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

**Award No. 44265**
**Docket No. MW-43488**
**20-3-NRAB-00003-200415**

**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 (Coleman Industries) to perform Maintenance of Way and Structures Department work (cut up and dismantle a tank) at the Waste Water Treatment Plant in the Hobson Yards in Lincoln, Nebraska on November 12, 13 and 14, 2014 (System File C-15-C100-20/10-15-0058 BNR).**

**(2) The Agreement was further violated when the Carrier failed to 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 L. Divoll, R. Reimers and C. Nielsen shall now be compensated '… twenty two ((sic) 22) straight time hours and eight (8) overtime hours at the appropriate rate of pay as settlement of this claim.'"**

**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 21, 2014 the Organization was informed that the Carrier "plans to contract for all work associated with the demolition to the IWW treatment system sludge tanks located at Hobson Yard in Lincoln, NE. BNSF forces do not possess all of the necessary skills required for the proper torch-cutting and disposal of contaminated sludge tank materials." Contractor work to be performed and an approximate September 8, 2014 starting date also were noted. A contracting conference produced no agreement. A March 3, 2015 e-mail from Blacksmith Roger Reimers indicated that he witnessed the disputed work being performed on November 12, 13 and 14, 2014 and that he had done similar work. He saw neither special equipment nor respirators being used. A December 6, 2015 e-mail from Mr. Reimers indicated that he had been told originally that he and Mr. Nielsen were to complete the job, but a week prior to the starting date plans changed. 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 claim should be sustained. The contention that the disputed work is basic Maintenance of Way work must be accepted as fact since this was not disputed by the Carrier. Maintenance of Way forces have customarily performed the scope work belonging to the Bridge and Building Sub-Department. Even if an exception may exist that would permit subcontracting, the Carrier is obligated to provide notice of the intent to contract and to meet with the Organization if requested. The notice was vague and did not apply to the disputed work, thus a good-faith attempt to reduce subcontracting and increase the use of Maintenance of Way forces did not occur. The Carrier did not produce even one of**

**the nine (9) items requested during the contracting conference. The Carrier has not made a good-faith effort to properly staff or schedule its own forces.**

**All of the Carrier defenses, none valid, should be rejected because of the lack of compliance with the requirement to notice and meet. The Organization has presented a prima *facie* case that the work was done, which the Carrier admitted. The need for special skills and equipment was not proven. Manpower and equipment had been assembled to do the work in-house. Appendix Y does apply on the property. The "exclusivity defense" has been rejected by numerous Boards in favor of the criterion of "customarily performed." If the Claimants were unavailable, it was because the Carrier had assigned them elsewhere. No effort was made to assign the work to Maintenance of Way forces. The Carrier did not show that Blacksmith Reimers was an improper Claimant, but even if he was the, claim is not invalidated. The requested remedy should be awarded to compensate for lost work opportunities and to uphold the integrity of the Agreement.**

**The Carrier insists that the claim should be denied as the contracting out was in accordance with the Note to Rule 55 because the necessary special skills and equipment were lacking to perform the environmentally sensitive work. The work was not reserved to the Maintenance of Way forces by Rule 1 Scope as that is a general scope rule. The Organization has not shown that the disputed work has been performed exclusively, system-wide such that past practice would reserve the work to Maintenance of Way forces. The Organization has not even shown that the disputed work was emblematic of a mixed practice, but even a mixed practice would not deprive the Carrier of the right to contract the work. The Board is faced with a factual dispute that requires that the claim be dismissed or denied. Appendix Y does not limit the right to contract and, in fact, is not applicable on BNSF property. Should the claim be sustained, damages would be improper because the Claimants were fully employed when the disputed work was done and have not shown out-of-pocket expenses. Overtime payments would be improper since the Claimants performed no overtime work. Nor is the Board authorized to provide 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 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.**

**Turning to the claim at hand, the August 21, 2014 notice of intent to contract specified the work to be done, the reason for the contract and the approximate starting date. In short, it met the requirements for a proper notice. All of the evidence relating to the necessary elements of the *prima facie* case the Organization is required to make are contained in a March 3, 2015 e-mail from Claimant Reimers to Mr. Landy Walker in the General Chairwoman's office.**

> **"November 12, 13, 14, 2014 I witnessed contractors cutting up tank at treatment plant and installing a new tank in its place. I worked on the crew that removed tanks in this same treatment plant replacing with new system that required tearing out side of building tearing out tank foundations in the building and replacing the floor, major construction this took place in the 1990s. We also built the tank farm at the diesel shop built b-1 and b2 fueling requiring setting new tanks. No special equipment was used or was respirators noticed being used by these employees. I have the same equipment to use plasma cutter, welder, also they used the over head crane in the treatment plant to do the required lifting of scrap and new tanks. After they installed the tank we installed the pipe to it and retrofitted catwalk to it. Thank you Roger Reimers."**

**While Claimant Reimers' e-mail does not actually identify the location of the work he witnessed, the Carrier has not denied that forces from Coleman Industries performed the tank work at Hobson Yards.**

**The e-mail identifies one instance where Claimant Reimers was involved removing tanks sometime in the 1990s. This is the only documented instance of tank removal in the record. One instance that occurred between 20-30 years ago does not show that this work was customarily and historically performed by Maintenance of Way forces. For that reason, the Organization has not proven both elements necessary to make a *prima facie* case. Moreover, the seeming infrequency of the work supports both the Carrier's statement in the notice that the special skills necessary to do the work in compliance with OSHA regulations did not exist and the ultimate decision to contract out the work.**

## 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.**