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

Award No. 44257
Docket No. MW-43474
20-3-NRAB-00003-200407

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 (Belknap Plumbing & Heating) to perform Maintenance of Way and Structures Department work (installation of duct work, gas piping, water piping, plumbing and related work) in the New Office Building, Lunch Room, Locker Room and at the Allouez Taconite Facility in Superior, Wisconsin on the Twin Cities Division beginning on September 5, 2014 through September 30, 2014 (System File T-D-4541-M/11-15-0139 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding 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 the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and (2) above, Claimants D. Tollers, S. Stariha, B. Hartwig, D. Nelson and J, Bartczak shall each be compensated for '… two hundred

sixteen (216) hours with pay to be at his respective overtime rate 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.

By letters dated August 20, 2012, August 25, 2012, February 19, 2013, and September 12, 2013 the Carrier sent an original and amended notices to General Chairman Glover pertaining to work to be done at the Allouez Taconite Facility in Superior WI. None of these notices referenced the work that was the subject of the above-noted claim. On November 1, 2013 the Carrier sent a notice to IBEW General Chairman Doyle of its intent to contract work to be done at the Allouez and Auburn, WA facilities. Relevant to the claim considered herein is the following description of work to be contracted: "Install plumbing, electrical, insulation, HVAC systems, drywall, fencing." A witness statement by Claimant David Tollers, dated September 26, 2014, indicated that the outside forces installed four (4) HVAC units in the new office building, lunch room and locker room and that the work included the installation of "all gas piping, water piping, water heaters, showers, sinks, toilets, drains, air exchanger and duct work." Accompany this statement was Claimant Tollers' written assertion that he has been in the Water Service Department for thirty-six (36) years and has performed similar work "throughout the system." The Carrier's submission states that a contracting conference was held with no agreement reached. The Organization filed a timely claim that was properly progressed on the property without resolution and thereafter referred to the National Railroad Adjustment Board for final adjudication.

The Organization asserts that the claim should be sustained because the Carrier contracted Scope Work shown to have been reserved to and customarily and historically performed by Maintenance of Way forces. Even if the Carrier believed that an exception allowing contracting existed, it was obligated to provide an appropriately detailed notice of the intent to contract and to conference about the work if requested. The four notices relied on by the Carrier did not mention the disputed work, nor did the Carrier prove that the work was governed by the IBEW/BNSF Agreement. The Carrier did not make a good-faith effort to reduce contracting and increase the use of Maintenance of Way forces.

The Carriers' affirmative defenses should be rejected because no proper notice was given. The Organization has shown that Maintenance of Way forces had the necessary skills, have performed the disputed work and that special licensing was unnecessary. The Carrier has failed to maintain an adequate work force and cannot rely on a lack of proper planning. The Organization has made a *prima facie* case by detailing the work performed as well as dates and location. Appendix Y applies. The Carrier's "exclusivity" defense has been rejected off and on the property in favor of a showing that the disputed work has been customarily performed. The Claimants were unavailable only because the Carrier assigned them elsewhere. The Carrier has a duty to properly staff and is not being asked to piecemeal the project. There is no dispute about the facts that would require the claim to be dismissed or to be denied. A remedy is proper as compensation for missed work opportunities and to protect the integrity of the Agreement. The status of the Claimants is irrelevant as the Organization has the prerogative to name the Claimants and there is no showing that any Claimant's time off would have affected the total hours.

The Carrier insists that the claim should be denied because arbitral precedent rejects attempts to piecemeal smaller parts of larger projects, even when Maintenance of Way forces "might occasionally perform some of these peripheral work items in isolation." As the moving party, the Organization has the burden of proof, which it has failed to meet. The disputed work requires special licenses to perform. 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. The Organization has not shown that any of the Claimants suffered out-of-pocket expenses.

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 persuasive 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 Y, contains additional requirements to be met by the Carrier, include 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 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. This 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.

The Bridge and Building Sub-Department includes the classifications of Water Service Foreman, Water Service Mechanic or Pump Repairer, Plumbers, Steamfitters and Pipefitters. Rule 55 Classification of Work describes the work of Water Service Mechanic—Pump Repairer as follows: "An employee skilled in and assigned to repair pumps, pipe lines, or any other work in connection with the maintenance of water or fuel supplies or steam heating plants, including the bending, fitting, cutting or threading of pipe in connection with pipe work. . ." The record includes Claimant Tollers' statement that he has done the disputed work. The Carrier has not disputed these indications that the claim involves work that Maintenance of Way forces have done, but defends against the claim by the

assertion that its own forces did not have the necessary licenses and that the Organization has not shown that the Bridge and Building Sub-Department forces have performed the work exclusively, system-wide. As noted above, the "exclusivity" defense has, in essence, been run off the property. While the Carrier has not shown that this work has previously been subcontracted, because the Board finds the disputed work to have been customarily performed by Bridge and Building forces, the Organization has proved the first element of its *prima facie* case.

The Organization also has proved the second element of its *prima facie* case—that outside forces performed the disputed work. While Claimant Tollers' primary witness statement does not mention the number of hours or the specific number of outside forces involved, the statement specifies the subcontractor, the work done, the location and the dates involved. The Carrier has acknowledged that the work was performed by outside forces.

Because the Organization has successfully presented a *prima facie* case, the burden of proof shifts to the Carrier to show that it has complied with the Note to Rule 55 and Appendix Y. The Note to Rule 55 requires a minimum of fifteen (15) days' notice of intent to contract with reasonable specifics about the work to be contracted, the location where the work will be performed, equipment to be used, if relevant, and the approximate time frame involved. There are exceptions that will allow subcontracting, but only after notice has been given and conferenced, assuming the Organization requests a conference. The notice may be waived only if emergency time requirements exist. A mixed practice does not allow waiver of the notice.

The notices issued on August 20 and 25, 2012 and February 19 and September 12, 2013 contained no mention of the disputed work. The only notice of intent to contract the work set forth in Claimant Tollers' witness statement is dated November 1, 2013 and was sent to the General Chairman of the IBEW, but not to the Organization. In the on-property correspondence, the Organization asserted that there was no conference over this work because there was no notice. The assertion was not disputed on the property.

Appendix Y speaks not only of the Carriers' assurance that "they will assert good faith efforts to reduce the incidence of subcontracting and increase the use of the maintenance of way forces to the extent practicable . ." but also affirms "the

intent . . . that advance notice requirements be strictly adhered to." Failure to provide the notice deprived the Organization of the opportunity to convince the Carrier that its own forces could do the work or alternatively, to be shown proof that the licensing requirement precluded the assignment to Bridge and Building Sub-Department forces. The Carrier's failure to provide the notice violated the Note to Rule 55 and Appendix Y. That violation makes any consideration by this Board of the licensing requirement moot.

Damages are due consistent with the framework set forth above as it pertains to remedies. The Board rejects the Organization's request that damages be set entirely at overtime rates. Damages are to be figured as though Building and Bridge Sub-Department forces were assigned full-time so that for each day that was worked, the first eight (8) hours are to result in damages at the straight-time rate and work thereafter on that day is to result in damages at the overtime rate. An exception will be for days such as rest days when all work would be paid for at overtime rates. The Carrier is to document the days that were involved and the hours worked on each of these days so that proper damages can be paid.

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.