Department work (build access road) next to the tracks between Mile Posts 16.3 and 17 on Line Segment 4 on the Ravenna Subdivision on March 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27 and 28, 2013 (System File C-13-C100-233/10-13-0335 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 work referred to in Part (1) 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.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants E. Delano, H. Pelayo, D. Franke, J. Franke, T. Brandt, M. Perez, J. Covarrubias, M. Lane, M. Sailors, D. Ficke and S. Conradt shall each '… be paid ninety-six (96) straight time hours and fifty-eight (58) hours overtime at the appropriate rate of pay as settlement of this claim.'"

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 building of an access road during March 2013 to Lewis Construction and Buel/Pavers and to forgo advance notice to the Organization of the intent to subcontract. When the resulting claim was not resolved on the property, it was advanced to this Board. The Claimants all held seniority within their respective classifications within the Maintenance of Way Department and all were regularly assigned within their respective classifications at times relevant.

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. "(T)he Carrier did not and could not seriously dispute that the work claimed herein is basic, fundamental Maintenance of Way work that has ordinarily, customarily, traditionally and historically been performed by Maintenance of Way forces for decades throughout the Carrier's system" (Submission, p. 14).[1] 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.

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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 awards are not specifically noted in this summary of the Organization's contentions but will be referenced as appropriate in the analysis that follows.

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. "(T)rack construction, repair and maintenance work is Maintenance of Way work across the board via all types of methods". The informational letter provided to the Organization about the Carrier's intent to subcontract contained no specific reference to the disputed work, nor did the conference that followed involve a discussion of the disputed work. The equipment used "was not special or unusual to railroad work" and was available within the Carrier's inventory or via rental/lease. 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 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. This contention simply attempts to shift the burden of proof to the Organization. The Carrier asserts that an emergency justified the subcontracting allegedly due to a need to get equipment in place to repair rough track affecting train traffic, but there is no proof of an emergency. There was no immediate halt to train traffic, only a slowing of trains. The problem existed because of poor Carrier planning that allowed track deterioration and there was no indication of unavailable or unskilled Maintenance of Way forces. 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 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 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 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 "photographs and self-serving statement from some of the Claimants themselves" 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

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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.

allowing for liquidated or punitive damages. Moreover, the Claimants unavailable for work at times relevant are not to receive damages. In a prior 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".

As the moving party, the Organization must prove all elements of its claim. See on-property Third Division Awards 43147 and 36208 as well as Third Division Awards 32351, 20745, 24975 and 26219. There is no question that some so-called self-serving statements do not constitute probative evidence. For example, in Award 26219 the Organization asserted that it had a relevant statement from the Claimant but failed to produce the statement. In Award 24975 the Claimant asserted support for his contention that others could place him at home to receive calls that did not come, but failed to produce that support in the form of additional statements. In the case considered herein, the statement of Mr. Ficke plus photos of Lewis Construction Equipment indicate work by outside forces. The statement from the Carrier's James Matthews, provided as rebuttal to the claim, includes the following: "Lewis was contacted to provide initial work and Pavers supplied rock to run an access road." Thus, it is obvious that the disputed work was contracted out.

The Organization's claim fails because there is an assertion, made without evidentiary support, that the disputed work has customarily, traditionally and historically been that of Maintenance of Way forces. Local Chairman Sailors wrote that "I have 37 years out here and have seen gangs bid out for access roads . . . if you would research this you would find this out." The suggested research either was not done or was unproductive as there is nothing in the evidentiary record to indicate when, where, who and under what conditions Maintenance of Way forces may have been involved in building access roads. The Organization's assertion is insufficient to make a *prima facie* case. The Carrier's "emergency situation" defense is moot. The claim must be denied.

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.