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

Award No. 43666
Docket No. MW-42936
19-3-NRAB-00003-150019

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
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(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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (replace switches and track panels, hauling materials and related work) at various locations on the Casper, Canyon and Orin Subdivisions on July 22, 30, August 1, 6 and 22, 2013 (System File C-13-C100-356/10-13-0622 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with proper 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 A. Case, P. Christman, Z. Mader, T. Mills, B. Rittel and M. Prettyman shall now each now be compensated as follows:

'…Claimant Case be paid 40 straight time hours at his appropriate rate of pay. Claimants Mills, Mader, Christman, and Rittel each receive 38 straight time hours at their appropriate rate of pay. And

Claimant Prettyman receive 16 straight time hours at his 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 R.J. Corman to move materials and install switches and panels at various locations on the Canyon, Casper, and Orin Subdivisions on July 22 and 30, 2013, and August 1, 6, and 22, 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. 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 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. Further, the Carrier argues that it did comply with the notice and meeting requirements of the Note to Rule 55 and Appendix Y. The Carrier also argues that the Organization has failed to prove actual 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 Board finds that the Organization has established that the installation of switches at issue has been customarily performed by its members. On-property, the Carrier did not dispute that BMWE-represented forces customarily do this work. The Carrier also suggested that the work at issue is customarily performed by unit members when it notified the Organization that it was going to contract "to *assist* BNSF forces with the replacement of multiple switches and crossovers." (Emphasis supplied). Thus, the Organization has established that the work at issue is customarily performed by its members.

The Carrier argues that the Organization has not met its burden to prove that the claimed work was performed by the contractor as alleged. The Organization's claim named the contractor, the type of work performed, the dates of the alleged contracting, the locations of the contracting, the number and classifications of the contractor's employees, and the equipment used. The Organization included statements from the Claimants and other employees to support these allegations, and the Carrier did not deny that this work occurred. Thus, the Organization has produced sufficient evidence to establish that the claimed work occurred.

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 contracted work involves special skills not possessed by the Carrier's employees and that the Carrier is not adequately equipped to handle 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 in a letter of intent dated March 25, 2013. Apparently, after the Organization's receipt of this letter, there was a meeting between the parties to discuss the proposed contracting, but the parties did not reach an understanding. The March 23, 2013 notice, stated, in relevant part:

> **"As you are aware, BNSF has multiple large-scale installation and improvement projects in progress on the Powder River Division. BNSF is not adequately equipped to handle all aspects of these projects nor do BNSF forces possess the specialized skills required for all aspects of these installations. BNSF plans to contract for additional heavy equipment, such as trackhoe (excavators), 100 ton off-track cranes, side-boom cranes, extra-capacity long haul trucks, as it has done in the past, to assist BNSF forces with the replacement of multiple switches and crossovers at several locations on various sub-divisions. The work to be performed by the contractor includes but is not limited to, unload/haul switch and track panels to locations; remove/replace necessary switches; necessary sub-grade work; and debris removal at the following locations:**
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> **Alliance Yard - MP 364.00 – 366.20**
>
> **Black Hills Sub – MPs 587.30-587.80; 583.60-584.50; 476.4-477.0**
>
> **Butte Sub – MPs 422.60-422.70**

Casper Sub – MPs 134.20-135.70; 159.40-159.60

Canyon Sub – MPs 95.60-90.40

Campbell Sub – 9.3-9.6

Guernsey Yard – 102.3-103.3

Orin Sub – MPs 0.43-0.53; 14.20-14.90; 16.90-18.10; 39.8-39.90; 42.20-43.00; 55.60-56.10; 61.70-62.60; 80.40-81.0; 85.40-85.90; 110.3-110.80

Sand Hills Sub – MPs 256.70-256.80; 258.20-258.30; 290.0-290.10; 290.30-290.50

It is anticipated that this work will begin on approximately April 10, 2013."

In this letter, the Carrier provided two reasons that may justify contracting under the Note to Rule 55. First, the Carrier asserted that it was "not adequately equipped" to handle all aspects of the project described; and, second, it asserted that it did not have the "specialized equipment" that was going to be used. The instant claim involves the contractor's employees use of excavators that are customarily used by Organization-represented employees, so the issue here is narrowed to whether the Carrier met its obligations under the "not adequately equipped" standard.

The "not adequately equipped" standard is vague and could be interpreted broadly, so it is important to review the content of the notice and the circumstances of the contracting so that the Organization's legitimate interests in protecting unit work and the Carrier's legitimate interests in getting necessary work completed are considered. In that regard, the first issue is whether the Carrier's notice covers the disputed work, including the work to be performed and the location of that work. The instant notice states that "additional heavy equipment, such as trackhoe (excavators)" will be used "to assist BNSF forces with the replacement of multiple switches and crossovers at several locations on various sub-divisions." The disputed work involves the use of excavators of the type customarily used by unit members to move material

and replace panels and switches, so the notice covered the claimed work. The notice also covered the locations listed in the claim, except the placement of a #20 switch and panels at mile post 103.20 of the Orin Subdivision.

As to the circumstances involved in the contracting, the project involved "multiple large-scale installation and improvement projects" that were scheduled to occur over at least 24 different locations spread out over several subdivisions and yards. This large-scale project directly raises a central issue in the "not adequately equipped" standard of whether the Carrier has sufficient forces to perform this work. Neither party presented sufficient evidence to decide this issue.

In the absence of sufficient record evidence on the issue, the resolution of the claim comes down to which party has the burden of proof. There is general authority for the proposition that the Organization bears the burden to prove the elements of its claim. See Third District Awards 28338, 30414, and 36208. There is some disputed authority on that issue in contracting cases. In Third District Award 39685, Referee Brown held that it is the Carrier's burden to prove it meets a contracting exception as an affirmative defense. On the other hand, in Third District Award 40563, Referee Halter placed the burden on the Organization to prove that the Carrier's reasons for its actions constituted a breach of the Agreement. Similarly, in Third District Award 40671, Referee Knapp placed the burden of providing evidence of how Carrier forces might have been able to do the work on the Organization.

Here, the Carrier established that its notice included a reason for the contracting under the Note to Rule 55 and the notice covered most of the claimed work. In support of the "not adequately equipped" exception raised by the Carrier, it alleged that the Claimants were fully employed when the claimed work was performed and it provided evidence that some of the Claimants were unavailable for work. The Organization did not deny these allegations, nor did it present any evidence that its members were available to perform the claimed work, or that any of its members were adversely affected by being out of work. Because these factual issues bear more directly on the Organization's interests, it is reasonable and in keeping with arbitral precedent for the burden on this issue to rest with the Organization. On this record, the Organization has not met this burden. Thus, the Carrier has met its obligations under the Note to Rule 55 and Appendix Y, except for the placement of #20 switch and panels at mile post 103.20 of the Orin Subdivision that were not covered in the Carrier's notice.

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 on August 22, 2013, by a foreman, four group 2 operators, and a laborer placing a #20 switch and panels at mile post 103.20 on the Orin Subdivision. Thus, the Claimants shall each receive 8 hours of straight time at their appropriate rates of pay.

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.