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

Award No. 44271
Docket No. MW-43515
20-3-NRAB-00003-200421

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 (Service West Contracting) to perform Maintenance of Way and Structures Department work (track construction) between Mile Posts 60 and 62 near Tamarack, Minnesota on the Brainerd Subdivision beginning on October 7, 2014 through October 28, 2014 (System File TD-4575-M/11-15-0210 BNR).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notification requirements regarding 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 M. Martin, F. Volk, R. Laursen, K. Rasmussen and R. Beck shall now each be allowed '… one hundred ninety two (192) hours with the pay to be at the claimant's respective overtime rates of pay and any additional hours worked by the contractor continuing until the project is completed.'"

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 June 10, 2014 sent to the General Chairman, the Carrier gave notice that it planned "to contract for additional heavy equipment such as excavators and front end loaders with operators to assist BNSF forces with the installation of various temporary turnouts to support the various tie and rail production gangs located on the Twin Cities Division." The notice further stated that "BNSF is not adequately equipped with sufficient equipment to perform all aspects of this project." After identifying the contract work to be performed, the notice listed the twenty-four (24) subs on which the work was to take place. The contracted work was to "begin approximately on June 27, 2014 unless production schedules require the work to be sooner."

By letter dated June 11, 2014 the Organization requested a conference and alleged that the notice was defective because it covered 2,700 miles of track without identifying even one specific location where the contracted work would take place, leaving the Organization "unable to examine available Carrier equipment and Carrier force at any particular location." The heavy equipment referred to in the notice was said to be in Carrier inventory or available to rent. The time frame indicated to the Organization that a contract had already been negotiated. The Organization requested a list of specific locations and a breakdown of the anticipated work of BNSF forces and outside forces. The General Chairman, in his January 13, 2016 letter confirming a claims conference in late June 2015, stated that during the July 1, 2014 contracting conference the "Carrier simply refused to

provide any information over and above that as written in the June 10, 2014 notice;" a statement that is not refuted in the record.

As stated in the claim, the disputed work was actually performed in October 2014. The resulting timely claim, filed on December 1, 2014, was progressed on the property without resolution and thereafter advanced to the National Railroad Adjustment Board for final adjudication.

The Organization contends that the claim should be sustained. The disputed work is within the scope of the Agreement and has been customarily performed by Maintenance of Way forces. The Note to Rule 55 and Appendix Y were violated because the notice of intent to contract was faulty and because the Carrier did not show the required good faith. Appropriately skilled employees were available and the necessary equipment either was in the Carrier's inventory or could be rented. Contrary to the notice, all work was done by outside forces. The defective notice

alone requires a sustaining award without regard to Carrier defenses, but defenses relying on the inapplicability of Appendix Y, the Organization's supposed failure to prove that the disputed work was reserved by virtue of exclusive, system-wide performance, arbitral determination that the work did not have to be piecemealed and the injunction against windfall damages are all unavailing. Finally, the Organization urges an award with damages to compensate for the lost work opportunity and to protect the integrity of the Agreement.

The Carrier avers that the claim should be denied because the Organization has not shown that the work was preserved by exclusive, system-wide performance. Arbitral precedent allows mixed practice work to be contracted. On-property Third Division Award 32629 and Third Division Award 31483. In essence, the case involves an irreconcilable factual disagreement that must result in dismissal or denial of the claim. Appendix Y is not applicable on BNSF property and does not prohibit contracting. Should the claim be sustained, the Claimants are not due damages because they 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.**
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> **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 does not reserve the disputed work to Maintenance of Way forces, but the record as a whole shows that the work is central to these forces. That record includes Rule 5 Seniority Rosters and specifically, within the Track Sub-Division, Rank C Sectionman and Extra Gang Man and within the Roadway Equipment Sub-Division Machine Operator Group 2 and Machine Operator Group 3 as well as crawler excavator in the listing of Group 2 machines and Skid Steer loader (such as Bob Cat) in the listing of Group 3 machines. Classifications in Rule 55, a description of the work performed in the Note to Rule 55 and statements in the record pertaining to Typical District Maintenance Gang, Typical Section Gang and Typical New Track Construction Gang as well as statements by Carrier Officers Armstrong and McCarthy show that the various aspects of rail work comprise a core function of Maintenance of Way employees. Moreover, in the initial declination of the Organization's claim, the Carrier wrote that "The construction of track, siding, placing panels and bolting panels, laying ties, laying rail, laying plates, aligning track, dumping ballast and surfacing track either for and/or resulting in a benefit for BNSF has been performed by contracted forces, private industry and BNSF forces. The evidence is indisputable that the work that has been contracted has been performed customarily because it is at the core of work done by Maintenance of Way forces.

During the on-property progressing of the claim, the Organization provided specific details about the number and types of contractor employees, the equipment used and the work performed. The record includes nine (9) photos, with one

identifying the contractor and others showing men and/or equipment used for the project. Not only has the Carrier implicitly confirmed the use of outside forces by issuing the notice of intent to contract and defending the decision to contract, but also as possessor of the relevant records, the Carrier has not disputed the detail provided by the Organization. The record establishes the disputed work as that customarily and historically performed by Carrier forces and that during October 2014 was performed on the Brainerd Sub by outside forces. The existence of the Organization's requisite *prima facie* case shifts the burden of proof to the Carrier to show that a proper notice of intent to contract was issued.

The burden cannot be proven. The notice of intent to contract sent to General Chairman Glover is set forth below:

> **"As information, BNSF plans to contract for additional heavy equipment, such as excavators and front-end loaders with operators to assist BNSF forces with the installation of various temporary turnouts to support the various tie and rail production gangs located on the Twin Cities Division. These temporary turnouts will be installed to allow for the machines and equipment on these production gangs to tie up at more efficient locations and prevent lost production time when traveling longer distances to tie up equipment. BNSF is not adequately equipped with the sufficient equipment to perform all aspects of this project. The work to be performed by the contractor includes but is not limited to, load/haul/set/remove No. turnouts (including necessary leading/trailing track panels); necessary excavate/grade/compact materials for set-out track; load/haul/unload necessary sub-ballast and ballast; and debris removal on the following sub-divisions:**
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> > **Aberdeen, Allouez, Appleton, Brainerd, Browns Valley, Casco, Devils Lake, Grand Forks, Hib Tac, Hillsboro, Hinkley, Jamestown, K O, Lakes, Marshall, Midway, Monticello, Morris, Noyes, P Line, Prosper, St. Paul, Staples, Watertown.**
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> **The work to be performed by the contractor will begin approximately on June 27, 2014, unless production schedules or track windows require the work to be done sooner. BNSF forces will be on-**

> **hand performing associated production gang and ancillary heavy equipment work. If you wish to discuss this work please contact Khoury Farrar at (817) 352-0612."**

The day the notice was received, the Organization requested a conference. In a letter that stated that the notice was defective for several reasons, including the following that the Board finds particularly relevant:

> **". . . your Notice fails to identify each contracting transaction for which you intend to provide Notice. You have identified 24 separate Subdivisions in the Twin Cities Division for which you purport to be providing Notice for without providing one single milepost or city and station location. Twenty-four (24) separate Subdivisions represents the clear majority of all Subdivisions that exist on the Twin Cities division. Your Notice covers some 2,700 miles of railroad where this work could potentially be performed. Such a generalized Notice does not comply with Carrier's obligation in Rule 55 or Appendix Y."**

The request for a conference clearly put the Carrier on notice that the Organization wanted more specific information. The Board sees the request as a necessary precursor to an informed, good-faith discussion of specific projects and possible alternatives that might result in an "increase in the use of Maintenance of Way forces."

The Carrier had an opportunity to address the Organization's concerns in the conference that followed on July 1, 2014. However, in his January 13, 2016 letter confirming the claims conference on the property, General Chairman Carroll wrote that no additional information was forthcoming before or during the July 1, 2014 conference. Nowhere in the on-property progressing of the claim or in its submission has the Carrier contradicted statements made by the Organization concerning the general nature of the notice and the lack of a response to the request for more specificity.

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." 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.

In on-property Third Division Award 40546 the Board wrote as follows:

> **"Moreover, the Organization established persuasively that the Carrier failed to provide the General Chairman with proper advance notice of its intent to contract out the specific work as required by Rule 55 and Appendix Y. Although the General Chairman met with representatives of the Carrier on February 11, 2004, thus satisfying the requirement that such a meeting take place, the Carrier's letter of January 15, 2004 failed to list with specificity where the asphalt work was expected to occur in 2004, because the letter listed more than 1,800 separate locations across the Carrier's rail system where asphalt work was anticipated."**

The Board's reaction to the facts before it is no different than this Board's reaction to the set of facts we have had to consider. The Carrier has not lived up to the assurance memorialized in Appendix Y that it "assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable." The violation of the Note to Rule 55 and Appendix Y requires a sustaining award and makes consideration of other contentions moot.

This Board will follow the on-property precedent of ordering that the Claimants receive damages, but with variation from the request made in Part (3) of the claim. We do not believe that all hours worked by outside forces were paid at overtime rates. The listed Claimants are to be paid assuming they performed the disputed work based a combination of straight-time and premium pay rates, with calculations based on the Carrier's records.

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.