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

Award No. 44274
Docket No. MW-43519
20-3-NRAB-00003-200424

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 (Stack Brothers) to perform Maintenance and Structures Department work (installation of new threaded gas line and thaw heaters and related work) on the BNSF 5 Dock Suttle Deck at Allouez Taconite Facility in Superior, Wisconsin on the Twin Cities Division beginning on September 15, 2014 through October 31, 2014 (System File T-D-4551-M/11-15-0152 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 92) above, Claimants D. Tollers, S. Stariha, B. Hartwig, D. Nelson and J. Bartczak shall now each be compensated for an '…equal and proportional (sic) of the hours work(sic) by the contractor with pay to be at his respective overtime rate 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 August 20, 2012 the Carrier gave notice to the General Chairman that it planned "to contract all work associated with the facility improvements at the Allouez Taconite Facility located in Superior, WI" because "BNSF forces do not possess the necessary specialized dirt work skills to complete this project" and because "BNSF is not adequately equipped to handle all aspects of this work." The notice listed at least eight (8) structures on the Allouez Taconite Facility that were to be improved. The work was to begin on approximately September 4, 2012.

By letter dated March 21, 2014 the Carrier gave notice to the General Chairman that BNSF planned:

> **". . . to contract all worked associated with the arc gate thawing improvements near the conveyor transfer beam at the Allouez Taconite Facility located in Superior, WI. The work will consist of demolition of various components and fabrication of new site-specific support structure. BNSF forces possess the necessary specialized skills for fabrication and installation on this project. The work to be performed by the contractor includes but is not limited to, demo existing thaw system; install necessary false-work for support; fabricate/install new structural support framing to conveyor hanging frames; fabricate/install new hanger connections; remove/replace/re-install thaw system components (including gas lines, safety valves, filters**

torches, flame rods, air fans, and associated parts); and debris removal.

It is anticipated that this work will begin on approximately April 9, 2014."

During the on-property progressing of the subsequent claim, the Organization introduced a Claim Information Sheet filed by Claimant Tollers that listed the days on which the disputed work took place, the hours worked and the number of outside forces involved each day and the positions worked. The Information Sheet listed the following equipment used: welder, grinder, manlift, torches, hand tools, crane, backhoe, pipe cutter and pipe threader. The claim sheet further listed the same equipment that was in the Carrier inventory.

As a result of the contracted work, the Organization filed the above-noted timely claim, which was progressed on the property without resolution and advanced to the National Railroad. The Organization asserts that the claim should be sustained. The Carrier contracted work that is central to and reserved to the Bridge and Building Sub-Department forces. This is work that has been previously performed by BNSF forces. It did not involve dirt work or the use of heavy equipment. The Note to Rule 55 and Appendix Y were violated because the notices were defective. Neither included a reason for the decision to contract the work. Therefore, the Carrier has not made a good-faith attempt to reduce subcontracting and increase work for Maintenance of Way forces. The Carrier asserted that BNSF forces did not have the licenses necessary to perform the work, but provided no supporting evidence.

The defective notice alone requires a sustaining award without consideration of Carrier contentions. That aside, the Organization has provided the necessary *prima facie* case. Contrary to the Carrier's assertion, Appendix Y applies on BNSF property and the Organization must show only that the disputed work has been performed customarily, but not exclusively, system-wide. The Organization has not asked that the work be piecemealed and piecemealing is not an exception listed in the Note to Rule 55. Claimants were available, but assigned elsewhere. Moreover, the Carrier made no effort to assign the Claimants and has not properly staffed to have the work done in-house. The Carrier's assertion that the Organization has filed duplicate claims is erroneous as the instant claim is the only one involved this

particular contract. The Claimants' inclusion in separate claims involving different projects does not invalidate this claim. A remedy is appropriate as compensation for lost work opportunities and to protect the integrity of the Agreement.

The Carrier insists that the claim be denied. Proper notices were provided. The Organization has failed to make a *prima facie* case because it has not shown that BNSF forces have performed this work previously, let alone exclusively, system-wide. Moreover, the work involved special skills as this was the first time the particular process had been used. This was part of a large-scale project that BNSF forces were not equipped to carry out. Nor was the Carrier required to piecemeal the work. BNSF forces did not have the necessary licenses to perform the work. Contracting is not prohibited either by the Note to Rule 55 or by Appendix Y, with the latter not applicable on BNSF property. The Board is faced with an irreconcilable factual dispute that requires the claim to be dismissed or denied. Damages are not appropriate for some of the Claimants who are listed in another claim involving disputed work that conflicts with the work that is the subject of the instant claim. Also, damages are not appropriate because all of the Claimants were fully employed or on approved leave and have not shown 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 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.

It is a matter of record that outside forces performed the disputed work. Not only did the Organization produce Claimant Toller's detailed Claim Information

Sheet, but also the Carrier has not denied the use of outside forces and has defended the decision to contract the work. Thus, the Board turns to consideration of whether the disputed work has been customarily performed by BNSF forces, When the relevant Water Service classifications within the Bridge and Building (B&B) Sub-Department, Carrier Officers' statements in the record and Claimant Toller's statement about his work in Water Service are considered, the conclusion must be that B&B forces have customarily installed heating and air conditioning systems and plumbing fixtures, to include the installation of duct work, water, air and sewer lines.

In its submission, the Carrier relies on an e-mail from the Allouez Taconite Facility Manager said to have been "provided to labor relations—which was later provided to the Organization." The e-mail explains that the "Arc-Gate thawing process installed at Allouez is new technology [that] is specially-engineered and has not been installed at another site; Allouez was the first." Here chronology is critical. The instant claim was filed on November 10, 2014, progressed on the property and declined for the second time on April 29, 2015. The Facility Manager's e-mail to Donald J. Merrill in Labor Relations, is dated May 13, 2015. Nothing in the record establishes the date on which the e-mail was forwarded to the Organization.

The notices of intent to contract also must be considered. The August 20, 2012 notice includes nothing about arc gate thawing improvements but states that "BNSF Forces do not possess the necessary dirtwork skills to complete this project and that "BNSF forces are not adequately equipped to handle this work." The March 21, 2014 notice is specific about the work to be contracted and includes the sentence that "BNSF forces possess the necessary skills for fabrication and installation on this project." The notice then goes on the identify specific components of the project to be contracted. The Board does not speculate about whether the notice accurately says what the Carrier intended to say. We take the words as they were written. What the record shows is that from the March 21, 2014 notice through the Carrier's second declination of the claim, the Carrier did not indicate the reason for the decision to contract. Nor can the Carrier confirm whether the reason was advanced before the claim conference was held "during the week of June 23, 2015."

The Board, after carefully reviewing the record, concludes that substantial evidence shows that the explanation for contracting the disputed work appears for the first time in the Carrier's submission, but was not advanced during the on-

property discussions of the claim. In this appellate procedure, new argument cannot be considered. Without the new argument contained in the Facility Manager's e-mail, the Board finds that the Organization customarily performed the disputed work, albeit using different technology, and that the Carrier did not issue a notice that complied with the Appendix Y stricture that "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" (Board emphasis). Therefore, the claim is sustained.

However, the remedy involves a modification of the Organization's request for compensation stated in Part (3) above. The Claimants named above are the same Claimants named in Award No. 44257. That claim, also sustained, involved compensation for the September 5-30, 2014 period. Assuming that the Carrier had assigned the Claimants to the disputed work in the earlier case rather than contracting the work, they could not have been available to do the work contracted in the instant case. Therefore, to provide the compensation requested above would, indeed, constitute a windfall by compensating the Claimants for a second missed work opportunity that would have been impossible to perform. Therefore, the Order for this case will cover only the periods September 5-14 and October 1-31, 2014. Compensation will be paid at straight-time and overtime rates, as appropriate, during each day of the specified periods.

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.