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

Award No. 44259
Docket No. MW-43476
20-3-NRAB-00003-200409

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 (RJ Corman and Lakeside Construction) to perform Maintenance of Way and Structures Department work (load, haul and unload plates) from Larimore and Hillsboro, North Dakota to Minot and Berthold, North Dakota on the Twin Cities Division and Montana Division on August 28, 2014 through September 5, 2014 (System File T-D-4534-M/11-15-0119 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) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. Pippin, D. Burt, G. Pladson, G. Billie, J. Footh, L. Viall and S. McMahon shall each be compensated for '… one hundred twelve (112) hours overtime, with pay to be a (sic) claimant's 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 June 5, 2013, the Carrier informed the General Chairman of its intent to contract out work said to be part of a large capital expansion related to the Bakken Shale discovery. The Carrier explained that it had neither the necessary equipment nor the qualified employees to perform the work. The notice stated that among the locations where work would be done was the Glasgow Sub, with mileposts 30-62, 82-94 specified for 2013 and mileposts 14-30, 62-82 and 94-115 specified for 2014. Particularly relevant is the inclusion in the notice of work "unloading/placement turnout, track and OTM components. . ." The project as a whole was to begin on or about June 21, 2013 with completion by December 31, 2015. The parties discussed the intent to contract out, but reached no agreement, resulting in the above-noted timely claim. The claim 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. The disputed work is scope work, a fact not denied by the Carrier, reserved to Maintenance of Way forces and customarily performed by these forces. Advance notice of intent to contract is required even when the Carrier believes an exception may permit contracting. The notice was defective because it was vague and did not factually apply to the disputed work, but, instead, applied to "dirtwork." The disputed work was never specifically discussed. The Carrier has not made a good-faith effort to reduce contracting and increase the use of Maintenance of Way forces.

The Carrier has not provided valid defenses, which should not be considered due to the defective notice. The Organization has presented a *prima facie* claim with a description of the work performed and the dates involved, which the Carrier has not denied. The Carrier has had adequate time to plan for the Bakken Shale boom that began in 2008. The Carrier has not adequately staffed. Appendix Y applies on the property. The Carrier's "exclusivity" defense has been rejected consistently on and off the property. The claim does not ask the Carrier to piecemeal the work, but piecemealing is not one of the exceptions listed in the Note to Rule 55. The Claimants were unavailable only because the Carrier assigned them elsewhere. The Carrier abandoned its DOT hours of work defense. A remedy is appropriate to make the Claimants whole for lost work opportunities and to protect the integrity of the Agreement. The Carrier could have rescheduled the work. The Organization has the right to name the Claimants and the request for the overtime rate is appropriate.

The Carrier asks that the claim be denied, finding that the Organization did not meet its burden of proof. The Scope Rule does not reserve the disputed work to Maintenance of Way forces and the Organization has not shown that Maintenance of Way forces have exclusively performed the work system-wide. Even if the Organization has shown that at times Maintenance of Way forces have performed similar work, at best there has been a mixed practice that opens the right to contract out. Neither Rule 55 nor Appendix Y have been violated as the Carrier's right to contract work has not been restricted, as established by prior awards. In fact, Appendix Y is not applicable on BNSF property. The disputed work was a small part of a very large project that the Carrier did not have to piecemeal.

Were the claim to be sustained, the Claimants are not entitled to damages because they suffered no monetary loss. Nor are the Claimants due damages at the overtime rate for overtime not worked. The Claimants were fully employed and have not proven out-of-pocket expenses. Claimants who were absent from work at times relevant would have been unavailable and not deserving of damages for that reason.

The claim considered herein represents 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 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, PLB4768, 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, 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 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. 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.

Turning to the instant dispute, the Board must first consider whether the claim is for work customarily and historically performed by Maintenance of Way forces. The claim noted the use of six (6) dump trucks and one (1) loader by outside forces. The Track Sub-department includes, among other classifications, Machine Operators and Truck Drivers. The description of vehicles that Truck Drivers might operate includes dump trucks. Group Two Machines include a front-end loader. The Note to Rule 55 states that employees in the Maintenance of Way and Structures Department . . . "perform work in connection with the construction and maintenance or repairs of and in conjunction with the dismantling of tracks . . ." Clearly the Agreement contemplates work by Maintenance of Way forces that is similar to that assertedly performed by the outside forces named in the claim. The Carrier has not denied that its forces have performed such work, but defends with the assertion, rejected in more recent on-property awards, that the Organization must show that Maintenance of Way forces have performed the disputed work exclusively, system wide. Assuming, *arguendo*, that at a minimum the disputed work has been part of a mixed practice, the Carrier, in order to fulfill the Appendix Y requirement that it endeavor in good faith to reduce subcontracting and increase the use of its own forces, must still provide a proper notice of the intent to contract. The record herein establishes that the work has been customarily and historically performed by employees represented by the Organization.

The Organization's claim is specific as to the work performed, the equipment used, the dates on which the work was performed, the number and types of outside

forces that were involved and the hours involved. The Carrier, possessor of the detailed records that might allow it to dispute the specifics of the claim, has not denied the use of outside forces. Instead, justification for their use has been provided: a lack of qualified forces and necessary equipment, the need for a large-scale, capacity expansion project, prior awards establishing that such projects need not be piecemealed and the fact that the Note to Rule 55 and Appendix Y do not prohibit subcontracting. The record establishes the second necessary leg of a *prima facie* case; that being the proof that the disputed work was performed.

The *prima facie* case shifts the burden of proof to the Carrier to show that a proper notice of intent to contract was issued and if so, there was a proven exception, as set forth in the Note to Rule 5, that justified the contracting. Despite the Organization's assertion that no notice was issued, the record contains the June 5, 2013 notice and the Organization's letter to the Carrier summarizing from its perspective the contracting conference that was held on June 20, 2013. The record does not contain amending notices; thus, the Board can only conclude that none were issued. The notice is defective/incomplete in three ways. While the notice justifies the intent to contract because of a lack of the necessary equipment and a lack of skilled forces, the disputed work involved neither special skills nor specialized equipment so that the Carrier is left without justification relevant to the loading, hauling and unloading of plates. Also, the notice covers an eighteen (18) month period between June 21, 2013 and December 31, 2015. That is not much better, if at all better, than an open-ended notice. Not knowing with more precision when the contracted work is likely to take place hampers any good-faith discussion about possible alternatives that would allow Maintenance of Way forces to perform the work. Finally, and most critically, while the notice mentions the need for other track materials (OTM), giving rise to a reasonable assumption that such materials would have to be delivered to various work sites, nowhere in the notice is loading, hauling and unloading of plates specified. The Board finds that the disputed work has not been identified in the June 5, 2013 notice. Language in the notice and the Organization's letter memorializing the contracting conference, places the emphasis on dirt work. The Carrier has not shown that the notice provided sufficient information about the disputed work to allow good-faith discussion of alternatives. The defective notice violates the Note to Rule 55 and Appendix Y and makes consideration of the Carrier's "large capacity expansion" and "piecemealing not required" defenses moot. See on-property Third Division Awards 43567, 43572, 43638, 43663, 43714, 43261, 43282, 43393 43629, 43633.

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. Even though the outside forces may have worked as much as fourteen hours a day, we assume that the first eight (8) hours would have been at straight-time rates. Damages are based on this assumption. Moreover, if the Carrier can document that the disputed work took fewer days and/or fewer hours per day that the Organization alleges, Carrier documentation will be used to calculate damages. The list of Claimants provided by the Organization will remain.

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.