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

Award No. 43667
Docket No. MW-42941
19-3-NRAB-00003-150058

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 (Greentree Transportation) to perform Maintenance of Way and Structures Department work hauling equipment (push carts and flood lights) from Orchard Farm, Missouri, Line Segment 14 to Galesburg, Illinois on August 12, 2013 (System File C-13-C100-383/10-13-0670 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 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 R. Jarvis and M. Semande shall each now be compensated for eight (8) hours straight time and two (2) 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 outside contractors to transport push carts and flood lights assigned to Regional System Tie Production Gang TP-09 from Orchard Farm, Missouri, to Galesburg, Illinois, on August 12, 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 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 work performed by the contractor on August 12, 2013, was work involving the hauling of Carrier equipment 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. 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 use "contract flatbed trucks and trailers to *supplement* our lowboy service." (emphasis supplied). Thus, the Organization has established that the work at issue is customarily performed by its members.

The Carrier also argues that the Organization did not prove that the disputed work was performed by the contractors. The initial claim letter put the Carrier on notice of the disputed work. Specifically, that letter named the contractor, the number of trailers used by the contractor, the dates the contractor was alleged to have moved the Carrier's equipment, the number and types of the Carrier's equipment moved, and the locations where the equipment was picked up and delivered. In the Organization's appeal of the Carrier's denial, the Organization repeated the specifics of its claim, and it added the production gang that the Carrier's equipment was assigned to and the number of hours worked by the contractor's employees. This information provided by the Carrier was sufficient for it to review its records and determine whether this work occurred as claimed by the Organization. The Carrier did not deny that this work took place. The Organization also introduced a statement from one of the Claimants that supports the allegations. On this record, the

Organization has met its burden to establish that the work at issue occurred as alleged.

After the Organization has met its initial burden, as it has done here, the Carrier may defeat the claim by showing that the Carrier met the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. See Third Division Awards 32320, 39685 and PLB 2206 Award 57. The Note to Rule 55 and Appendix Y address the elements to be included in the Carrier's notice of intent to contract. Specifically, the Note to Rule 55 states that work may only be contracted for certain identified reasons, and the requirement to provide notice occurs "[i]n the event the Company plans to contract out work because of one of the criteria described herein." Further, Appendix Y requires that advance notices of subcontracting "identify the work to be contacted and the reasons therefor." Failure to provide a notice or an adequate notice is grounds to sustain the claim because it frustrates the process of discussions contemplated by the notification language. See Third Division Awards 31280, 32862, 34216 and 36015.

In the case, the Carrier provided a notice to the Organization on December 17, 2012, stating, in relevant part:

> **"As information, BNSF plans to continue the ongoing program of using contract flatbed trucks and trailers to supplement our lowboy service. The trucks and trailers will be used to haul various roadway machines, vehicles and Gang support trailers throughout the BNSF system in 2013 for Region/System, Division and Sickles gangs, on an as needed basis per the attached 2013 RSG work program. This schedule is subject to change without notice.**
>
> **This letter is intended to inform you of our trackwork programs, and keep you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between BNSF and the BMWED.**
>
> **Attached is the tentative 2013 system gang schedule. Obviously, this schedule is subject to change as the work season progresses.**

> **If you would like to confer on this issue, I can meet with you in our Forth Worth offices on Thursday December 27, 2012 starting at 9:30 am."**

The Organization argued that this notice was inadequate because it did not provide (1) any contractually valid reason for contracting out the work involved; (2) the specific dates that the work would be performed; (3) a full description of the work to be contracted; (4) the length of time the work was expected to take; and (5) the number of contractor employees to be utilized in the performance of the work.

In the Carrier's December 17, 2012 notice, it did not identify any of the specific reasons in the Note to Rule 55 that may justify contracting. The reason given in the notice is to "supplement our lowboy service," but that alone is not a contractual justification. In the Carrier's declination of appeal, it argued that its notice was the same type of system notice that had been issued for many years, but it did not provide any evidence in support of that argument, not did it make that argument in its submission. The Carrier also cited to Pubic Law Board 4768, Award 21, for the proposition that the issue of particularity in its system-wide notices has been resolved in its favor. A review of that award shows that the Carrier had identified the "special equipment not owned by the Company" reason for the contracting and was able to establish the basis for that exception on property. The notice in this case does not identify a reason to justify contracting under the Note to Rule 55, and the Carrier did not submit any evidence that would support any contractual justification. On this record, the claim 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 Organization seeks to have Claimants R. Jarvis and M. Semande compensated for eight (8) hours straight time and two (2) hours overtime at their respective rates of pay. This remedy is supported by the evidence about the number of hours worked by the contractor's employees.

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.