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

**Award No. 44255**
**Docket No. MW-43424**
**20-3-NRAB-00003-200405**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division -**
**(IBT Rail Conference**
**PARTIES TO DISPUTE: (**
**(BNSF Railway Company (Former Burlington Northern**
**(Railroad 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 Structures Department work (remove and replace a track switch) at the Rip track switch in Williston, North Dakota on the Glasgow Subdivision, Montana Division on August 20, 2014 (System File T-D-4525-E/11-15-0110).**

**(2) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove and replace a track switch) at the Red River switch in Williston, North Dakota on the Glasgow Subdivision, Montana Division on August 21, 2014 (System File T-D-4528-E/11-15-0113).**

**(3) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification of its intent to contract out the work referred to in Parts (1) and/or (2) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 55 and Appendix Y.**

**(4) As a consequence of the violations referred to in Parts (1) and/or (3)**

**above, Claimants T. Brandt, D. Jacobson, S. Szymanski, W. Oyloe, C. Gable, G. Nybakken, M. Regalado, J. Reagor, T. Rakes, R. Thilmony, D. Petroff, K. Burch, T. Vandall, T. Rudolph and R. Najar shall each '*** receive eight (8) straight time hours and six (6) overtime hours as worked by the contract (sic) employees, with pay to be at their respective rates of pay.'**

**(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants T. Brandt, D. Jacobson, S. Szymanski, W. Oyloe, C. Gable, G. Nybakken, M. Regalado, J. Reagor, T. Rakes, R. Thilmony, D. Petroff, K. Burch, T. Vandall, T. Rudolph and R. Najar shall each '*** receive eight (8) straight time hours and six (6) overtime hours as worked by the contract (sic) employees, with pay to be 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.**

**On March 19, 2014 the Carrier sent a note "of its plans to contract for additional dirt and track work on both the Glasgow Sub-Division and in Gavot Yard located in Minot, N.D."[1] The notice continued in relevant part as follows:**

**"BNSF outlines the reasons for contracting—not adequately equipped for projects of this magnitude which require both specialized equipment not possessed by BNSF forces and specialized skills not**

**[1] The March 19, 2014 notice referenced four (4) previous notices, none included in the record.**

> **possessed by BNSF employees. The contractor will be using necessary specialized equipment, such as scrapers, GPS equipped graders, rollers, compactors, dozers, loaders, blades, off-track cranes, pile-drivers, barges, as well as front- end loaders, dump trucks, water trucks, and track-hoes (excavators) necessary to perform this volume of bridge and dirt work."**

**The notice also included the information that on the Glasgow Sub, crossing, turnout and bridge panel renewals would take place at MPs 121.2, 121.7, 121.9 and other MPs up to 262.1, with work to include: "necessary sub-grade prep; necessary clear/grub; excavate/build-up/compact switch pads; furnish/haul/unload necessary sub-ballast and ballast; synchronized pick/place of crossing, bridge, and turnout plants (including leading trailing track panels); and debris removal." A conference took place at the Organization's request, but no accord was reached and the Carrier contracted the now-disputed work.**

**The record includes two claims that have been consolidated for this arbitration. Regarding the first claim, the names of nine (9) witnesses are listed on a claim information sheet stating that on August 20, 2014 a contractor, R. J. Corman, used four (4) excavators, three (3) front-end loaders a grader and a bobcat involving three (3) Foremen, eight (8) in various Group 2 position equivalents and three (3) Laborers. The work, removing and replacing the Rip track switch, was said to have taken place at MP 121.3, although the work was actually done at 121.1, Regarding the second claim, the record contains a handwritten statement from Wes Oyloe that on August 21, 2014 he witnessed R. J. Corman employees replace a #11 switch at MP 121.8. Description of the machinery and manpower used, as well as the fifteen (15) hours taken to complete the work, duplicated information provided about the previous day's work.**

**Consequently, on October 23, 2014 timely claims were filed for each of the two days. The claims were properly progressed on the property without resolution and were referred to the National Railroad Adjustment Board for final adjudication.**

**The Organization asserts that the claim should be sustained as the disputed work is Scope work customarily performed by Maintenance of Way forces and reserved to these forces by the Note to Rule 55 and Rule 55 itself. The Note to Rule 55 and appendix Y were violated because the Carrier did not notify the General Chairman in advance of the intent to assign outside forces. Even if the Carrier**

**believed special skills and equipment were unavailable, or that it was not adequately equipped to handle the work or there was an emergency time requirement, the notice requirement still existed. The March 19, 2014 notice was deficient because it did not identify the work to be contracted. No good faith effort has been made to reduce contracting and increase the use of Maintenance of Way forces.**

**The Carrier's defenses are invalid, and should not even be considered due to the deficient notice. The Carrier has not maintained an adequate work force. The Bakken Shale boom began in 2008, giving the Carrier sufficient time to plan for necessary expansion. The Organization has made a *prima facie* case that the contracted work was performed. Abundant prior awards have stated that Appendix Y is applicable on the BNSF property, including PLB No. 4768, Award No. 1 (Referee Marx). Also, abundant awards reject the Carrier's exclusivity defense in favor of the need to show that the work in question has been customarily performed by Maintenance of Way forces. The Claimants' unavailability occurred only because the Carrier had assigned them elsewhere, never attempting to schedule its own forces to perform the work. There is no need to dismiss the claims, as the facts are not in dispute. The requested remedy is appropriate to make the Claimants whole for lost work opportunities and to protect the integrity of the Agreement. While there were Claimants on leave on the days the disputed work was performed, it is well settled that the Organization is allowed to specify the Claimants.**

**The Carrier insists that the claim must be denied because the dispute is controlled by prior on-property awards that, as a generality, have found that the Carrier does not have "to piecemeal out small portions of more complex projects simply because its own employees might occasionally perform some of these peripheral work items in isolation." The disputed work was contracted out because the Carrier had neither the manpower nor the equipment to perform the work. Moreover, the Organization has not proved that the work was reserved to Maintenance of Way forces. The Scope Rule is a general rule, and that requires that the Organization show that the disputed work is performed exclusively by the represented employees, which the Organization has failed to do. Ultimately, the parties dispute the facts, requiring that the Board dismiss the case or rule against the moving party. Additionally, the Organization has not met its burden of providing probative evidence to support the claim. There has not been a violation of Appendix Y, which does not restrict contracting out and is not applicable without proof that the disputed work is reserved to Maintenance of Way forces. In fact, Appendix Y does not even apply on BNSF property. Were the claim to be sustained,**

**the Organization has not shown damages as the Claimants were fully employed, to include overtime work, during the claim period.**

**The consolidated claims considered herein represent simply another instance in what over the past three years has become a plethora of claims arising out of what the Carrier characterizes as large-scale capacity expansion work spawned by the 2008 Bakken Shale discovery. That said, the analytical framework below is much the same for all contracting cases.**

**The Organization bears the burden of proof in contracting cases and, consequently, must show that the disputed work has been performed by Maintenance of Way forces such that with certain exceptions the work should have been assigned to Carrier forces. The Organization and the Carrier continue to dispute whether the showing must be that the work was customarily, traditionally and historically performed by Maintenance of Way forces as the Organization contends or performed exclusively, system-wide as the Carrier contends. The analysis concluding that customarily rather than exclusively applies has been set forth in other awards and will not be repeated here. Despite the existence of earlier awards that have adopted the exclusive, system-wide approach, at this time there is continuing agreement in on-property awards, including awards in which contracting claims have been denied, that "customarily" is the proper level at which the Organization must show that the disputed work falls under Rule 1 Scope which, as the Carrier notes, is a general Scope Rule. Third Division Awards 43662, 43566, 43966, 40563, 20338, PLB 4402, Award 20, PLB 4768, Award 1.**

**If the Organization shows that it has customarily performed the disputed work, then it must show that the work was contracted to outside forces. If this element of the burden of proof is met, the Organization will have established a *prima facie* case that shifts the burden of proof to the Carrier. Not only must the Carrier show that a notice of intent to contract was issued to the Organization a minimum of fifteen (15) days before the work was to have commenced, but also the Carrier must show that the notice included reasonable specifics about the work to be performed, the location where the work would be performed and the approximate time frame in which the work would take place. "Emergency time requirements" allow the Carrier to contract with outside forces without providing the notice. Exceptions that do not waive the notice requirements, but ultimately allow the Carrier to contract the work are found in the Note to Rule 55 that reads in relevant part as follows**

> **". . . such work may be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the company, or special material available only when applied or installed through the supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."**

**Moreover, the December 11, 1981 Letter of Agreement, the Berge-Hopkins letter often referred to as Appendix A, contains additional requirements to be met by the Carrier, including notice requirements, as set forth below:**

> **"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.**
>
> **The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."**

**Even if the Carrier can show that over time, both Maintenance of Way and outside forces, or even another craft, have performed the disputed work—a mixed practice—the Carrier is obligated to provide a proper notice and to conference about the notice if requested.**

**If the Organization can show that the work performed by outside forces was not identified in the notice or that the work was performed by outside forces without the special skills and/or the special equipment that the Carrier stated was lacking, then it is possible that the notice will be found defective and the Organization's claim will be sustained.**

**The Organization relies on Appendix Y in contract cases, while the Carrier asserts that not only does the Appendix not preclude subcontracting, but also it does not apply on BNSF property. Like the "customarily-exclusively" dispute, the Appendix Y dispute has been resolved by a series of on-property awards that include Appendix Y in the Board's analysis. Third Division Awards 39685, 40563, 40670, 40798, PLB 6204, Award 33.**

**The third dispute in this analytical framework involves the award in cases where the claim has been sustained. The Carrier insists that damages are not appropriate because the Claimants were fully employed, possibly including overtime, at times relevant. Conversely, the Organization contends that even when Claimants are fully employed or on approved leave, damages are appropriate because the Claimants have lost work opportunities and in order to protect the integrity of the Agreement since a violation should not go without a remedy. Moreover, the Organization contends that it has the right to name the Claimant(s) who will benefit from a sustaining award. The Board finds that this dispute has been resolved by a series of on-property sustaining awards where damages, including overtime payments, have been ordered, although damages may vary as to whether overtime is included and whether particular circumstances may affect some Claimants. Third Division Awards 40677, 37470, 40567, 40563, 40798.**

**Turning to the claim at hand, the Organization has proved that removing and replacing track switches is work that has been consistently performed by Maintenance of Way forces in the Track Sub-Department. Rule 55 Classification of Work establishes classifications relevant to repair and maintenance of switches. The Carrier has not contended that the removal and replacement of track switches is not Maintenance of Way work, but has contended on the property that the work has not been done exclusively, system-wide by Maintenance of Way forces. Noted above are the witness statements that provide details about the men and equipment used and the hours expended on August 20 and 21, 2014. The Carrier has acknowledged that outside forces performed the work. The Organization has provided a *prima facie* case that shifts the burden of proof to the Carrier to show the promulgation of a proper notice of intent to contract.**

**Although the Organization contends that the Carrier failed to provide advance notice, the record shows that the notice dated March 19, 2014 was provided, with that notice specifying the location of the work, the work to include "crossing, turnout, and bridge panel renewals" and the window (April 6-December 31, 2014) during which the work would take place. In its submission, the**

**Organization wrote, "Moreover, during the contracting conference, the Carrier failed to prove any contractually valid reasons for assigning the work to a contractor . . . (Board emphasis). The Organization has acknowledged that the conference occurred.**

**The Board notes the Organization's contention that the work performed ultimately did not involve special skills or equipment as set forth in the notice, but in this particular case sees no need to consider that contention. The notice referred to the "tremendous growth in freight volume due to the recently discovered oil and gas reserves known as the Bakken Shale . . ." In both on-property declinations, the Carrier pointed to the capital expansion and stated that it was not "adequately equipped for projects of this magnitude . . ." There is abundant on-property precedent for denying many of the claims stemming from the use of outside forces for large capacity expansion projects even if the disputed work was within Maintenance of Way skill sets and BNSF owned or could lease necessary equipment. In on-property Third Division Award 41223, the Board stated in denying that claim that:**

> **". . . The Carrier determines the size of its work force, which should be adequate for routine track work and maintenance. But periodically, the Carrier will engage in large construction projects requiring an even larger investment of resources (both labor and equipment). Typically, these projects will be either for capacity expansion or major renovation of existing facilities. The Carrier simply does not have the existing manpower and equipment to complete such projects in a timely fashion. Whether the Board concludes, as did Referee Marx in Public Law Board No. 4768, Award 22, that the work is not "customarily performed" by Carrier forces (in which case the Note to Rule 55 does not apply) or that the work is of the type "customarily performed" but that the Carrier is "not adequately equipped to handle the work (one of the exceptions to the Note to Rule 55's strictures against contracting) the end result is the same—the claim will be denied. . ."**

**See also Third Division on-property awards 37433, 41222, 37434, 38383, 43662, 43341, 43346.**

**Because the contracted work, removing and replacing track switches, was work that the Carrier was "not adequately equipped to handle," it is an exception to the Note to Rule 55 and not contrary to Appendix Y.**

## AWARD

**Claim denied.**

## ORDER

**This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD**
**By Order of Third Division**

**Dated at Chicago, Illinois, this 23rd day of October 2020.**