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

Award No. 44278
Docket No. MW-43525
20-3-NRAB-00003-200428

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 to perform Maintenance of Way and Structures Department work (fence construction) between Mile Posts 66.1 and 79.1 on the Ravenna Subdivision of the Nebraska Division beginning on October 27, 2014 and continuing through December 13, 2014 (System File C-15-C100-35/10-15-0075 BNR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing in advance of its intent to contract out the aforesaid work or to 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 Part (1) and/or (2) above, Claimants C. Davidson, A. Salinas, J. Cramer, L. Snyder and J. Perry shall now each be compensated for three hundred sixty-eight (368) hours at their respective straight time rates of pay and one hundred eighty-four (184) hours at the 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 December 5, 2011 the Carrier issued a notice of its plans to contract work related to an expansion project on the Ravenna Sub-division. The notice is not in evidence. By letter dated October 28, 2014, the Carrier notified the General Chairman of an intent to contract for "additional dirt and bridge work between MP 73.11 and MP 80." Relevant to the instant case, the work to be contracted included "install approx. 70,000 l.f. 5-strand Barb wire fencing." The amended notice further stated that "It is anticipated that this additional project scope will begin on approximately November 14, 2014. However, as your office was advised, a portion of this work may already be underway." The reason for the decision to contract seemingly remained unchanged; that being that the Carrier was "not adequately equipped with the necessary specialized equipment" and "BNSF forces do not possess the necessary specialized dirt work skills for projects of this type and magnitude."

In evidence is an e-mail from Claimant Davidson to Mr. Landy Walker in the Organization office stating that he and Claimant Cramer "have witnessed contractors on bnsf premises installing fence along the right of way between mile post 66.1-79.1 on the Ravenna sub near Hampton Nebraska between October 27th and dec13th (sic) . . . Also in evidence is a handwritten statement from Claimant Snyder that "Green Streak Inc Install plastic fence on the Ravenna Sub between mile post 66.1 to 79.1 next to the main line for the new track protect 10-27-2014 to 12-13-2014. The contracted work resulted in the above-noted timely claim that was

progressed on the property without resolution and thereafter advanced to the National Railroad Adjustment Board for final adjudication.

The Organization insists that the claim should be sustained as there is no indication of a proper notice. The Note to Rule 55 and Appendix Y were violated when the Carrier assigned outside forces to scope work reserved to and historically, customarily and traditionally performed by Maintenance of Way forces. The Carrier has not operated in good faith and has not shown the existence of an exception that would allow the work to be contracted. The Organization has provided a *prima facie* case.

The lack of a proper notice alone requires a sustaining award without consideration of Carrier defenses, but that said, the defenses are unavailing. The Carrier has failed to maintain an adequate workforce or to properly plan for the work. Appendix Y applies on BNSF property. The Organization must show only that its forces performed the disputed work customarily, not exclusively. The Organization has not requested that the disputed work be piecemealed. This is not a factual dispute that requires the Board to dismiss or deny the claim. A remedy is appropriate as compensation for lost work opportunities and to protect the integrity of the Agreement.

The Carrier avers that the claim be denied. The Organization has not presented a *prima facie* case. Three (3) of the Claimants are invalid because they were away on vacation or personal leave. Work of the contractors has not been documented. Rule 55 does not reserve the work to Maintenance of Way forces and Appendix Y, which does not apply on BNSF property, does not prohibit contracting. The disputed work is part of a capacity expansion project that precedent allows to be contracted rather than piecemealed. The Organization has not shown that Maintenance of Way employees have performed the work exclusively, system wide, so that past practice reserves the work. Moreover, the Carrier has the right to determine work processes, including the equipment to be used. Ultimately, this is an irreconcilable factual dispute that the Board must dismiss or deny. Should the claim be sustained, there is no proof of damages as 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 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.**
>
> **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.

Turning to the instant claim, there is no question that the disputed work has been customarily performed by Maintenance of Way forces. Within the Track Sub-Department, Roster 1, Rank C are a number of positions including Sectionman and Fence and Tile. Rule 55 Classification of Work includes "Q. Sectionmen. Employes assigned to constructing, repairing and maintaining roadway and track and other work incident to." Surely the construction of fencing is "work incident thereto" when repair, maintenance and construction of roadway is considered. The Note to Rule 55 includes that employees in the Maintenance of Way and Structures Department "perform work in connection with the construction and maintenance of repairs of and in connection with dismantling of tracks . . .located on the right of way and used in the operation of the company in the performance of common carrier service. . ." If this were not sufficient, PLB 4402, Award 21, an on-property award, concerned the consolidation of four claims arising from the Carrier's use of outside forces to perform fence construction and repair. In its submission, the Carrier wrote that "The history on this property has shown that Maintenance of Way Employes have shared this work when called upon with outside contractors and others." The Board found that fence construction and/or repair clearly falls within work performed "in connection with the construction and maintenance or repairs of … structures or facilities located on the right of way …"

Nor can there be any debate about whether outside forces actually performed the disputed work. The claim filed by the organization described the work performed, the location of the disputed work, the number in the crew installing the plastic fencing, the number of days worked and the number of hours worked each day. Included in the on-property correspondence are the above-noted statements from Claimants Davidson and Snyder attesting to the performance of the disputed work by outside forces. The Carrier, with the records to dispute the information provided by the Organization, has not done so and has never denied that the fencing work was performed by outside forces.

Since the *prima facie* case has been established, we turn to the viability, or lack thereof, of the notice of intent to contract the work. For either of two reasons, this Board must find the notice insufficient. While the notice is included as an exhibit appended to the Carrier's submission, the notice was not appended to the initial declination of the Organization's claim or to the declination that followed the Organization's appeal, in the initial claim is the following: In this instance there was no indication that a proper notice was given to contract out this work." The Organization's contention has been made throughout the progressing of this claim. Nowhere in the on-property correspondence is there evidence of the notice or an indication that the Organization requested and participated in a conference to discuss the fencing project. The notice included in the Carrier's submission is viewed as new evidence provided too late to be considered.

Alternatively, if the notice is considered, it must be viewed as defective, as it is dated October 28, 2014. The Organization's claim states that the work began one day earlier on October 27, 2014 and there is nothing in the record that contests the accuracy of the dates provided. As this Board has observed in an earlier award, a notice that is issued after the contracted work has begun is tantamount to no notice at all, as the Organization has been deprived of the opportunity to discuss the project and therefore has been deprived of the opportunity to convince the Carrier to "increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y." In view of the violations, discussion of other contentions offered by the Carrier and the Organization is 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.