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

Award No. 44270
Docket No. MW-43514
20-3-NRAB-00003-200420

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 (5-Star) to perform Maintenance of Way and Structures Department work (building remodeling) at the Vancouver office building beginning on October 6, 2014 and continuing (System File S-P-1956-G/11-15-0194 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with timely 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 its 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 A. Wells, S. Keller, D. Dewey, G. Sutter, R. Healea, J. Parsons, R. Huelle, C. Munson, G. Wells and R. Holsinger shall now each be compensated for an '… equal share of all hours worked by contractors (hours vary as number of contractors vary) and all benefits that the claimants did not receive because of these violations until the violation stops.'"

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 September 7, 2014, the Carrier provided the General Chairman with notice that it planned "to contract all work associated with facility improvement of the Vancouver Office Building located in Vancouver, WA on the Northwest Division. The state of Washington requires licensing for certain aspects of this project. Moreover, BNSF is not adequately equipped to handle all aspects of this project nor do BNSF forces possess all the specialized skills for all aspects of the project." The notice went on to list in detail all that the project involved.

The letter noted that it was being sent UPS Next-Day Air and listed the tracking number. The UPS tracking document also indicated next-day air with delivery at 10:14 am on October 3, 2014. The date received stamp affixed in the Organization's office shows receipt on October 3, 2014. The Organization contends that a contract was signed with 5-Star before the notice was received. Apparently, the Carrier contacted the Organization to inquire about a conference also before the letter was received. Also, apparently, a conference was held with no agreement reached to have the Carrier's Bridge & Building Sub-Department forces do all or part of the facility improvement work. Thereafter the Organization filed a timely claim that was progressed on the property without resolution and advanced to the National Railroad Adjustment Board for final adjudication.

The Organization contends that the claim should be sustained as contract language and additional documents establish that the disputed work is reserved for B&B Sub-Department forces, that customarily have done the work in the past. The

Carrier has conceded that the disputed work was contracted. It did not involve electrical or asphalt work and, according to Washington State law, could be done by the Carrier's forces. The notice of intent to contract was faulty and violated the Note to Rule 55 and Appendix Y, which is applicable on BNSF property. The notice was received only three (3) days before the contracted work began, when, according to the Organization, the contract already had been signed. The Carrier relied on the need for the contractor to be licensed, but its own forces were exempt from that requirement. Special skills and special equipment were not identified. The Note to Rule 55 and Appendix Y were violated, as the Carrier has not acted in good faith. The Carrier's defenses should not be considered because of the timing of the notice, but they are not valid. The Organization need only show that the disputed work was customarily, but not exclusively performed system-wide. The defense of unavailability of Carrier forces cannot prevail because the Carrier was obligated to staff so as to keep the work in-house. A remedy is appropriate to compensate for lost work opportunities and to protect the integrity of the Agreement.

The Carrier contends that the claim should be denied. The Organization has not shown a violation of any of the rules and has not provided a *prima facie* case because it hasn't show that B&B Sub-Department forces performed the work exclusively, system wide or that outside forces did the disputed work. Neither Appendix Y nor Rule 55 restrict subcontracting and Appendix Y is not applicable on BNSF property. The Organization has not shown what equipment was used or if necessary equipment was available. The contractor had to be licensed to perform electrical and plumbing work. The use of hot mix asphalt is not scope covered. There is ample arbitral precedent showing that the Carrier is not obligated to piecemeal work, even when some could be done by its own forces. And the work, not reserved to Carrier forces, has been contracted for almost a century. Should the claim be sustained, damages are not appropriate because the Claimants were fully employed at times relevant and have not proven 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.

Rule 1 Scope is a general scope rule that, by itself, does not reserve the disputed work for B&B Sub-Department forces. However, the B&B Sub-Department includes classifications of Foreman, Carpenter or Mechanic 1st class and Carpenter or Mechanic 2nd Class. Moreover, the Note to Rule 55 states that "The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way and Structures Department:"

> **"Employees within the scope of this Agreement. . .perform 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. . ."**

Mr. William T. McCarthy, in his statement, explained that B&B Sub-Department employees repair and maintain buildings and bridges. The conclusion is inescapable that activities such as rehabbing buildings or facility improvement are contemplated within the Agreement and reserved for the above-noted forces.

That does not exclude the possibility that such work might be contracted where it can be shown that contracting is permitted by one or more of the exceptions set forth in the Note to Rule 55. The Carrier has shown that it has a long history of contracting work on structures, although the documentation shows that new construction and demolition by outside forces has occurred far more often than remodeling. The mixed practice does not absolve the Carrier of the requirement to give notice, as the Carrier has committed to attempt to reduce subcontracting and increase the use of Maintenance of Way forces.

The second facet of a *prima facie* case is proof that outside forces performed the disputed work. This Board does not expect that documentation need extend to a member of the Organization not assigned to the project to spend time observing and documenting the tasks performed and the tools used. The Organization has asserted that the work was performed, the date on which the project began and the contractor whose forces were doing the work. Not only has this information not been disputed by the Carrier, the work was detailed in the notice and defended rather than denied. A *prima facie* case exists.

The burden now shifts to the Carrier to show that it issued a proper notice. It is an impossible burden to carry because the documentation shows that the notice was mailed on October 2, 2014, four (4) days before the contracted work began, and received three (3) days before the start of the work, well under the minimum fifteen (15) days required by the Note to Rule 55. Moreover, the Organization has alleged that the contract was signed before the conference took place and there is no documentation in the record that would contradict the assertion. The Board need not speculate on the reason for the tardy notice, but simply notes that the chronology does not meet the good faith requirements set forth in the Note to Rule 55 and Appendix Y. While the notice may have been conferenced, a conference held under the conditions that occurred would not set the stage for open-minded discussion of the possibility of keeping the work within Carrier forces. The tardy notice makes moot consideration of the Carrier's defenses and, by itself, requires a sustaining award (see on-property Third Division Award 40488 and PLB 4768, Award 1).

For reasons noted above, the Board finds that damages are appropriate. The Carrier must provide records that show the hours worked by outside forces improving the Vancouver Office Building. The parties must agree on the number of straight-time hours and, if any, the number of overtime hours worked by outside forces, with these hours becoming the basis of payment to the Claimants.

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.