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

Award No. 44266
Docket No. MW-43510
20-3-NRAB-00003-200416

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) between Mile Posts 21.5 and 23.7 on the Dickinson Subdivision, Montana East Division on September 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22, 2014 (System File B-M-2794-EN/11-15-0134 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) between and around Mile Posts 196.600 and 198.100 near the siding at Hodges, Montana on the Dickinson Subdivision, Montana Division on September 5, 6, 8, 9, 10, 12, 13. 14, 15, 16, 17, 18, 19, 21, 23, 24, 25 and 26, 2014 (System File B-M-2791-EN/11-15-0131).

(3) The Agreement was violated when the Carrier assigned outside forces (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) between and around Mile Posts 113.0 and 115.0 near the Eland, North Dakota

siding on the Dickinson Subdivision on September 9 and 10, 2014 (System File B-M-2792-EN/11-15-0132).

(4) 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 regarding the aforesaid work as required by the Note to Rule 55 and Appendix Y.

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimant J Boehm shall now be compensated for eighty-eight (88) hours at his applicable straight time rate of pay and ninety-eight (98) and one-half (98.5) hours at his applicable time and one-half rate of pay.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimant R. Zimmerman shall now be compensated for one hundred twelve (112) hours at his applicable straight time rate of pay and ninety-five (95) hours at his time and one-half rate of pay.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimant J. Schumacher shall now be compensated for sixteen (16) hours at his applicable straight time rate of pay and four (4) hours at his time and one-half 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.

This case involves the consolidation of three claims relating to the contracting out of flagmen work. By letter dated June 21, 2013, the Carrier sent the Organization notice that it would contract flagging work in various locations in the Montana and Twin Cities Divisions in light of the "tremendous growth in freight volume" triggered by the Bakken Shale oil and gas discoveries. Fifteen (15) track authority flagmen were to be contracted for work across four (4) Subs and three (3) yards, including the Dickinson Sub, MP 0.0 to 215.8 because of the "unwillingness of a sufficient number of qualified employees to accept and retain assignments as flagmen. . ." in key areas of District 200 and 300, that "will result in a mounting backlog of capacity expansion work that is not possible to complete without resorting to outside help." The notice indicated that among other locations in which the 15 track authority flagmen would be working was the Dickinson Sub, MPs 0.0 to 215.8. The notice was amended by letter dated February 19, 2014 that specifically noted that capacity expansion was to be done on the Dickinson Sub, MP 70.0 to 73.0 (Hebron Extension) and MP 21 to 24.0 (Judson). The amended notice did not refer to flagging duties, but mentioned track work including access roads, turnouts and crossings at both of the above-noted locations. The work was scheduled to begin on or about March 10, 2014 and to end no later than December 31, 2015. The amendment noted that the work was part of the large-scale capacity expansion necessitated by the Bakken Shale discoveries. Another notice was issued on June 24, 2014 advising the Organization that the Carrier intended to contract for up to seven (7) flagmen "to provide protection for dirt work contractors working within three (3) Subs, including the Dickinson Sub as follows: Hebron siding extension, MP 70-73; Hodges siding extension, MP 196-198; Beaver Hill siding extension, MP 187-190; and new siding between Lyons and New Salem, MP 21-23.7. The Carrier anticipated that the "work would begin on July 10, 2014 and continue through the remainder of the project, or until a sufficient number of flagging positions are filled." Contracting conferences did not produce agreement resulting in the above-noted timely filed claims that were 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, 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 made 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 show 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 Claimants were unavailable only because the Carrier assigned them elsewhere. The Carrier made no effort to assign one of its own employees. A monetary remedy is appropriate to make the Claimants whole for the lost work opportunities and to protest the integrity of the Agreement.

The Carrier insists that the claim should be denied as prior awards establish that it is not required to maintain sufficient forces to carry out large capital expansion projects in-house and does not have to piecemeal these projects. On-property Third Division Awards 41223, PLB 4768, Award 22. Beginning with the notice to contract the disputed work, the Carrier has consistently indicated that available Maintenance of Way forces are insufficient. The contracting out was in accordance with the Note to Rule 55 because the necessary special skills and equipment were lacking to perform the work. The work was not reserved to Maintenance of Way forces by Rule 1 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 Carrier 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 they 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 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, 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 these elements of the burden of proof are 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.

The Organization has proven the two elements required to show a *prima facie* case. The inclusion of the flagman position in the Agreement, the bulletins that list flagmen positions, the multitude of statements attesting to the performance of flagman work by Maintenance of Way employees and even the June 24, 2014 notice of intent to contract flagging positions "through the remainder of the project, or until a sufficient number of flagging positions are filled" all show that flagging duties lie within Rule 1 Scope of the Agreement. Additional statements in the record also show that the work can be done by qualified employees in various crafts, by Signalmen and by exempt Carrier employees. While flagging has been done customarily, traditionally and historically by Maintenance of Way forces, it has not been done exclusively, system-wide. The mixed practice still requires a proper notice of intent to contract in order to meet the good-faith requirement stated in Appendix Y.

The record also establishes that the disputed work was done. The claims are precise as to the locations where the flagging took place and the dates on which the work was performed. The Carrier correctly asserts that the hours set forth in the claims are unsubstantiated, but this does not vitiate the claims as the Carrier has not contended that the flagging was not contracted.

The *prima facie* case requires the Carrier to show the issuance of a proper notice of intent. As detailed above, the notices and amended notices provide

sufficient information to allow the parties to discuss the proposed contracting. The Organization's contention that the General Chairman was not informed of the intent to contract the flagging work is, therefore, buried under the notices in the record.

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 such that it is reserved to Maintenance of Way employees. 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. See on-property Third Division Awards 43710, 53566, 43340, 43662.

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