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

Award No. 43650
Docket No. MW-43448
19-3-NRAB-00003-160159

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when on May 14, 15, 20 and 21, 2014 the Carrier assigned outside forces (Blakeslee Excavation) to perform Maintenance of Way work (ballast regulating and equalizing in connection with the installation of track panels) at Mile Post BI 116.6 at St. Joe, Indiana on the Great Lakes Division (System File H42606814/2014-169703 CSX).

(2) As a consequence of the violation referred to in Part (1) above, Claimants M. Reer and D. Williams shall '... be paid sixty-four (64) hours of straight time and eight (8) hours of overtime, divided equally amongst the Claimants at their respective straight time and 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.

It is undisputed the work in question was of the type reserved to the Organization's members by the Scope Rule of the Agreement. The pivotal issue in this dispute is whether the work was performed under an emergency exception to the Scope Rule.

It is undisputed a derailment occurred on Carrier's mainline tracks on April 22, 2014. According to a news article in the record, the derailment happened shortly after noon that day but they were reported back in service the next day. A statement from one of the Claimants said "... we straight railed the interlocking to get both mains open and trains running again on April 23rd morning."

The disputed work was not begun until May 14, 2014, which was twenty days after the tracks were back in service on April 23rd.

When the claim was received, an email was sent to the field to obtain factual information for the Carrier's response. The email thread which followed acknowledged that no notice of the contracting had been provided to the Organization. The thread also shows that the Carrier's claims specialist asked the following direct question of the official having responsibility for the area of the work:

> **"Could have BMWE represented performed the work? If not, please explain why."**

The field official apparently side-stepped the question because he did not provide an answer. Instead, he merely noted that the two named Claimants worked along with the contractor employees. Thereafter, the Carrier denied the claim by contending as emergency conditions permitted its contracting of the work.

After the claim was conferenced on January 28, 2015, the Organization wrote a lengthy letter dated April 21, 2015 that made a number of factual assertions that directly contradicted the Carrier's position that an emergency situation justified the

contracting of the work. The Carrier never refuted any of factual assertions made in the Organization's letter.

It is clear that the disputed work in question was reserved to the Organization's members by the provisions of the Scope language of the Agreement unless it was covered by an exception, such as emergency circumstances, that constituted an affirmative defense. It is well settled in dispute resolution that a party claiming the protection of an affirmative defense must bear the burden of proving its right to access the defense.

On the record before this Board, we find the Carrier has failed to satisfy its burden of proof to establish the emergency defense. As a result, the disputed work was reserved and should have been performed by the Organization's members. Moreover, no proper basis was established to excuse the Carrier's failure to provide advance notice to the General Chairman of its plan to contract the work. The twenty-day delay in performing the work provided the Carrier with ample opportunity to comply with its Agreement obligation to provide the required notice. This, we find the Agreement was violated as alleged in the claim.

The mere fact that the Claimants were employed on the claim dates is not a valid defense to the claimed remedy. As Third Division Award No. 37955 between these same parties determined in September of 2006, the full-employment contention is not a proper defense to a compensation remedy where a violation has been proven. A compensatory Award is appropriate to preserve the integrity of the Agreement.

Given the state of the record, the claim must be sustained. And because the Carrier never challenged the magnitude of the remedy requested by the claim, the claim must be sustained as presented.

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 17th day of May 2019.