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

Award No. 43662
Docket No. MW-42853
19-3-NRAB-00003-150057

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference (BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Spicer Trucking and Strata) to perform Maintenance of Way and Structures Department work (load, haul, unload and stack track components and materials) from material piles at Minot Yard to various locations in Gavin Yard beginning on June 15, 2013 through July 28, 2013 (System File T-D-4275-M/11-13-0340 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, Claimants B. Miller, J. Nelson, L. Marcy, Jr., D. Dahm, T. Hanson and D. Wald shall each '*receive five hundred and eight (508) hours worked by the contractor, with pay to be at their respective overtime rate 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 dispute involves the Carrier's alleged assignment of contractors Spicer Trucking and Strata to perform Maintenance of Way work of loading, hauling, and stockpiling track material such as rail, frogs, insulated joints, plates, bars, and other material from its Minot Yard to various locations in its Gavin Yard during the period commencing on June 15, 2013, and continuing until July 28, 2013.

The Organization argues that the work at issue is contractually reserved to, and has customarily, historically, and traditionally been performed by, Maintenance of Way employees, and it should have been assigned to the Claimants rather than the contractors. Further, the Organization argues that the Carrier failed to comply with the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. Based on these arguments, the Organization submits that the Claimants are entitled to the remedy requested in Paragraph (3) above.

The Carrier argues that arbitral precedent establishes that new construction projects of the magnitude and type at issue are not performed by BNSF forces. Further, the Carrier argues that the work at issue was properly contracted out with advance notice of intent to contract the work on the grounds that it was not adequately equipped to handle all aspects of the work, nor did its forces possess the specialized skills required for all aspects of the project. In addition, the Carrier argues that the Organization did not prove that the alleged violation occurred or that Maintenance of Way forces had customarily performed this work on a system-wide basis to the exclusion of others. In addition, the Carrier argues that Appendix Y is not applicable until the Organization proves that the disputed work is reserved to

Maintenance of Way forces, and Appendix Y does not apply on this property. Finally, the Carrier argues that the Organization has failed to prove damages.

In contracting cases, the Organization bears the initial burden to demonstrate a claim to the work under the Agreement, and to produce sufficient evidence to establish a violation of the Agreement. See Third Division Award 36208. The parties' respective arguments concerning whether the Organization may establish a claim to the work are based on different interpretations of the Note to Rule 55. The Organization argues that for the Note to Rule 55 to apply when the Carrier contracts with outside forces, it must only prove that BMWE-represented forces "customarily performed" the work at issue. The Carrier argues that the Organization must prove that BMWE-represented forces "customarily performed the work" *and* that BMWE-represented forces had done so "on a system-wide basis to the exclusion of others." In Award 43565, this Board reviewed arbitral precedent on this issue and determined that the threshold issue in contracting cases is whether the work at issue is "customarily performed" by bargaining unit employees.

In this case, the work performed by the contractor from June 15, 2013, through July 28, 2013, was work involving loading, hauling, and stockpiling track materials that bargaining unit employees regularly perform. On-property, the Organization alleged that its members customarily and historically performed this work. The Carrier did not specifically deny this allegation. Instead, the Carrier issued a general denial and contended that unit members did not perform this work on a system-wide basis to the exclusion of others. Thus, the Organization has established that the work at issue is customarily performed by its members.

The Carrier also argues that the Organization has not met is burden to prove that the claimed work was performed by the contractor as alleged. It is well established that the Organization has the burden to prove its claims. Third District Awards 26219, 36208, 28338 and 30414. In contracting cases, some boards have adopted a civil pleading approach under which a claim by the Organization that puts the Carrier sufficiently on notice as to the essential details of the work allegedly contracted will be treated as establishing a *prima facie* case unless the Carrier issues a specific denial by answering that the contracting did not occur as alleged. Third District Awards 15444, 18447, 20892 and 43347. If the Carrier specifically denies that the work took place, then the Organization bears the ultimate burden of providing sufficient evidence to establish the claim. The reasoning for adopting this approach is that if the Carrier has evidence of a probative nature in its control that it does not

produce, it may be presumed that the evidence was unfavorable to the Carrier. Another reason to adopt this approach is that in many cases, such as this case, the Carrier will also assert that it provided notification of the contracting to meet its burden under the Note to Rule 55 and Appendix Y, which is a tacit admission that the alleged contracting occurred.

In this case, the Organization's claim provided sufficient notice of the essential details of the work allegedly contracted to permit the Carrier to specifically admit or deny the allegation. The Organization also put in the record two statements in the record that support parts of its claim. The Carrier did not deny these allegations, and instead defended the claim, primarily on the grounds that it had provided notice to the Organization of a large magnitude project. Under these circumstances, the Organization has met its burden to establish that the claimed work occurred as alleged.

When the type of work to be contracted has customarily been performed by Organization-represented employees, the Carrier is obligated to comply with the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. The Note to Rule 55 identifies the "criteria" or "reasons" that may justify contracting, and Appendix Y states that those reasons must be included in the notice. Among those reasons are that the Carrier is not adequately equipped to handle the work and that the work involves special skills not possessed by the Carrier's employees. After a notice is received by the Organization, it may request a meeting with the Carrier to discuss the contracting transaction, and if requested, the parties are obligated to promptly meet and make a good faith effort to reach an understanding concerning the contracting.

In this case, the Carrier contends that it met its obligation to provide the Organization with advance notice that the work at issue would be performed by contractors though a series of three letters of intent. Those letters put the Organization on notice that the Carrier planned "to contract all work associated with the capacity expansion project located in Gavin Yard." Further these letters advised that "t]his multi-phase project will include extensive track, utility, and dirt work," that BNSF was not adequately equipped to handle all aspects of a project with this magnitude, nor do BNSF forces possess the specialist dirt work skills necessary for this portion of the project." Previous on-property awards have held that the Carrier did not violate the Agreement when it contracted out such projects. Third Division Awards 37433, 37434, 38383, and 41222. Furthermore, the Carrier is not required to

piecemeal the project to give the work to existing Maintenance of Way forces. Third Division Awards 43258 and 43259. The rationale behind these awards is that large-scale construction or capacity expansion projects that ordinarily involve unit work cannot realistically be performed by Carrier forces. As concluded in Public Law Board 4768, Award 22:

> **"After reviewing all the circumstances, the Board concludes that this project was of a nature which would have prevented the use of Carrier equipment and forces on any practical basis. While there is no doubt that elements of the work are regularly performed by carrier forces, this does not therefore determine that such major projects could have been undertaken other than by outside forces. More significantly, however, is that the organization has failed to demonstrate that such projects are "customarily performed" by Maintenance of Way forces. This is the necessary element for consideration of the application of the Note to Rule 55."**

This rationale is persuasive, and these precedents shall be applied in this case. The Carrier determined that it would need additional forces to complete a multi-phase project in the Gavin Yard because it was not adequately equipped to handle all aspects of a project of this magnitude and that its forces did not have the necessary skills to perform specialized dirt work. Although it appears that a conference took place between the parties following receipt of the Carrier's letters of intent, there is no evidence in the record that the Organization contested the reasons the Carrier identified for the Gavin Yard contracting prior to the submission of this claim. There is also no allegation or evidence that contractor forces were being used to replace Organization-represented employees.

The disputed work at issue in this case involved loading and hauling rails and material piles from the Minot Yard to the Gavin Yard. All three of the Carrier's notices of intent to contract advised that large amounts of various material would be loaded and hauled. In addition, the Carrier's second notice, dated May 18, 2012, advised that the work to be performed included, among other things, hauling new sub-grade material and hauling and loading existing material into stockpiles; and its third notice dated October 9, 2012, advised that the work to be performed included hauling material, hauling existing ballast from stockpiles, and hauling track panels and turnout panels. These notices sufficiently put the Organization on notice that the work of the type involved in this claim would be done in the context of the capacity

expansion project at the Gavin Yard. Under these circumstances, the Carrier has met its obligations under the Note to Rule 55.

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 17th day of May 2019.