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

Award No. 44267
Docket No. MW-43511
20-3-NRAB-00003-200417

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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (install track panels, haul and dump rock, realign track and related work) between Mile Posts 42 and 46 at Girard, Illinois beginning on November 17, 2014 (System File C-15-C100-33/10-15-0073 BNR)

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its 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 R. Arcaro, R. Hopkins, C. Branson, J. Eveland and G. Nichols shall now each '* be paid for eight hours of straight time and twelve hours of overtime paid at one and one-half of the respective 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.

By letter dated July 23, 2012, the Carrier gave notice that "Union Pacific (UP) plans to contract for all work associated with the improvements to the existing diamond that crosses BNSF mainline between MP 43.5 and MP 45.00 on the Beardstown Sub-Division." The notice further stated that the work was "at the request and for the benefit of UP" and that BNSF had neither the forces with required specialized skills nor the specialized equipment to do the dirt work, although Maintenance of Way forces were to be involved in the project. The work was to begin approximately on August 8, 2012.

The above-noted project apparently did not take place in 2012 or 2013. A notice from the Carrier dated January 8, 2014 informed the Organization of an intent "to contract for additional heavy equipment, with operators, to assist BNSF forces with support work for the upcoming regional and divisional tie, rail and undercutting programs taking place on various sub-divisions within the Springfield Division." The Beardstown Sub-Division, MP 159.6x to MP 102.1x; MP 0.0 to MP 203.6, which includes Girard, IL was among the locations listed. The work was scheduled to begin approximately February 1, 2014. Handwritten witness statements by Claimants Arcaro and Branson reported the work done and the equipment used by the outside forces. The 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 because the contention that the disputed work is that customarily performed by Maintenance of Way forces was not disputed by the Carrier and must be accepted as fact. The work is contractually reserved to Maintenance of Way forces, to be contracted only under "certain unique circumstances." The General Chairman was not notified at least fifteen (15) days in advance of the contracting out, which the Carrier must do even when one of the limited exceptions might allow such a contract. The January 8, 2014 notice was vague and the disputed work was never specifically discussed. The Carrier has not made a good-faith effort to reduce contracting out and increase the use of Maintenance of Way forces.

The deficient notice alone requires a sustaining award. Moreover, the Carrier admitted that the disputed work was performed. It did not show a need for or use of special equipment. Appendix Y has been incorporated into the Agreement contrary to the Carrier's assertion of inapplicability. The Carrier's exclusivity argument is meritless. If the Claimants were unavailable to do the work, it was only because the Carrier had assigned them elsewhere and was inadequately staffed. The Carrier made no effort to assign Maintenance of Way forces to perform the work. The requested monetary award is appropriate to make the Claimants whole for missed work opportunities and to protect the integrity of the Agreement.

The Carrier insists that the claim should be dismissed because it violates an agreement between the parties that no claim would be filed if a "Track Construction Gang was working on the Seniority District during the time when the outside contractors were also performing track construction work." The July 23, 2012 notice of intent to contract provided sufficient notice to the Organization. The Organization has not met the burden of proof that falls to the moving party. Rule 1 Scope is a general scope rule that does not reserve the work for the Maintenance of Way forces. The Organization has not shown that the disputed work had been performed exclusively, system-wide by these forces, so that the past practice would reserve the work. Even if a mixed practice were to be found, such a practice would not preclude contracting out. The Carrier has not violated either Rule 55 or Appendix Y. Appendix Y does not prohibit contracting and, moreover, is not applicable on BNSF property. Finally, the Organization has not proven damages as the Claimants were fully employed at times relevant 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 appropriate standard has been set forth in other awards 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, the "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 December 21, 2014 claim filed by the Organization makes clear that the disputed work was that detailed in the original, July 23, 2012 notice: "The violation occurred in the Beardstown Subdivision when the carrier contracted with RJ Corman, Inc. to place track panels, haul and dump rock, and align the BNSF track to connect with the Union Pacific track between Mileposts 42 and 46 at Girard, Illinois."

Before applying the analytical framework set forth above, the Board considers a preliminary matter. In its submission, the Carrier asserts that this case is moot because the Organization violated a March 5, 2013 settlement between the parties in which the Organization was said to have withdrawn approximately 4,000 claims appealed before May 1, 2012 in exchange for a significant payment. The blanket settlement excerpted the following:

> **"E. Mobile Track Construction Gangs that perform the work of track construction, track and switch panel installation and grade crossing installation covered under this Agreement are added to the coverage of Section 12 (RSG's) of the BNSF Addendum to the 2012 National Agreement, and the parties further agree:**

> **i. The Organization agrees to withdraw all existing track and switch panel installation claims appealed on or before August 31, 2012. The Organization also agrees that during 2013 it will not file new claims if a contractor performs the type of work performed by a Section 12 Track Construction Gang on a seniority district where a Section 12 Track Construction Gang is simultaneously working. In return, BNSF agrees that it will not perform track construction or track, switch and crossing installation "blitzes" with contractors on seniority districts where Section 12 Track Construction Gangs are working. If BNSF acts in good faith relative to this provision in 2013, the Organization will agree to extend the claims prohibition of this provision through 2014. If BNSF similarly acts in good faith during 2014, the Organization will agree to extend claims prohibition of this provision through"**

A careful reading of the on-property correspondence shows that the February 5, 2015 declination of the claim makes no reference to the March 15, 2013 settlement. Likewise, the April 23, 2015 declination of the Organization's appeal of the February 5, 2015 decision does not mention the settlement on which the Carrier now relies. The parties have structured their long-standing appellate procedure used for arbitration so that Boards are to consider only the evidence and the contentions that come into the record during the on-property progressing of claims filed by the Organization. The Board has no choice but to find that the contention based on the parties' March 5, 2013 settlement is new argument that comes too late to be considered by this Board.

As noted above, the Organization must show that the disputed work has been performed customarily and traditionally, but not exclusively, system-wide. The disputed work is at the core of what Maintenance of Way forces do essentially on a daily basis. Relevant classifications and machinery are listed within Rule 5 Seniority Rosters. The Note to Rule 55 speaks to "construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department." This description is more or less repeated later in

the Note when it states that "Employes included within the scope of this Agreement—in the Maintenance of Way and Structures Department. . .perform work in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employes of named Repair Shops." Moreover, the March 5, 2013 settlement discussed above refers to "track construction or track, switch or crossing installation" work. Clearly, this dispute implicates customarily performed scope work.

The statement given to BNSF on July 14, 2015 authored by Claimant Arcaro establishes the contracted work.

> **"On Monday 11/17/14 R.J. Corman had a foreman, 2 rotary hyrail dump trucks & 2 trac hoes working for BNSF on the Union Pacific connection at Girard, IL. They were at the job briefing at 0400 and worked until midnite or later. Their truck hoes placed panels for the new track contraction and their dump truck dumped new ballast for the panels. I was on the surface gang as foreman and witnessed all the above machines and dump trucks working that job. . . .This work was on the Beardstown Sub., Springfield Division. MP 42 – MP 46."**

A second witness statement from Claimant Branson contains essentially the same information as the statement above, including that "They performed track panel installment, dumped rock and aligned track." The Carrier has not denied that outside forces performed the work. The Organization has, therefore, presented a *prima facie* case that shifts the burden of proof to the Carrier to show that a proper notice of intent to contract was issued.

The July 23, 2012 notice identifies the disputed work but falls short of being a valid notice. The notice at first states that the Union Pacific Railroad, not the BNSF, planned to contract for work on the diamond that crosses the BNSF main line, although the notice goes on to state that "BNSF is not adequately equipped to handle all aspects of these projects, nor do BNSF forces possess the specialized skills required for the dirt work." Assuming that the notice intended to identify BNSF as the party doing the contracting, the notice is insufficient because the work was not done until twenty-seven (27) months later and was not described by Claimant Arcaro as simply dirt work. While the Carrier realistically should be afforded some

latitude when estimating a time frame for work to be contracted, twenty-seven (27) months is essentially an open-ended time frame hardly conducive to good-faith negotiations because of the inherent imponderabilities in such a notice.

A more recent notice dated January 8, 2014 also is insufficient. It states that "BNSF plans to contract for additional heavy equipment, with operators to assist BNSF forces with support work for upcoming regional and divisional tie, rail and undercutting programs taking place on various subdivisions within the Springfield Division." The notice goes on to list the machinery required and the work to be performed. Thirteen (13) Sub-Divisions are listed, including significant stretches of track within each Sub.

Appendix Y notes in relevant part that "In the interests of improving communications between the parties on subcontracting, the advance notice shall identify the work to be contracted and the reasons therefor." Nothing in the January 8, 2014 notice identifies specifics of the work that was to be parceled out to the thirteen (13) subdivisions listed in the notice and nothing identifies, even if not with a laser focus, the areas within each Sub-Division where work is contemplated. The Organization should not have to treat such notices as a puzzle that requires fitting the pieces together so that a clear picture emerges and the contracting conference can discuss in good faith specific projects and the possibilities of keeping the work within Maintenance of Way forces.

The claim considered herein contains the following sentence: "No indication was received of a notice to contract out the work." After the claim was declined, the Organization's appeal stated that:

> **"The Carrier's notice dated January 8, 2014, would be an invalid notice for the work performed in this particular case, due to the fact that the Carrier's notice fails to mention anything regarding outside contractors placing track panels, hauling and dumping rock, and realigning the BNSF track to connect with the Union Pacific track between Mile Post 42 and Mile Post 46 at Girard, Illinois on the Beardstown Subdivision of the Springfield Division. . ."**

Following the Carrier's declination of the Organization's appeal, the claim was conferenced on July 14, 2015. General Chairwoman Moody-Gilbert's letter

confirming that conference states that "The Carrier Notice dated January 8, 2014 is invalid due to the fact that the work performed was not mentioned in the notice. The work performed was placing panels and hauling and dumping rock, your notice was for heavy equipment and ties."

The record establishes that objections to the January 8, 2014 notice were raised during the on-property progressing of this claim so that the defective notice is properly considered by this Board. The Board's finding that the notice indeed was defective renders discussion of other contentions moot.

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.