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

Award No. 44272
Docket No. MW-43516
20-3-NRAB-00003-200422

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 (North Shore Track) to perform Maintenance of Way and Structures Department work (track construction) within the Gunn Yard on the Lakes Subdivision, Twin Cities Division beginning on October 7, 2014 through December 2, 2014 (System File T-D-4577-M/11-15 0211 BNR).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notification and meeting 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 B. Hartman, D. Seeley, J. Emerson, C. Gregerson, D. Suonvieri, J. Mohn, G. Bone, S. Herzog, D. Guderian, D. Kolodzeske, M. McDonell, D. Mercier, T. Eller and the members of RSG Gang CG 06 shall now each be allowed compensation for an '…equal and proportional amount of the

hours worked by the contractors with the pay to be at the claimant's (sic) respective overtime 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.

On July 14, 2014, the Carrier sent the following notice to the General Chairman:

"As information, BNSF plans to improve yard capacity by extending existing tracks and constructing new leg to the Wye track at Gunn Yard located between MP 106 and MP 109 on the Lakes Sub-Division. BNSF is not adequately equipped to handle dirt work of this magnitude and intends to contract for the necessary heavy equipment, such as excavators (track-hoes), F/E loaders, graders, compactors, dumps, and paving equipment, all with operators. Moreover, BNSF forces do not possess the necessary specialized dirt work or paving skills for this project. The work to be performed by the contractor includes but is not limited to, install erosion-control measures; install necessary vehicular traffic control (including barricades, signage and flags); install temporary construction access roads; excavate approx. 54,500 c.y. of existing material; excavate/grade/build-up/compact approx. 28,500 c.y. of new embankments, turnout pads and berms; excavate/grade/compact new ROW road (North edge); furnish/unload/compact approx. 11,000 c.y. new sub-ballast material; furnish/haul/unload necessary ballast; install necessary utility lines; necessary mulch and over-seeding; necessary assistance

relocating/unloading/placement of track and turnout components; install extend necessary culverts (including inlet/outlet protection and grading drainage route); pave necessary hot-mix asphalt; assist with pick/set turnout plants; and debris removal."

It is anticipated that the work will begin on approximately July 31, 2014.

On July 15, 2014 the Organization wrote the Carrier requesting a conference to discuss the Gunn Yard project. In a January 13, 2015 letter to the Carrier confirming that claim conference, the General Chairman stated that "The Carrier did not respond to, nor did the Carrier arrange to meet with the Organization until January 14, 2015." The Gunn Yard project actually began on October 7 and was completed on December 2, 2014 according to on-property correspondence. In fact, there is mention that the work started prior to October 7, 2014, performed by Maintenance of Way forces, before outside forces began the work. The Organization filed a timely claim on December 1, 2014. The claim was progressed on the property without resolution and advanced to the National Railroad Adjustment Board for final adjudication.

The Organization insists that the claim should be sustained as the disputed work has been customarily and historically performed by Maintenance of Way forces and these forces had done the disputed work for four (4) weeks before being replaced by outside forces. BNSF forces lacked neither the skills nor the equipment to do the work. The Carrier had already piecemealed the work because Gunn Yard project began with BNSF forces. Appendix Y applies on the property and both Appendix Y and the Note to Rule 55 were violated because the requested contracting conference was not held until January 15, 2015, after the completion of the Gunn Yard work. Thus, the Carrier showed a lack of good faith. The timing of the contracting conference alone requires a sustaining award without consideration of Carrier contentions. A remedy is appropriate as compensation for lost work opportunities and to protect the integrity of the Agreement.

The Carrier responds that the claim should be denied because the Organization has not shown how the rules were violated, because Rule 55 does not prohibit contracting, because the Organization has not shown that the work falls under the general scope rule by having been performed exclusively, system wide and because Appendix Y neither applies on BNSF property nor prohibits contracting.

Moreover, the Organization has not proven all elements of its claim. This is a dispute over irreconcilable facts such that the claim must be dismissed or denied. The Carrier cannot be required to piecemeal projects. The notice was specific as to the work to be performed, the location of the work and the reason for using outside forces. Should the claim be sustained damages are not appropriate as the Claimants were fully employed at times relevant and have not provided 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 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 BSNF 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.

The record shows that outside forces performed the disputed work. The claim stated that "The contractor had thirteen (13) employees work seven (7) days a week fourteen (14) hours per day. . ." The Carrier responded that the Organization had not substantiated the hours that it claimed the outside forces had worked, but the Carrier did not deny that outside forces had performed the disputed work. In fact, in the initial declination of the claim it is stated 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 contracting forces, private industry and BNSF forces." The Organization has provided the necessary *prima facie* case so that the burden of proof falls on the Carrier to show that a proper notice of intent to contract was issued.

That the notice was issued on July 14, 2014 is a matter of record despite the Organization's contention that no advance notice was issued. The Carrier's problem lies not in the absence of a notice, but in the failure to properly respond to the Organization's request for a conference to discuss the intent to contract. The Note to Rule 55 gives the Organization the right but not the obligation to request a conference, but if a conference is requested "the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting. . ." (Board emphasis). Appendix Y requires that the requirements for advance notices be strictly adhered to. In a letter confirming the claims conference, the Organization wrote that "The Carrier did not respond to, nor did the Carrier arrange to meet with the Organization until January 14, 2015" (original emphasis). The Carrier has neither disputed the statement nor explained the delay in responding to the Organization's request.

For all practical purposes, the failure of the Carrier to arrange for and hold a conference until after completion of the contracted work is equivalent to not issuing a notice at all. Once the disputed work has been completed it becomes impossible to hold good-faith discussions that might result in reducing contracting and increasing the use of BNSF forces, at least for the completed project. There is ample on- and

off-property arbitral precedent for finding that under the circumstances, the facts at hand require a sustaining award and make moot any further consideration of contentions raised. On-property Third Division Awards 43641 and 43962.

For reasons noted in the analytical framework above, damages are appropriate, although modified from the Part (3) request in the claim. The named Claimants are to share in the damages but not all hours are to be paid for at overtime rates. The parties are to use Carrier records to calculate damages as though the Claimants had performed the work, so that damages will be calculated based on the appropriate combination of straight-time and premium pay hours at each Claimant's respective rate.

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.