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

Award No. 44264
Docket No. MW-43487
20-3-NRAB-00003-200414

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 (Fenton Construction Inc.) to perform Maintenance of Way and Structures Department work (haul equipment) "from Sioux Falls, South Dakota to Sioux City, Iowa on the Twin Cities Division on September 4, 2014 (System File T-D-4535-M/11-15-0127 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction Inc.) to perform Maintenance of Way and Structures Department work (haul equipment) from Mitchell, South Dakota to Sioux City, Iowa on the Twin Cities Division on September 5, 2014 (System File T-D-4536-M/11-15-0128).

(3) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction Inc.) to perform Maintenance of Way and Structures Department work (haul equipment) from Worthing, South Dakota to Garreston, South Dakota on the Twin Cities Division on September 8, 2014 (System File T-D-4537-M/11-15-0135).

(4) 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 Maintenance of Way forces as required by Rule 55 and Appendix Y.

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimants W. Thompson and L. Aichele shall each be compensated for ten (10) hours at their respective overtime rates of pay.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimants W. Thompson and L. Aichele shall each be compensated for eleven (11) hours at their respective overtime rates of pay.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimants W. Thompson and L. Aichele shall each be compensated for ten (10) hours at their respective overtime rates 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.

This case consolidates three claims involving similar fact patterns. On December 17, 2012 the Carrier issued written notice of the intent "to continue the ongoing program of using flatbed trucks and trailers to supplement out lowboy service." A tentative 2013 system gang schedule was attached. A subsequent conference did not result in agreement and, ultimately, the above-noted timely claims were filed, progressed on the property with resolution and referred to the National Railroad Adjustment Board for final adjudication.

The Organization asserts that the claim should be sustained as operating a tractor-lowboy to transport work equipment is scope work customarily performed by Maintenance of Way forces and customarily reserved to these forces. The Note to Rule 55 and Appendix Y were violated by the Carrier's failure to provide the required advance notice, which must be issued even if an exception allowing contracting might apply. Here there was no notice and no contracting conference. The Carrier has not made a good-faith effort to reduce subcontracting and increase the use of Maintenance of Way forces.

The Carrier has not provided valid affirmative defenses. The lack of proper notification alone requires a sustaining award. The Organization provided evidence of a violation so that a *prima facie* claim was established. The Carrier has not denied that the disputed work was performed. The Carrier's assertion that adequate equipment and adequate skilled employees were unavailable is without merit. The Carrier has the equipment in inventory and, alternatively, could have leased or rented the equipment. The Carrier's contention that Appendix Y is inapplicable is meritless. So is reliance on the "exclusivity defense" as the Note to Rule 55 and on- and off-property Awards require only that the disputed work has been performed customarily and historically.

The Claimants were unavailable only because they were assigned elsewhere, with the Carrier required to be adequately staffed. No effort was made to assign Maintenance of Way forces to the disputed work. The facts are not in dispute as the Carrier alleges; hence, there is no basis for dismissing the claim. A monetary remedy is appropriate to make the Claimants whole for missed work opportunities and to protect the integrity of the Agreement. The Organization has the right to name the Claimants.

The Carrier insists that the claim should be denied because the Organization as the moving party has failed to meet its burden of proving that the disputed work was reserved to Maintenance of Way forces. Rule 1 Scope is a general scope rule that does not serve to reserve the work and the Organization has not shown a past practice that the work has been performed exclusively, system-wide so that it should have been assigned to Maintenance of Way forces. A mixed practice does not restrict the Carrier's right to contract the work. Essentially the Board is faced with an irreconcilable factual dispute that requires that the claim be dismissed or denied. Appendix Y has not been violated because it does not restrict contracting out and it is not applicable on BNSF property. Damages are not appropriate because the Claimants were fully employed and have not shown out-of-pocket expenses. The Agreement does not provide for liquidated or punitive damages.

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 proper standard 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 persuasion 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.

Even without statements from Maintenance of Way forces, the evidence establishes the inclusion in Rule One Scope of the Truck Driver classification. Included in Rule 5 Seniority Rosters under Track Sub-Department is Roster 2 Truck Driver. Included in a list of Group Two Machines is Tractor-Lowboy with the accompanying note that "It is understood that if a Tractor-Lowboy is used to deliver work equipment machines from one district to another, the operator from the district where the trip commences may handle the equipment to its destination without penalty." In addition, in the notice of intent to contract the Carrier begins by stating that "As information BNSF plans to continue the ongoing program of using flatbed trucks and trailers to supplement our lowboy service" (Board

emphasis). The above-noted inclusions in the Agreement and the Carrier's own notice show that "lowboy service" has been customarily performed by Maintenance of Way forces.

Relying on the Carrier's notice, it is also clear that the lowboy service has not been performed exclusively, system-wide by its own forces, but as stated above, the current requirement on BNSF property is for the Organization to show that the work has been done customarily and traditionally. The record so indicates to the Board's satisfaction. As for the disputed work, each of the three claims, now consolidated, are specific as to the date on which the machinery was transported, the beginning and ending points of the transport and the hours involved, although the Board does not unquestionably accept the hours involved. The Carrier has never denied that the machinery was transported by outside forces, but has simply contended for reasons summarized above that the contracting out was appropriate and within contractual bounds.

The conclusion that the use of a tractor-lowboy to transport various types of machinery was a mixed practice does not eliminate the shifting of the burden of proof to the Carrier and the need to show that the notice of intent to contract was appropriate in view of the Appendix Y stricture to make a good-faith attempt to reduce contracting and increase the use of Maintenance of Way forces. Here is where the Carrier's case falters. Each of the three claims involves one date—namely September 4, 5 or 8, 2014. Nowhere in the record is there either an Organization's correction of the 2014 dates or the Carrier's assertion that the disputed work occurred in September 2013. The Board can only find that 2014 is the correct year. However, the only notice of intent to contract that is in the record (reproduced for each of the three claims) is dated December 17, 2012 and includes the following sentence: "These trucks and trailers will be used to haul various roadway machines, vehicles and Gang support trailers throughout the BNSF system in 2013 for Region/System Division and Sickles gangs, on an as needed basis per the attached 2013 RSG work program." The notice further states that the "tentative 2013 system gang schedule" is attached.

The record is devoid of a notice of intent to contract the 2014 work accompanied by a 2014 system gang schedule. Obviously, the Board cannot know whether there was no notice issued that covered the disputed 2014 work or whether there was a notice issued that was not made a part of the record. The Board can

only find that there is no notice that covers the disputed work and no conference since the Organization was never alerted to the contracting possibility. The finding requires that the claim be sustained.

In accordance with the discussion on remedy set forth above, the Board will order damages. In each letter appealing the Carrier's initial declination is the following sentence: "The claim is only for the hours worked by the contractor." The Board is skeptical of the request for overtime for all hours worked, wonders about the use of two employees on each of the three days, and wonders about the need for ten (10) and eleven (11) hour days. Damages are to be paid based on the Carrier's records for the three (3) days in question. If the Carrier cannot produce records, the claim is to be sustained as written.

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.