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

Award No. 43665
Docket No. MW-42888
19-3-NRAB-00003-150118

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 Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (clean up old grain, mud and rock) on tracks at various switch locations in the Hobson Yards in Lincoln, Nebraska on September 26, 27, 30 and October 1, 2, 3 and 4, 2013 (System File C-14-C100-8/10-14-0024 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (clean up old grain, mud and rock) on tracks at various switch locations in the Hobson Yards in Lincoln, Nebraska on October 7, 8, 9, 10 and 11, 2013 (System File C-14-C100-9/10-14-0025).

(3) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (clean up old grain, mud and rock) on tracks at various switch locations in the Hobson Yards in Lincoln, Nebraska on October 14, 15, 16, 17 and 18, 2013 (System File C-14-C100-16/10-14-0030).

(4) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (clean up old grain, mud and rock) on tracks at various switch

locations in the Hobson Yards in Lincoln, Nebraska on October 21, 22, 23, 24 and 25, 2013 (System File C-14-C100-17/10-14-0031).

(5) 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 described in Parts (1), (2), (3) and/or (4) 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.

(6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Claimants M. Sailors and H. Pelayo shall now each be compensated for fifty-six (56) hours straight time and seven (7) hours overtime at their respective rates of pay.

(7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Claimants M. Sailors and H. Pelayo shall now each be compensated for forty (40) hours straight time and five (5) hours overtime at their respective rates of pay.

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimants M. Sailors and H. Pelayo shall now each be compensated for forty (40) hours straight time and five (5) hours overtime at their respective rates of pay.

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants M. Sailors and H. Pelayo shall now each be compensated for forty (40) hours straight time and five (5) hours overtime 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 Hazmat Response to clean old grain, mud, and rock from tracks and switch locations in the Hobson Yard in Lincoln, Nebraska, on various dates in September and October, 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 Paragraphs (6), (7), (8) and (9) 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 in September and October of 2013 using vacuum trucks to clean old grain, mud, and rocks from tracks and switches was work that bargaining unit employees regularly perform, as established by a the Claimant's statement that the Carrier did not rebut. This statement also provides 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.

Here, the Carrier argues 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 letters most relevant to this case are dated October 23, 2013, and January 15, 2013. Both of these letters refer to a multi-year, multi-phase yard improvement project requiring installation of new track,

crossovers, crossings and pavement, and in connection with specific aspects of this project "debris removal." Thus, the claimed work was covered in the notices.

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, and Public Law Board 4768, Award 22. 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.

This rationale is persuasive, and ordinarily these precedents would have been determinative in this case, except that it is not clear that the project described in the Carrier's letters of intent discussed above was still underway at the time the work at issue was performed. The Organization argued on property that the project contemplated in the Carrier's notices was completed on July 23, 2013, before the claimed work occurred in September and October of 2013, and it presented evidence in the form of a statement from a the Claimant that the Hobson Yard improvement project was completed on July 23, 2013. The Carrier did not contest the Organization's argument or provide any evidence that the project was still ongoing at the time of the instant dispute. On this record, the Carrier failed to provide notice of the claimed work, and the claims 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 the remedy requested in Paragraphs (6), (7), (8) and (9) 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.