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

Award No. 44258
Docket No. MW-43475
20-3-NRAB-00003-200408

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference**
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(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 (Ferrosafe LLC) to perform Maintenance of Way and Structures Department work (brush and vegetation removal) from under and around bridge at various locations within the Twin Cities Division beginning on September 8, 2014 and continuing (System File T-D-4544-M/11-15-0142 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 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/or (2) above, Claimants C. McClusky, D. Smith, L. Enze, T. Tobin, J. Barr, T. Williams, T. Koch, M. Wilson, K. Borg, J. Lindenberg, C. Flatten, J. Lockwood and R. Harris shall each be compensated for '… an equal and proportional amount of the hours worked by the contractor, with pay to be at their 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 letter dated August 30, 2013 the Carrier provided notice to General Chairwoman Moody-Gilbert and General Chairmen Marquart and Glover that BNSF planned "to contract for additional heavy equipment with operators, to perform the necessary bridge vegetation removal and herbicide application programs at various locations on the BNSF System. Necessary equipment was to include "hy-rail excavators, (track-hoe) excavators with attachments, bucket trucks, dozers, weed-mowing equipment, boom-equipped man lifts, and shredder/clippers." The notice stated that the Carrier did not possess the necessary specialized equipment or forces with the necessary skills to apply regulated herbicides that had to "be applied by commercially licensed applicators in compliance with applicable state and federal regulations." The Carrier estimated that the work would begin on or about September 16, 2013. The Carrier's submission confirms that a contracting conference took place with no agreement reached. A witness statement by Mr. Matt Wilson, dated October 17, 2014, indicates that between October 6-10, 2014 he provided flagging duties for Ferrosafe employees at fifteen (15) different locations, where the contractor's employees "used their smaller chainsaws to cut trees and bushes smaller than 10" in diameter. They also sprayed them with herbicide." The Organization filed the above-noted timely claim that was properly 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 because the disputed work is Scope covered and historically performed by Maintenance of Way forces using chain saws and hand tools, etc. The Carrier was required to give notice of intent to contract even if it believed that an exception existed. The notice sent to the Organization did not identify the disputed work or the use of hand tools and ordinary chemicals. The Carrier has not made a good-faith effort to reduce the use of

contractors and increase the use of Maintenance of Way forces. The work required no specialized equipment.

The Carrier's affirmative defenses are invalid and should be rejected outright because the notice was improper. Traditional Maintenance of Way work was performed with tools in the Carrier's inventory or available through rental/lease. Only Round-Up was used as an herbicide. The contractor work emulated a long-time practice performed by Carrier forces. The Carrier has a responsibility to adequately staff so that work can be performed by its own forces. The Organization has presented a *prima facie* case and the Carrier has not denied that the contractor performed the disputed work. Appendix Y is applicable. The Carrier's exclusivity doctrine has been rejected in favor of the need to show that the work has been customarily and historically done by Maintenance of Way forces. If Claimants were unavailable, it was only because the Carrier had assigned them elsewhere. This case does not contain a factual dispute that would require the Board to dismiss or deny the claim. A remedy is appropriate as compensation for the missed work opportunity and to protect the integrity of the Agreement. The Carrier has not shown that rescheduling the work was impossible. The Organization has the right to name the Claimants.

The Carrier insists that the claim should be denied as "Arbitral precedent has consistently held that vegetation control when accompanied by the contemporaneous application of restricted-use herbicides is work not customarily performed by Company employees and can be contracted out." The Carrier does not employ the required, commercially licensed applicators. Even if the disputed work is part of a mixed practice, the Carrier has the right to contract out. It does not need to piecemeal smaller parts of large projects.

The Organization has not met its burden of proof as there is no evidence that the disputed work was performed other than a "self-serving" statement from Claimant Wilson, dated five (5) months after the work was supposedly performed. Assuming the work was performed, this is simply a factual dispute that the Board must dismiss or deny. The Organization has not shown how Rules 1, 2, 55 or the Note to Rule 55 reserve the disputed work to Maintenance of Way forces. Furthermore, the Organization has not shown that Maintenance of Way forces have performed the work exclusively, system-wide so that past practice would reserve the work for them. Nor has the Organization shown that it has even customarily performed the work.

The Organization has not explained the charge that the Carrier failed to provide notice of intent to contract. And, the Organization cannot rely on Appendix Y. If Appendix Y is applicable, and it is not on BNSF property, it is only after a showing that

the disputed work is reserved to Maintenance of Way forces. Finally, no damages are due because the Claimants were fully employed, including overtime, during the claim period. Nor has the Organization shown that out-of-pocket expenses were incurred.

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 provided 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, 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 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 the 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.

Statements in the record as well as on-property Third Division Awards 43148 and 43265 establish that Maintenance of Way forces have cleared brush and trees in the past. The record also establishes that this work has been contracted out in the past, thus there is a mixed practice. The mixed practice does not eliminate the requirement to notify the Organization if the Carrier intends to contract out the work, as Appendix Y contains the commitment to decrease contracting out and increase the use of Carrier forces when practicable. Mr. Matt Wilson's statement details the dates, locations and tools involved as well as the work outside forces performed.

As the Organization has provided a *prima facie* case, the Carrier was obligated to issue the notice of intent, which it did on August 30, 2013, to General Chairman Carroll and others. The Carrier's submission indicates that a contracting conference was held, and obviously no agreement was reached. Mr. Wilson's statement that no special equipment was used is accepted as accurate but is not determinative. Mr. Wilson mentioned the use of an "herbicide," but did not identify Roundup as the herbicide used. However, in General Chairman Carroll's December 9, 2015 letter to General Director Heenan confirming the June 23, 2015 claims conference, Mr. Carroll writes: "Claimant Matt Wilson, . . .has advised that the chemical used at limited locations, only on the stumps of tree in excess of six inches, was advised by subcontract employee Paul Cross, during required job safety briefings that the chemical was a form of Roundup, a non-restricted herbicide." The report by the Claimant of use of a "form of Roundup" which was relayed from one of the contracted forces, but not included in Mr. Wilson's written statement, does not rise to the level of substantial evidence and must be considered an assertion supported by hearsay, which equates to an unsupported assertion. In the notice of intent to contract, the Carrier wrote, in relevant part, that its own forces did not have the skills to apply regulated herbicides that had to "be applied by commercially licensed applicators in compliance with applicable state and federal regulations." That the herbicides may have been applied with small hand

pumps and inconsistently does not establish that a non-regulated herbicide was used. Because the Organization has not shown that the Carrier forces have the necessary licenses, the work done falls under the "special skills" exception and was properly contracted out.

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.