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

Award No. 44275
Docket No. MW-43520
20-3-NRAB-00003-200425

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 (Osmose) to perform Maintenance of Way and Structures Department work (repair and rebuild piers on bridges) at bridges at Mile Posts 102.6 and 106.0 on the Lakeside Subdivision beginning on September 15, 2014 through October 31, 2014 (System file S-P-1948-C/11-15-0156 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 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 L. Smith, A. Zeff, C. Clift, D. Scott, G. Chubb, G. Sthilaire and M. Freeland shall now each be compensated '… an equal and (sic) apportioned amount of all hours worked by contractors straight time and overtime….'"

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.

This is a case where the Carrier referred to, but did not place in the record, two notices of intent to contract. Ironically, but understandably, the Organization placed both in the record during the on-property progression of the above-noted claim. The first notice to the General Chairman, dated May 11, 2011, indicated that "BNSF plans to contract for the removal of out-of-service bridges and drainage improvements located at MP 106.2 and 106.3 on the Lakeside Sub-Division." More does not need to be said about the notice because, while the work to be contracted was in the same location as the currently disputed work, the notice obviously refers to a different project. The second notice to the General Chairman, dated June 14, 2013, concerned capacity expansion to involve work in the Lakeside Sub for the first six (6) phases and the Fallbridge Sub for the seventh (7th) phase. None of the work described in this notice was to take place at Mile Posts 102.6 and 106.0 and the description did not include "repair and rebuild piers on bridges."

The timely claim was filed on November 13, 2014, progressed on the property without resolution and forwarded to the National Railroad Adjustment Board for final adjudication.[1] The Organization insists that the claim should be sustained

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[1] The Carrier contends that the claim is untimely, having been received on November 14, 2014, sixty-one days past September 15, 2014, when the outside forces began the work. However, the Carrier counted September 15, rather than September 16, 2014 as day one. Counting as usual, which means counting September 16 as day one, means that the Carrier received the claim on the 60th day. Rule 42 was not violated.

because the contracted work was scope work customarily performed by and reserved to BNSF forces. The work was not part of capacity expansion and involved neither specialized equipment or specialized skills. The Note to Rule 55 and Appendix Y were violated because neither of the notices referred to the contracted work; thus, the Carrier did not show good faith. Damages are due to compensate for lost work opportunities and to protect the integrity of the Agreement.

The Carrier asserts that the Organization has not shown that the contracted work had been performed exclusively, system wide by Maintenance of Way forces or that the work was reserved for these forces. Appendix Y is not applicable on BNSF property and, moreover, does not prohibit contracting. The Organization has not substantiated the hours claimed. In essence this case involves an irreconcilable factual dispute that requires that the claim be dismissed or denied. Should the claim be sustained, damages would be inappropriate because the Claimants, fully employed at times relevant, lost no wages and they did not show 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 this element of the burden of proof is 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 in order 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 Organization has proven both elements of the necessary *prima facie* case. A review of Bridge and Building (B&B) Sub-Department classifications shows that included are B&B Foreman, Assistant foreman, Carpenter or Mechanic-1st Class, Shop Carpenter, Carpenter or Mechanic-2nd Class, Carpenter or Mechanic Helper and Truck Driver—all classifications potentially relevant to "the construction and

maintenance or repairing 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. . .” A document titled Typical Bridge construction Gang lists as an example of programmed work bridge reconstruction. Typical maintenance work includes pile posting. A job posting for Bridge and Building Helper/Driver includes aspects of bridge work among the duties. Statements by Company Officers Michael Armstrong and William McCarthy refer to maintaining repairing and rebuilding bridges. The inescapable conclusion is that the work that the Carrier contracted is scope work encompassing core duties customarily performed by Maintenance of Way forces.

The work performed by outside forces is documented by a series of Claim Information Sheets and Witness Statements from a number of the Claimants detailing the dates on which the work was performed, the hours involved on each date, the number of outside forces used on each date and the equipment used. Witness statements describe aspects of the work that outside forces performed. The Carrier responds that the Organization has not substantiated the hours claimed, but as the party maintaining the official records, the Carrier has not documented hours that differ from those claimed, which the Carrier has done when documented hours were less than those claimed by the Organization. Other than questioning the hours involved, the Carrier has not disputed the use of outside forces.

With the *prima facie* case established consideration turns to the requirement in the Note to Rule 55 that the Carrier must issue a notice of intent to contract and the requirement in Appendix Y that the notice identify “the work to be contracted and the reason therefor.” As indicated above, the Carrier has failed to issue a notice that identifies the work that is the subject of the instant claim. Therefore, the Carrier has not met the good faith requirements of Appendix Y. A sufficiently detailed notice is a necessary precursor to productive discussions that might serve to reduce subcontracting and increase the use of BNSF forces. The violation alone requires a sustaining award and makes consideration of all other contentions moot.

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.