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

Award No. 43663
Docket No. MW-42854
19-3-NRAB-00003-150063

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 Carrier violated the Agreement when it assigned outside forces (LG Pike Construction Company) to perform Maintenance of Way and Structures work (install retarder and switch panels) in the Hobson Yard, Lincoln, Nebraska on July 23, 24 and 25, 2013 (System File C-13-C100-366/10-13-0651 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 said 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 R. Brennan, D. Biggs, S. Hrenchir, J. Francke, K. Kildow, B. Britt, M. Sailors, D. Boyle, J. Covarrubias and J. Butcher shall each now '… be paid twenty four (24) straight time hours and six (6) 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 dispute involves the Carrier's alleged assignment of contractor LG Pike Construction Company to install retarder and switch panels at the Hobson Yard in Lincoln, Nebraska, on July 23, 24, and 25, 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 on July 23, 24, and 25, 2013, of installing retarders and switch panels is work that bargaining unit employees regularly perform, as established by statements in the record. These statements also provide sufficient evidence that the work at issue was performed by the contractor 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. The letter most relevant to this dispute is dated October 23, 2012, and it states, in part:

> **"As information, BNSF advised by letter dated October 20, 2011 of its plans to contract for the necessary heavy equipment, such as excavators (track-hoes), F/E loaders, graders, compactors, dumps, and hot-mix asphalt paving equipment with operators to assist BNSF forces with the yard improvements at Hobson Yard located in Lincoln, NE. This is a multi-year, multi-phase project requiring installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this project. Moreover, BNSF forces do not possess the necessary specialized dirt work or hot-mix paving skills for this project. That earlier letter is hereby amended to include the following work and for the same reasons stated on October 20, 2011: install erosion-control measures; remove/excavate existing switches (Nos. 113 and 114); necessary sub-grade prep; load/haul/set 2-No 11 switches (including necessary leading/trailing track panels); and debris removal.**
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> **BNSF forces will be on-hand to perform associated track work (welding turnouts; switch in-service, and surfacing). It is anticipated that this work will begin immediately to take advantage of the existing track/yard windows being currently used with the multi-phase, multi-year improvements addressed in the October 20, 2011 letter."**

Previous on-property awards have held that the Carrier did not violate the Agreement when it contracted out projects of a magnitude described in the Carrier's letters of intent to contract. 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-year, multi-phase yard improvement project at Hobson 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. BNSF forces were planned to be on-hand to perform associated track work, and there is no allegation or evidence that contractor forces were being used to replace Organization-represented employees. The series of notices gave the parties the opportunity to discuss the planned contracting and address any issues they may have had.

The disputed work at issue in this case involved installing retarder and switch panels at the Hobson Yard. A review of the October 23, 2013 letter shows that it put the Organization on notice that it intended the contractor to install new track, crossovers, crossings, and switch panels, such that that issue could have been addressed by the parties in conference. However, these notices were insufficient to put the Organization on notice that the contractor would be installing retarders. The Carrier's failure to put the Organization on notice that it intended to contract out the installation of retarders was a violation of the Note to Rule 55 and Appendix Y, and for that reason, that part of the claim that addresses the installation of retarders shall be sustained.

Turning to the issue of a remedy, the Carrier argues that the Organization has failed to prove damages because the Claimants were fully employed during the claim period. It is an axiom in the law that there is no right without a remedy. Consistent with that principle, compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the Claimants may have been paid

at the time of the violation. See Third Division Awards 20633, 21340, 35169, 37470 and PLB 2206, Award 52. As the Board opined in Third Division Award 21340:

> **"With regard to compensation, numerous prior authorities have held that an award of compensation is appropriate for lost work opportunities notwithstanding that the particular claimants may have been under pay at the time of violation."**

Compensation awarded should be reasonable in view of the record evidence and realistically related to the amount of work actually contracted that represents the loss of work opportunity for the members of the craft. Public Law Board 6204, Award 32. In this case, the evidence supports a remedy for the work performed by the contractor installing retarders on July 23, 24, and 25, 2013. Due to the difficultly determining the number of hours spent by the contractor on that activity from this record, this case is remanded to the parties to determine the number of hours spent by the contractor installing retarders. The resulting number of hours shall be split equally among the Claimants, and paid at their appropriate straight time rates.

AWARD

Claim sustained in accordance with the Findings.

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 17th day of May 2019.