

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44261
Docket No. MW-43478
20-3-NRAB-00003-200411**

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

**(Brotherhood of Maintenance of Way Employees 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) for a survey “crew on the Jamestown Subdivision at Mile Posts 165-169 on August 28 and 29, 2014 (System File T-D-4530-M/11-15-0115 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 Parts (1) and/or (2) above, Claimant C. Heidinger shall now be compensated ‘... twelve (12) hours worked by the contractor, with pay to be at the 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.

The above-noted claim was timely filed, progressed on the property without resolution and referred to the National Railroad Adjustment Board for final adjudication.

The Organization asserts that the disputed work is reserved to its Maintenance of Way forces and is customarily performed by these forces, as shown by over 140 pages of job bulletins. The Carrier is required by the Note to Rule 55 and Appendix Y to provide at least fifteen (15) days' notice of the intent to contract out work. The Carrier did not issue such notice and did not meet and conference in good faith, nor has the Carrier made the required good-faith effort to reduce contracting and increase the use of Maintenance of Way forces. There are no valid Carrier affirmative defenses to the Organization's *prima facie* case. The Organization provided a detailed description of the work performed and the location and dates involved, which the Carrier has not denied. The Carrier has not maintained an adequate work force "to perform its regular, routine construction, maintenance and repair work, failing to properly plan for the Bakken Shale boom that began in 2008." Appendix Y is a contractual commitment. The Carrier's exclusivity defense is misplaced. The Claimant was unavailable only because the Carrier had assigned him elsewhere. Moreover, the Carrier made no attempt to assign Maintenance of Way forces to the flagging work. The monetary remedy is appropriate as compensation for the missed work opportunity and to protect the integrity of the Agreement and the overtime rate is appropriate.

The Carrier asks that the claim be denied as past arbitral precedent holds that flagging is not reserved to Maintenance of Way forces by Rule 1 Scope or by a past practice that shows that flagging has been performed exclusively system-wide by Maintenance of Way forces. At best, the Organization can demonstrate only a mixed practice, which allows the assignment of outside forces. This is simply a dispute over the facts so that the Board must 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.

At the hearing the Board was informed that the Organization had withdrawn this case.

AWARD

Claim dismissed.

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.