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

Award No. 44256
Docket No. MW-43425
20-3-NRAB-00003-200406

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 (Fenton Construction Inc.) to perform Maintenance of Way and Structures Department work (haul equipment) to and from various locations on the Twin Cities Division on August 15, 16 and 17, 2014 (System File T-D-4518-M/11-15-0085 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification 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) The claim* as appealed by General Chairman Carroll on February 3, 2015 to General Director Labor Relations W. Osborn shall be allowed as presented because said appeal was not disallowed by Director Labor Relations W. Osborn in accordance with Rule 42.

(4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, Claimants W. Thompson, E. Bartle and L. Aichele shall each '* receive thirty-six (36) hours, with pay to be at the employes (sic) respective overtime rate of pay.'**

***The initial letter of claim will be reproduced within our submission."**

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 December 17, 2013 the Carrier sent notice to three (3) General Chairman and one (1) General Chairwoman that:

> **". . . BNSF plans to continue the ongoing program of using contract flatbed trucks and trailers to supplement our lowboy service. These 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 2014 RSG work program. This schedule is subject to change without notice."**

A contracting conference did not produce agreement and the Carrier contracted with Fenton Construction, Inc. "to haul a speed swing from Granite Falls, MN to Sioux Falls, SD and haul a loader from Granit (sic) Falls, MN to Doone, IA and then back from Doone, IA to Granite Falls the next day." The above-noted, timely claim was filed as a result, progressed on the property without resolution and referred to the National Railroad adjustment Board for final adjudication.

The Organization asserts that the Claim should be sustained solely because Rule 42 was violated when the Carrier response from General Director Labor Relations Heenan was received more than sixty (60) days after the Carrier received General Chairman Carroll's appeal. This was never denied by the Carrier. 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 December 17, 2012 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 be denied, finding the Organization's time limits allegation to be "absurd" because the Carrier's response was mailed fifty-eight (58) days after it received the Organization's appeal. Both parties have always adhered to the Mailbox Rule to determine timeliness. Moreover, the Organization has failed to meet the burden of proof that is theirs as the moving party. The Scope Rule does not reserve the disputed work to Maintenance of Way forces; therefore,

the Organization must show that its members have exclusively performed the work system-wide. It has not shown this. At best, the record shows a mixed practice that does not exclude contracting out.

Neither Rule 55 nor Appendix Y have been violated. Appendix Y does not apply on BNSF property and, in any event, would not apply without proof that the disputed work is reserved to the Organization's members. Should the claim be sustained, no damages are due as the Claimants were fully employed on the relevant dates. Furthermore, Claimant Bartle was working as a Sectionman 400 miles away and Claimants Bartle and Aichele were on vacation on August 15, 2014. Claimant Aichele, governed by Department of Transportation regulations, would not have had the hours available to perform the disputed work on August 16, 2014. The Organization has provided no proof of out-of-pocket expenses.

Consideration of the claim begins with the procedural issue surrounding Rule 42 Time Limits on Claims, with the relevant language below.

> **"A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company to other similar claims or grievances."**

The Organization filed a timely claim on October 13, 2014, with the Carrier's timely declination dated December 9, 2014 and received by the Organization within sixty (60) days. The Organization's timely appeal from the declination was dated February 3, 2015 and received by the Carrier the following day. The Carrier's declination of the appeal was dated April 2, 2015 and was received by the Organization on April 6, 2015. The dates set forth above are not in dispute. The

Organization raised the Rule 42 issue during the June 23, 2015 claims conference, which was the first opportunity to do so on the property.

This Board must now consider the requirement inherent in the word "notify." Relying on the "mailbox rule," the Carrier insists that notify refers to the date the declination was placed in the mail, while the Organization contends that notify refers to a receipt date. Third Division Award 32727, included with the Carrier's submission, is not useful in clarifying the matter because the award does not include the language of Rule 42, relevant in that case, and because neither BNSF nor the Organization were involved. On-property Third Division Award 41162, also provided with the Carrier's submission, also does not provide clarity for this Board. Rule 42.A speaks to two unique actions: the presentation of a claim by the Organization and notification of the declination of a claim by the Carrier. The award in Third Division 41162 applies the "mailbox rule" to the presentation of a claim but is silent on the meaning of notify when a claim is disallowed.

Third Division Award 37842, an on-property award provided by the Organization, concerns a situation where the Carrier's declination of the claim was received sixty-three (63) days after the Carrier had received the claim. However, the claim was sustained not because of the date the declination was received, but because the Carrier could not show the date on which the declination was mailed. Again, the award provides no clarity where the meaning of notify is disputed. Third Division Award 37811, also an on-property award submitted by the Organization, is "on all fours" and is deemed precedential. In that case, the notice of a disallowed claim was mailed on the 60th day after receipt of the claim and was received by the Organization on day sixty-one (61) or sixty-two (62) according to that award. The Board found a violation based on the date the declination was received. There is no more recent on-property award in the record that reverses the precedent set in Third Division Award 37811. Rules 42 requires that "the claim or grievance shall be allowed as presented." Therefore, consideration of the claim based on the merits is moot.

The Board is aware that the Carrier believes that no damages are due because the Claimants were fully employed during the August 15-17, 2014 period and because no proof of out-of-pocket expenses has been shown. In addition, special circumstances set forth above should impact the eligibility of Claimants Bartle and Aichele for damages. The Organization insists that damages are appropriate to

compensate for lost work opportunities and to protect the integrity of the Agreement since a violation should not go unremedied. The Organization further asserts that it has the right to name the Claimants in a given case. After consideration, the Board believes that the contentions of the parties relating to damages are moot because of the language of Rule 42.A, which requires that if the Organization "is not so notified, the claim or grievance shall be allowed as presented." The Board can neither ignore nor rewrite the unambiguous language of the Agreement.

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 23rd day of October 2020.