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

Award No. 44276
Docket No. MW-43521
20-3-NRAB-00003-200426

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 (Perrett Construction) to perform Maintenance of Way and Structures Department work (mowing, hauling rock, sand and dirt, tearing out crossings and unloading panels) between Mile Posts 80.7 and 83.5 on the Hannibal Subdivision, Springfield Division beginning on October 10, 2014 and continuing (System File C-15-C100-30/10-15-0068 BNR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding 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 the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Bressler, M. Churchill, B. Rea, T. Maglioacchetti, J. Clark, S. Constable and B. Boyer shall now each be compensated at their respective rates of pay for an equal proportionate share of the total man-hours expended by the

outside forces performing the afore described work beginning on October 10, 2014 and continuing."

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 to the General Chairwoman dated July 15, 2014, the Carrier gave notice of intent to subcontract the construction of two sidings: one at MP 43 – 45.5 (Gibb) and the other, which is relevant to this case, at MP 81 – 83.5 (Burns). The notice began as follows:

> **"As information, BNSF plans to expand capacity with construction of two new sidings to improve velocity between MP 43 and MP 84 on the Hannibal Sub-Division. BNSF is not adequately equipped with the necessary specialized equipment, such as scrapers, graders, rollers, compactors, dozers, loaders, blades, off-track cranes, as well as front-end loaders, dump trucks, water trucks, and track-hoes (excavators) necessary to perform this volume of dirt work. Moreover, BNSF forces do not possess the necessary specialized dirt work skills for projects of this size and type."**

The notice goes on to identify the two locations, the details of the work to be done at each location and the anticipated starting date of approximately August 1, 2014. The intended contract was conferenced without resolution, the work began on October 10, 2014 and was completed on December 15, 2014. The above-noted claim was filed and progressed on the property, also without resolution. Thereafter the matter was advanced to the National Railroad Adjustment Board for final adjudication.

The Organization avers that the claim should be sustained because the Carrier violated the Note to Rule 55 and Appendix Y when it contracted work customarily performed by and reserved to Maintenance of Way forces. The Organization has provided a *prima facie* case by also establishing the dates and hours that the outside forces performed the work. The Carrier has not exhibited good faith in this matter as it has made no effort to adequately staff its forces or to attempt to assigned Maintenance of Way forces.

The notice is incomplete and for that reason defective so as to require a sustaining award. That said Carrier defenses are viewed as invalid. Necessary skills and equipment are present, Appendix Y applies on the property, the Organization must show only that its members have customarily, not exclusively, performed the disputed work, this is not an irreconcilable dispute over basic facts and a remedy is appropriate to compensate for lost work opportunities and to protect the integrity of the Agreement. The Organization has the right to name the clients and denies that it has admitted that hauling rock is work to be contracted.

The Carrier asserts that the claim should be denied. The disputed work involves capacity expansion, as noted in the initial declination. Awards establish that the work does not have to be piecemealed. Moreover, the Organization has not proven the allegations and has admitted that hauling rock should be done by outside forces. A proper notice of intent to contract was provided. The Organization has not shown that this was reserved work by virtue of past exclusive, system-wide performance. The Carrier has the right to determine methods by which the work will be performed. Damages are inappropriate because the Claimants were fully employed at times relevant and have not shown 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.

The Board finds that the Organization has provided the required *prima facie* case and does not find that the Organization has admitted that hauling rock is not the work of Maintenance of Way forces. Agreement language, common sense and a plethora of prior award establish the work as central to that performed by BNSF forces. Furthermore, the details provided by the Organization as well as the Carrier's tacit admission that it contracted the work and its defense of the decision to contract establish that outside forces performed the work.

Turning to the notice sent to the General Chairwoman, the Board finds that it contains a detailed statement of the work to be performed, the location of the work (MP 81-83.5), the anticipated date the work was to begin and the reason for the subcontract. The notice met the requirements of the Note to Rule 55 and Appendix Y. The Board has also considered the scope of the work involved, the two months that the project took, and the capacity expansion aspect of the work and concludes that, indeed, the project is appropriately characterized as large-scale capacity expansion. On-property Third Division Award 41223 considered a claim arising from the contracting of a project similar to that now under consideration. In denying the earlier claim, the Board wrote:

> **". . .The Carrier determines the size of its work force, which should be adequate for routine track work and maintenance. But periodically, the Carrier will engage in large construction projects requiring an even large investment of resources (both labor and equipment). Typically these projects will be either for capacity expansion or major renovation of existing facilities. The Carrier simply does not have the existing manpower and equipment to complete such large projects in a timely fashion. Whether the Board concludes. . .that the work is not "customarily performed" by Carrier forces (in which case the Note to Rule 55 does not apply) or that the work is of the type "customarily performed" but that the Carrier is "not adequately equipped to handle the work" (one of the exceptions to the Note to Rule 55's strictures against contracting) the end result is the same—the claim will be denied. Nor does the Carrier have an obligation to piecemeal parts of these large complex projects. . .This is not a case where the Carrier used contractor forces to replace its employees, but where it used them to supplement its own forces"**

The Board's rationale in this earlier case is both persuasive—particularly so given the similarities in the work that was contracted.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of October 2020.