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

Award No. 43664
Docket No. MW-42885
19-3-NRAB-00003-150108

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (R.J. Corman) to perform Maintenance of Way and Structures Department work (clean ballast and debris from switches and track) at various locations between Mile Post 2.9 and 3.0 and at the Clovis Point Junction switch on the Campbell subdivision on August 3, 5, 14, 15 and 19, 2013 (System File C-14-C100-10/1014-0012 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 J. Deeth, D. Turner and S. Wetz shall now each '… be paid 21.4 straight time hours and 5.3 overtime hours. *' at their respective 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 dispute involves the Carrier's alleged assignment of contractor R. J. Corman to clean ballast and debris from switches and track between Mile Posts 32.9 and 3.0 at the Clovis Point Junction switch on the Campbell subdivision on August 3, 5, 14, 15, and 19, 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 that the work at issue was properly contracted out with advance notice of intent to contract the work on the grounds that it required special equipment not owned by the Carrier. 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 August 3, 5, 14, 15, and 19, 2013, of cleaning ballast and debris from switches was 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 does not own special equipment required for the work. 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 letter of intent dated March 25, 2013. In that letter, the Carrier raised the "specialized equipment" reason to justify contracting under the Note to Rule 55. Specifically, the Carrier claims that it will be contracting for the use of

"specialized vacuum trucks for the removal/proper disposal of coal dust and coal-fouled ballast."

The parties raised several arguments in support of their respective positions on whether this notice justified the contracting at issue under the Note to Rule 55 and Appendix Y. Specifically, the Carrier argued to the Board that the work at issue was environmentally sensitive work that was not customarily performed by Organization-represented forces. The only possible indication in the record that the Carrier raised the issue that the work was environmentally sensitive is the statement in the March 25, 2013 notice that the work to be performed by the contractor was going to include the "*proper* disposal of coal dust and coal-fouled ballast." (Emphasis supplied). If the notice was intended to cover environmentally sensitive work, that argument should have been made on property, and it will not be considered here by the Board.

The Organization argued that the notice is too vague because the work it addresses covers about 1,200 miles of track, which is outside the parameters of "the contracting transaction" as described in the Note to Rule 55. The Carrier contends that this notice is similar to many system notices used during the contracting of vacuum trucks as far back as the early 1990s. The purpose of the Carrier giving notice of intent to contract is to give the Organization enough information about the Carrier's plans so that meaningful discussions may be had about reducing the incidence of subcontracting. The record here shows that the parties did have a conference after the Organization received the notice, and, to the extent that the parties did not come to an understanding regarding the proposed contracting, it does not appear to be because of the vagueness of the notice. The Organization knew that the Carrier intended to use a contractor to use vacuum trucks along eleven identified locations within the Powder River Division, and the communications that followed addressed whether that work could be performed using Carrier or rental equipment with BNSF forces. There is no evidence that the failure to come to an understanding regarding the proposed contracting resulted from the Organization's lack of information regarding the scope or location of that contracting.

The Organization also argued that the equipment utilized by the contractor – vacuum trucks – were not special or unusual to railroad work and were readily available to be rented and operated by Carrier forces. In support of that argument, the Organization points to the carrier's assurance in Appendix Y that their good faith

efforts to reduce the incidence of subcontracting will "include the procurement of rental equipment and operation thereof by carrier forces." The record contains evidence from the Organization showing that vacuum trucks were available to be rented by the Carrier and that the rental companies permitted Carrier forces to operate them. The Carrier did not submit any evidence showing that the vacuum trucks it contracted for were "specialized" in any way, or that they were not available to be rented or operated by Carrier forces. If the conference required by the Note to Rule 55 and Appendix Y are to be productive, the Carrier should make this information available to the Organization, and, in the event that the parties do not reach an understanding on the contracting, that information should be included in the record in defense of the Carrier's argument that it met its obligations under the Note to Rule 55 and Appendix Y. On this record, it cannot be determined that the Carrier met the "specialized equipment" exception to justify contracting the work at issue.

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 the remedy requested in Paragraph (3) above.

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 17th day of May 2019.