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

Award No. 44260
Docket No. MW-43477
20-3-NRAB-00003-200410

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 (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) in connection with track work being performed at Fryburg, North Dakota on the Dickinson Subdivision between but not limited to Mile Posts 136.000 and 140.000 September 9 and 10, 2014 (System File T-D-4527-E/11-15-0112 BNR).

(2) The Agreement was further violated when the Carrier failed to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces or reach an understanding concerning such contracting as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Part (1) and/or (2) above, Claimant J. Haas shall now be compensated '… sixteen (16) hours straight time and three (3) hours overtime as worked by the contractor, with pay to be at his respective 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 13, 2013, the Carrier sent a notice to the General Chairman that in relevant part stated:

> **"The unwillingness of a sufficient number of qualified employees to accept and retain assignments as flagmen in key areas of District 200 and 300 will result in a mounting backlog of capacity expansion work that is not possible to complete without resorting to outside help. To avoid endangerment to the safe and efficient operation of freight and commuter rail traffic, to prevent projects from not being completed, and to prevent the BNSF from failing to meet both the public and our shippers needs, BNSF must act quickly on this matter."**

Included in the areas for which the Carrier proposed to contract for fifteen (15) track authority flagmen was the Dickinson Sub, mileposts 0.0 to 215.8. Work on the rail line for which flagmen would be needed was estimated to take place between July 9, 2013 and December 31, 2015. The Carrier submission states that contracting conferences were held with no agreement reached. There is no dispute that the contracted work set forth in the above-noted claim was performed. The timely claim was 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, as the disputed work has been "customarily, traditionally and historically" performed by Maintenance of Way forces. This is fundamental Maintenance of Way work reserved by Rule 55. The Carrier failed to notify the General Chairman of intent to

contract the flagging work, a violation of the Note to Rule 55 and Appendix Y. The notice requirement is not waived by the possible existence of an exception that would allow contracting out. The Carrier has not met the required good faith effort to reduce subcontracting and increase the use of Maintenance of Way forces.

The Carrier has not presented valid affirmative defenses, with the failure to provide a notice of intent to contract alone requiring a sustaining Award. The Organization's prima *facie* claim shows that the disputed flagging was performed. The Carrier has not maintained an adequate work force. There was adequate time to plan once the Bakken Shale oil boom began in 2008. The contention that Appendix Y is inapplicable is meritless as it is a binding contractual commitment to reduce contracting out and increase the use of Maintenance of Way forces. Also meritless is the Carrier's exclusivity defense. The appropriate test is whether the flagging work has been customarily performed by Maintenance of Way forces, which the Organization has conclusively demonstrated. The Claimant was unavailable only because the Carrier assigned him elsewhere. The Carrier made no effort to assign one of its own employees. A monetary remedy is appropriate to make the Claimant whole for the lost work opportunity and to protect the integrity of the Agreement.

The Carrier insists that the claim should be denied because the dispute is controlled by arbitral precedent relating to the Bakken Shale capacity expansion project and rulings that the Carrier does not have to piecemeal the project. Moreover, flagging is not Scope work reserved to and performed exclusively system-wide by Maintenance of Way forces. At best, flagging is a mixed practice that allows the work to be assigned to other than Maintenance of Way forces. The flagging work was properly contracted out in accordance with the Note to Rule 55 because the Carrier did not have the requisite Maintenance of Way forces. Arbitral precedent establishes the Carrier's right to contract the work when a mixed practice exists. At heart, the case simply involved a factual dispute that requires the Board to dismiss or deny the claim.

The Organization has not met its burden of proof as the moving party, as mere assertions do not provide the probative evidence needed to prove all elements of the claim. Appendix Y has not been violated because it is not applicable on BNSF property. If it were, the Appendix does not preclude the Carrier from contracting out. Contracting out, per se, does not indicate bad faith. The Organization has not proved damages because the Claimant was fully employed at times relevant and has not shown to have incurred out-of-pocket expenses.

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 is the appropriate measure 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 (sic), 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 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 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.

Record evidence in the form of the inclusion of Flagmen and other relevant classifications in Rule 5 Seniority Rosters, bulletins listing Flagmen positions for bid and a host of statements from Carrier forces who have performed flagging duties show that it is anticipated that at least at times, Carrier forces will perform these duties. Statements and additional evidence show that flagging work has been done by a number of crafts, by Signalmen and by exempt Carrier employees. On-property PLB 6538, Award 6 states that seniority rosters do not reserve the flagging work as exclusive to Maintenance of Way forces. While flagging falls within the Scope Rule, it is at best a mixed practice. The practice does not relieve the Carrier of the obligation to issue a notice when it intends to contract flagging work, but neither does the mixed practice prohibit contracting of the work when appropriate.

The record establishes that Rail Pros did, in fact, perform the disputed work. The on-property correspondence includes an undated Claim Information Sheet signed by Claimant Haas showing 9.5 hours of flagging both on September 9 and 10, 2014 by Rail Pros west of Fryburg, ND between MPs 136.0-140.0 on the Dickinson Sub. The Carrier has defended the use of the contractor and has acknowledged that the work was done.

Evidence that flagging work has been customarily, though not exclusively, performed by Maintenance of Way forces and that the disputed work has been

performed by outside forces establishes a *prima facie* case that triggers the need for the Carrier to show that a proper notice was issued. Contrary to the Organization's contention, the record includes the June 13, 2013 notice referred to above. The notice establishes an intent to contract for fifteen (15) track authority flagmen to work in four (4) Subdivisions and three (3) yards, including the Dickinson Sub, with work to commence on July 9, 2013 and end on or before December 31, 2015.

The major question before this Board is narrowed to whether one of the exceptions in the Note to Rule 55 is applicable. Three on-property precedents determine the Board's response. First, because flagging work has been performed not only by Maintenance of Way forces but also at least by Signalmen and exempt employees, the work cannot be considered the exclusive province of the Organization. Second, the disputed work was contracted in conjunction with a much larger capacity expansion project, as evidenced by the flagging listed in the notice of intent that the Carrier did not have to piecemeal. Finally, considering only the flagging work, the Carrier did not have to piecemeal even that element of the capacity expansion and has satisfied this Board that sufficient on-property forces were unavailable. Therefore, the use of Rail Pros did not violate the Note to Rule 55 or 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.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 44260, DOCKET MW-43477 AND
AWARD 44266, DOCKET MW-43510
(Referee I. B. Helburn)

I must concur and dissent with the Majority's opinion. In a contracting out case, the Board must undertake a specific analytical framework. Specifically, the Board must analyze the following questions:

1. Is the work reserved by the Agreement?; and

2. Did the Carrier comply with the good-faith notification and conference provisions under the Note to Rule 55 and Appendix Y, which includes an analysis of all of the assurances made under Appendix Y?; and

3. Did the Carrier establish an exception or justification under the Note to Rule 55?

Initially, I must concur with the Majority's finding that flagging work is reserved under the terms of the Agreement. Specifically, the Majority held:

> "Evidence that flagging work has been customarily, though not exclusively, performed by Maintenance of Way forces and that the disputed work has been performed by outside forces establishes a *prima facie* case that triggers the need for the Carrier to show that a proper notice was issued. ***" (Emphasis in original)

The next matter for the Majority to analyze is the Carrier's compliance with the Note to Rule 55's notification and conference provisions. In this case, the Majority held that the Carrier complied with its obligations under the Rule.

Finally, the Board analyzed the Note to Rule 55 exceptions. The Board properly held:

> "The major question before this Board is narrowed to whether one of the exceptions in the Note to Rule 55 is applicable. ***"

However, my concurrence must stop here as the Board improperly found that the Carrier met one of the exceptions. In this case, the Carrier's sole justification in the on-property handling was that it had bulletined flagging jobs for BMWED members that went unfilled, which left the Carrier with no choice but to contract out the work.

The Carrier had no furloughed employes during this claimed period. Moreover, the record established that the Carrier's workforce has been systematically reduced over the last fifteen (15) years. Accordingly, if everyone is working, and the Carrier continues to bulletin jobs, logic would dictate that there is nobody left to fill the vacancies. However, the Majority has now allowed those same job vacancies to result in permissible contracting out. This essentially results in giving the Carrier a "no furloughs" contracting rule, wherein the Carrier can contract out whatever they want as long as there are no furloughs. This is clearly contrary to the clear language of the Note to Rule 55. Arbitration panels have consistently held that the Carrier is obligated to maintain adequate and capable forces to perform work reserved to its forces under the Agreement. See previously cited Third Division Awards 11027, 12374, 27614, 36053, 37955, 39685 and Award 33 to PLB No. 6204. However, the evidence in this case proves that the Carrier indeed failed to do just that. For this reason, I must dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member