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

Award No. 44269
Docket No. MW-43513
20-3-NRAB-00003-200419

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 (Garney Construction) to perform Maintenance of Way and Structures Department work (assembling and installing rain gutters) at the roundhouse building in Glendive, Montana beginning on October 13, 2014 through October 16, 2014 (System File B-M-2815-E/11-15-0205 BNR).

(2) 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.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Sutton, G. Schuman and R. Utgaard shall now each be compensated thirty-nine and one-half (39.5) hours at their respective straight time 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 21, 2011 with the reference to "Industrial Waste Abatement – Wastewater Treatment – Glendive, MT" the Carrier informed the General Chairman that "BNSF plans to contract for all work associated with necessary cleaning and wastewater abatement at the Wastewater Treatment Plant (WWTP) and Mechanical sites within the rail yard in Glendive, MT. BNSF forces do not possess the necessary training required under OSHA 29 CFR 1910.120 for proper disposal of contaminated debris." A careful reading of the listed work to be performed shows a mention of roundhouse pits but no mention of gutter work.

A second letter dated October 23, 2013 contained the notice that the Carrier was "experiencing continued weather-related damage to the roof of the car shop building located in Glendive, MT. The notice further stated that BNSF forces were unable to complete repairs "due to unsafe conditions with the existing substrate" and for that reason "BNSF plans to contract immediately for urgent repairs before winter weather approaches, and subsequent permanent roof installation," which required "specific installers to maintain the warranty." Description of the work to be performed appears to include gutter work, but the Yard Car Shop Building is a different structure than the roundhouse.

No further notices were issued until January 16, 2015. The gutter work that the Organization alleges was in violation of the Note to Rule 55 and Appendix Y occurred on October 13-16, 2014. The January 16, 2015 notice pertained to "Facility Improvements – Various Locations – Glendive, MT Divisions. The notice stated that

that the Carrier "plans to contract for all work associated with the facility improvements located at various facilities located in Glendive, MT and further stated that "BNSF forces do not possess the necessary specialized skills required for all aspects of these projects, including the projects that will carry a warranty." The notice indicated work to be done on four (4) buildings, including the roundhouse as indicated below.

> **"Roundhouse - Reinforcing existing brick pour, pour necessary new concrete retaining walls; installing necessary new steel siding; remove existing gutters and appurtenances; replace necessary compromised decking and insulation; install necessary fascia and soffit; install new complete (including re-route of downspout and drainage); install necessary ridge caps, valleys, rake edging, drip edging, flashings, and splashguards; and debris removal and debris removal (sic)."**

The Organization submitted a written request on January 19, 2015 to conference about the notice, but asserts without contradiction that no conference took place.

The timely claim set forth above had been filed on December 1, 2014 and progressed on the property with the second and final Carrier declination dated April 28, 2015 and the claim conference held during the week of June 23, 2015. Because the claim was not resolved on the property, it was advanced to the National Railroad Adjustment Board for final adjudication.

The Organization contends that the claim should be sustained because it has provided a *prima facie* case plus the Carrier did not issue the required notice. Maintenance of Way forces had the necessary skills to do the work and the necessary equipment was either in the Carrier's inventory or available through rental. The 2011 and 2013 notices were irrelevant as they did not refer to the disputed work. Carrier defenses should be summarily dismissed because there was no notice. Nevertheless, those defenses are unavailing. The Organization must show only that the work has been customarily, not exclusively performed by Maintenance of Way (B&B Sub-Department) forces. Appendix Y applies on BNSF property. The Carrier's piecemeal argument must be rejected. Damages are appropriate because work opportunities were lost and the integrity of the agreement must be protected.

The Carrier asserts that the claim should be denied as the Organization has not shown how rules were violated and what equipment was used or what work was performed. Notice was provided in 2011 showing that the disputed work was part of a larger project and did not have to be piecemealed. The work constituted an exception as set forth in the Note to Rule 55. The Organization has not shown that the work was reserved by virtue of exclusive, system-wide performance. Appendix Y does not apply on BNSF property but, in any event, it does not preclude contracting. This case involves an irreconcilable factual dispute and therefore should be dismissed. Should the claim be sustained, no damages are due as Claimants were fully employed at times relevant and provided no proof of out-of-pocket expenses.

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 applies 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 Bridge and Building Sub-Department includes the classifications of Foreman, Assistant Foreman, B&B Carpenter or Mechanic – 1st class, with the First-Class Carpenter to be "a skilled mechanic" in building and bridge work. The Note to Rule 55 states that work "customarily performed by employees in the Maintenance of Way and Structures Department includes "work in connection with the construction and maintenance or repairs of and 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. . ." The on-property correspondence includes a document titled Typical Bridge Construction Gang that reads in part that "Typical routine construction work

includes. . .building maintenance and repairs. . .” and that “(a)ll gang members must have the ability to work at heights, at times in excess of 100 feet above the ground or water. . .” The statement of Carrier Officer Mr. William T. McCarthy includes the information that “Bridge and building classifications are maintenance of way classifications, which repair and maintain bridges and buildings, as opposed to track and track structures.” Clearly the disputed gutter work falls within the building and maintenance repair work that is customarily performed by Maintenance of Way forces.

The Carrier contends that the statement of Claimant Schuman listing the days and hours during which outside forces assembled and installed gutters is insufficient proof that the work was performed and is simply self-serving. Whether the statement is self-serving or not is irrelevant. What is relevant is whether or not the statement is accurate. The Board does not believe that Claimant Schuman has written some fairly tale that exists only in his imagination. Moreover, the Carrier is the party with the detailed records of the work performed by outside forces and should have the ability to produce data that would countermand Claimant Schuman’s statement if it was inaccurate or worse, totally false. Moreover, the Carrier has not at any point in the process disavowed the gutter work performed by outside sources. The Organization has provided the requisite *prima facie* case that shifts the burden of proof to the Carrier to show that it issued a proper notice.

Even assuming, *arguendo*, that gutter work has been contracted in the past and thus constitutes a mixed practice, the Appendix Y requirement that the Carrier “assert good faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable. . .” requires a notice of intent to contract even in most cases when the possibility exists of an exception that would allow outside forces to perform work. That notice must be issued “not less than fifteen (15) days prior” to the contracting transaction (see the Note to Rule 55) and “shall identify the work to be contracted and the reason therefor” (see Appendix Y). The July 21 2011 and October 23, 2013 notices do not identify the roundhouse work and do not meet the above-noted requirements for that reason. The Board views these notices as irrelevant. The January 16, 2015 notice was issued three months after the completion of the roundhouse gutter project. A late notice, and particularly a notice issued after the completion of the work, is the equivalent of no notice at all. The Organization has been deprived of the opportunity to discuss in good faith the possibility of retaining all or part of the work or even to agree,

however unlikely it may be, that the work is appropriately contracted. The Carrier's violation of the Note to Rule 55 and Appendix Y renders consideration of the Carrier's defenses moot.

Consistent with the established practice on the property, damages are deemed appropriate as compensation for lost work opportunities and to protect the integrity of the Agreement.

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.