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

Award No. 44005
Docket No. MW-45331
20-3-NRAB-00003-190160

The Third Division consisted of the regular members and in addition Referee Keith D. Greenberg when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference
(
(Springfield Terminal Railway 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 work (surfacing) between Mile Post 367.8 and Mile Post 334.0 beginning on November 8, 2017 through December 4, 2017 (Carrier's File MW-18-13 STR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Pierce must be allowed six thousand two hundred sixty-nine dollars and ninety cents ($6,269.90); Claimant R. Hunter must be allowed six thousand one hundred seventy-seven dollars and eight cents ($6,177.08) and Claimant I. Urgin must be allowed one thousand five hundred twenty-two dollars and thirty-five cents ($1,522.35)."

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 matter involves the Carrier's assignment of bargaining unit work to contractors. This claim is one of seven related matters arising from notices, dated July 7, 2017, issued by the Carrier to the Organization advising of the Carrier's plan to use outside forces to perform various types of bargaining unit work. In particular, the work here involves surfacing of track that took place between Mile Post 367.8 and Mile Post 334 from November 8, 2017 through December 4, 2017. Specifically, the Organization asserts that the work at issue consists of the following, based on information provided by the Carrier:

Date	# Men	Location	Hours
8-Nov	2	369.12 & 367.8	12
9-Nov	2	367.8 & 367.1	12.5
10-Nov	2	367.1 & 365.6	12
11-Nov	2	365.6 & 363.9	11.25
12-Nov	2	365.9 & 362.66	12
15-Nov	2	351.1& 350	12
16-Nov	2	350 & 348.5	11.5
18-Nov	2	348.5 & 347.5	11.75
19-Nov	2	347.5 & 345.8	11
20-Nov	2	345.8 & 344.6	11.75
21-Nov	2	349 & 348	12.25
22-Nov	2	[illegible]	12
27-Nov	2	343.7 & 342.9	11.5
28-Nov	2	342.3 & 341.75	11.4
1-Dec	2	339.4 & 338.7	12
2-Dec	2	338.9 & 337.5	12
3-Dec	2	337.5 & 335.4	11.5
4-Dec	2	335.6 & 335	15

(Spelling as in original.)

The claimed hours here arise from a total of over 19,000 manhours of contractor work claimed by the Organization across the seven related claims.

By letter dated July 7, 2017, the Carrier notified the Organization that:

"Please allow this to serve as notice of the Carrier's intent to have a contractor install potentially up to sixty thousand (60,000) ties on the Carrier's system. Any Surfacing work associated with the tie installation would also be performed by the contracted forces. A Carrier Foreman would be expected to work with the contracted forces at all times. A contractor has not been officially retained as of the writing of this notice and there is no set start date for the work to beginning. It is anticipated, however, that this work may begin sometime near the beginning of August.

More specifically, a tie crew consisting of approximately fifteen (15) employees would install roughly twenty thousand (20,000) ties on main line tracks between MP 150.20 (Leeds) and MP 185 (Royal Junction). The same tie crew would also install roughly twenty thousand (20,000) ties in total, on main line tracks from Fitchburg to Deerfield. In addition, there may be a possibility that the fifteen (15) man tie crew would also install eight thousand (8,000) ties on the Portsmouth Branch and another twelve thousand (12,000) ties on the Worcester main line (bringing the overall tie count to 60,000). However, the Portsmouth Branch and Worcester main line work is highly speculative as of the writing of this notice.

Please further be advised that as of the writing of this notice, all Carrier forces are in the process of being returned from furlough and it is expected that no Carrier maintenance of way employees will be in furloughed status when the work outlined herein begins. Nonetheless, even with all Carrier maintenance of way employees returned to active service, the Carrier will not have the additional forces or the operable equipment needed to complete this work. However, the Carrier's maintenance of way employees will be actively working on other maintenance of way projects and will not be detrimentally affected by the

> **presence of contracted forces. In the event that you wish to discuss this matter further, please contact my office at your earliest convenience. Thank you."**

(Spelling and emphasis as in original.) The record reflects that the Parties met to discuss the planned contracting out, that they were unable to reach an understanding as to the planned contracting, and that the Carrier subsequently contracted out work pursuant to the above notice. This Claim followed.

The record appears to indicate that the Carrier called approximately 20 Maintenance of Way employes back from furlough in advance of contracting out the work referenced in the July 7, 2017 letter. It is noted that, in a May 25, 2018 letter to the Organization regarding this claim following discussion of the claim in conference, the Carrier wrote in relevant part that:

> **"The Organization's August 15, 2017 letter also states that the Carrier did not attempt to call employees back from furlough until after the July 7, 2017 notice in this matter was issued. And the Organization takes the position that the Carrier only recalled the twenty (20) furloughed employees (between July 7, 2017 and August 14, 2017) just to show 'full employment' so that the Carrier could hire contractors. In response, and to clarify for the record, the Organization should be well aware that the Carrier actually explained to the Organization directly and very candidly in conference on July 31, 2017, that the Carrier was in fact calling all employees back to work so that no one would be furloughed while the contractors were on the property. In fact, the Carrier explained to the Organization in further detail in that July conference that since the employees were not bidding on the jobs as posted, the Carrier was actually having to put up jobs that the Carrier did not even need in some of the furloughed employees' home zones, so that they would have a job that they would bid on, in order to have no one negatively affected when the contractors were on the property. . . ."**

(Spelling as in original.) (Citations omitted.)

The claim was discussed by the Parties in conference on April 12, 2018.

Article 3, Contracting Out, of the Parties' collective bargaining agreement ("Agreement") states in relevant part that:

> **"3.1 In the event the Company plans to contract out work within the scope of the Agreement, except in emergencies, the Company will notify the General Chairman involved, 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.**
>
> **3.2 If the General Chairman or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization representatives will make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.**
>
> **Note: The provisions of paragraph 3.1 above will not apply to contracting out of work expected to last one day or less with the understanding that such exception will be limited to 3 or less instances per calendar month."**

Article 27, Production Crews, of the Parties' Agreement states in relevant part that:

> **"27.1 (a) The Carrier may establish Production Crews for Track, B&B, and/or Mechanical forces with no assigned basic headquarters to work throughout the System wherever their use may be required.**
>
> **(b) Types of work covered by Production Crews include:**

**Tie
Gauging
Rail
Anchoring
Surfacing . . . .”**

The record reflects that, in term bargaining in or about 2017, the Carrier proposed that the Agreement be modified to permit the Carrier to contract out bargaining unit work in the event that no Maintenance of Way employes were on furlough at the time of the contracting out. The Carrier did not obtain that language in bargaining.

The record reflects that the Carrier employed 251 Trackmen as of January 31, 2014; that it employed 244 Trackmen as of January 31, 2015; that it employed 222 Trackmen as of January 29, 2016; that it employed 200 Trackmen as of January 16, 2017; and that it employed 186 Trackmen as of January 8, 2018.

The record also reflects that the Carrier had abolished two Work Equipment Repairman positions effective March 1, 2017; two additional Work Equipment Repairman positions effective April 14, 2017; and two additional Work Equipment Repairman positions effective June 9, 2017.

The Organization contends that surfacing work is core Maintenance of Way work and that the work at issue here, which consisted of surfacing behind production tie gangs, is performed by Maintenance of Way forces on an annual basis. This work is reserved to Maintenance of Way forces by customary and historical performance, as supported by work rules and undisputed assertions made by the Organization in the record here, with no evidence of other crafts or classes of employees performing this work. The reservation of work to the bargaining unit and the protection of that work is at the heart of the Agreement. For these reasons, the Organization asserts that it has met its prima facie case to demonstrate that the work at issue here is reserved to the bargaining unit.

The Organization maintains that the Carrier does not have the unfettered right under the Agreement to contract out work. The Organization urges the Board to reject the Carrier’s argument that it need only meet and discuss a contracting

transaction with the Organization consistent with Article 3 in order to proceed with the contracting out without limitation; the ramifications of that argument, if adopted by the Board, could permit the Carrier, at least in theory, to contract out the entirety of the work customarily and historically performed by the bargaining unit.

The Organization contends that nothing in the applicable contractual language provides the Carrier the right to contract out any and all work; rather, it leaves the question of whether the Carrier had the right to contract out work to the Parties, for discussion in the first instance, and to the Board, if the Parties are unable to reach an understanding or agreement. The Organization notes that no criteria are provided, however, for the Board's consideration.

The Organization acknowledges that there may be situations in which the Carrier would be justified in contracting out bargaining unit work. The Organization asserts that, because the Agreement does not provide criteria for when contracting out work would be appropriate, the Board should look to traditionally recognized standards under which the contracting out of work may be permissible. First, the Organization argues that the Carrier must establish a highly compelling need to contract out the work. Second, the Organization acknowledges that unexpected circumstances may give rise to the need for contracting out. The Organization contends that the work at issue is not reflective of a spike in work; rather, this maintenance work is performed annually; the Carrier has every reason to expect that work of this type will be performed every year. The Organization maintains that the Carrier created the circumstances that it now uses to justify its need to contract out; because the Carrier created those circumstances, they cannot constitute a compelling need for contracting out. The Organization asserts that the Carrier attempted to compress what is normally a seven to eight month maintenance production period into a two to three month burst of work to build a case for contracting out.

The Organization contends that the assertion that the Carrier lacked manpower should also be rejected as the Carrier had reduced its headcount of Trackmen from 251 employees to 186 employees between January 2014 and January 2018; moreover, at least 20 employees were on furlough immediately prior to the 2017 contracting out. The Organization maintains that, had the Carrier kept headcount at a reasonable level and called back furloughed employees during the prime season for maintenance work, it would have had sufficient forces to complete the work at issue

without contracting out. The Organization notes that, although the Carrier raised at arbitration the assertion that the Organization "cherrypicked" rosters so as to support its case, the Carrier raised no challenge to the accuracy or appropriateness of the use of those rosters during the on-property handling of this claim. The Organization also points out that the Carrier was not advertising any openings for Maintenance of Way positions; the record is less than clear, however, as to the timeframe to which the Organization refers.

Third, the Organization recognizes that, traditionally, an employer lacking the equipment to perform particular tasks may contract out those tasks to a contractor that possesses the proper equipment. Although the Carrier claims that it lacked equipment to perform the work at issue, the Organization contends that the Carrier has again attempted to manufacture conditions that would support its decision to contract out bargaining unit work. The Organization points out that the Carrier never identified particular equipment that was inoperable. The Organization also notes that the Carrier had abolished six Work Equipment Repairman positions in just over three months in 2017; the Carrier cannot claim that it has insufficient operable equipment to support core Maintenance of Way work at the same time that it eliminates the positions tasked with repairing and maintaining that equipment. The Organization further notes that there was no evidence that the Carrier attempted to lease appropriate equipment for use by Maintenance of Way employes. The Organization also points out that the Agreement does not permit contracting out in the event that the Carrier lacks appropriate equipment.

The Organization asserts that, in light of the Carrier's demonstrated breach of the Agreement here, a monetary remedy is appropriate regardless of the employment status of the individual Claimants in this matter, as the work given by the Carrier to its contractors was lost forever to the bargaining unit. The Organization cites to Third Division Award No. 42889, issued on this property, as well as other Awards under other BMWE Agreements, such as Third Division Award Nos. 30943, 31521, 40320, 40677, 40765, 40774 and 40921. To the extent that the Carrier asserts that other Maintenance of Way employes would be better suited as Claimants in this dispute, the Organization contends that such assertions should be rejected, and cites to Third Division Award No. 10229 and Award No. 4 of Public Law Board No. 7097.

The Organization contends that the Board should reject the Carrier's claim that the Organization failed to meet its obligation, under Article 3, to make a good faith attempt to reach an understanding concerning the contracting out at issue here. The Organization asserts that the fact that it took a hard position on the contracting out here – in response to the Carrier's failure to maintain its equipment and its furloughing of many employees – is not inconsistent with a good faith attempt to reach an understanding. The Organization notes that there was no evidence that the Organization failed to consider the Carrier's position and proposals or that the Organization in some way failed to provide sound reasons for declining to agree that the Carrier could contract out this work.

The Carrier notes at the outset that the Organization bears the burden of proof in this case. The Carrier asserts that the Organization seeks to hold the Carrier to standards that are not in the Parties' Agreement. The Carrier contends that Article 3 sets forth the entirety of the process governing contracting out and that the Carrier complied with that process; notice was provided to the Organization more than 15 days before the work at issue was contracted out. The Carrier acknowledges that the work at issue here is within the scope of the Agreement; it is for precisely that reason that the Carrier provided the Organization with notice of its intent to contract out this work.

The Carrier points out that the Organization will always seek to have the Carrier hire more bargaining unit employees, and notes that the Organization is not entitled to determine the number of Maintenance of Way forces employed by the Carrier.

The Carrier contends that the Board must follow the language of the Parties' Agreement, and cannot add conditions or standards not contained therein. The Carrier argues that the standards put forward by the Organization – a demonstrated compelling need, a showing of extraordinary circumstances, or the Carrier's lack of equipment – are not present in the Agreement and cannot be understood to limit the Carrier's right to contract out.

The Carrier asserts that it attempted to obtain language in term bargaining permitting contracting out where no bargaining unit employees are furloughed in order to head off contracting out disputes, which have arisen with some frequency on

this property. It contends that the fact that it sought this language is not indicative of any current restriction on its ability to contract out as needed, subject to the requirements of Article 3.

The Carrier notes that manpower fluctuates from year to year, and asserts that the Organization has simply selected certain rosters that support its contentions.

The Carrier maintains that the Organization failed to meet its own obligations under Article 3 of the Agreement, which requires both Parties to make a good faith attempt to reach an understanding regarding a contracting transaction. The Carrier asserts that the Organization failed to make the requisite good faith attempt.

The Carrier asserts that the work at issue here was a large scale production tie job for which the Carrier did not have the necessary operable equipment or the money to fix that equipment.

The Carrier contends that there is no evidence of any missed work opportunities here, as the Carrier's Maintenance of Way forces were fully employed while contractors performed the work that is the subject of this dispute. The Carrier asserts that, even if the Claim were to be granted, the Organization's claim for a monetary remedy would, therefore, be inappropriate. The Carrier maintains that this situation cannot be viewed as a lost work opportunity meriting a monetary remedy; otherwise, every situation in which the Carrier were to contract out would be considered a lost work opportunity meriting a monetary remedy. The Carrier asserts that such a remedy would be punitive in this case.

The Board carefully reviewed the record, the Submissions, and the arguments of the Parties at the Hearing.

The Organization bears the burden of proof to demonstrate a violation of the Agreement. In reviewing the record, the Board finds that there was insufficient evidence on this record to find pretextual or otherwise in bad faith the Carrier's claim that the subcontracting at issue was necessary due to insufficient manpower. The Board is, therefore, unpersuaded that the contracting out of the surfacing work at issue here violated the Agreement.

There was no showing of harm to the Carrier's Maintenance of Way employees. All furloughed employees were offered the opportunity to return to work. No evidence was adduced as to why the furloughed employees had been on furlough (or for how long) and there was no indication that their furlough had been successfully challenged by the Organization. The record, therefore, fails to establish that their furloughs were violative of the Agreement. The Carrier's decision to assign the returned employes to some jobs that the Carrier may not have believed were needed is a decision within the discretion of the Carrier. The record does not provide sufficient basis to conclude how many employees were so assigned. The fact remains that the Carrier's Maintenance of Way forces were fully occupied at the time that the Carrier had the work at issue here performed by outside contractors.

The Organization failed to demonstrate that the reduction in the Carrier's Maintenance of Way forces violated or was inconsistent with the Agreement. No evidence or explanation was provided as to the reasons for the decline in the number of the Carrier's Maintenance of Way forces. Although that decline took place over a number of years, no evidence was adduced as to any prior claim by the Organization that the reduction in headcount was in some way violative of the Agreement.

There was also no evidence to support a finding that the Carrier's timing of the work at issue violated the Agreement or was otherwise done in bad faith. The Carrier enjoys the management right to determine, for good faith business reasons, when work is performed. The record in this case fails to establish that the scheduling of the disputed work or other work within the work jurisdiction of the Organization during 2017 was done by the Carrier for other than bona fide business reasons.

For the reasons set forth herein, the Board denies the claim in its entirety.

The Board agrees with the Organization that Article 3 does not allow the Carrier to contract out work without limitation so long as notice and discussion takes place first. Rather, once work is found to be within the scope of the Organization's recognized work jurisdiction, there exist implied limitations on the right of the Carrier to contract out that work. It is not necessary to reference herein all of those implied limitations. It is sufficient to observe that the record established that no employees were on furlough and that the work in question, when combined with the other work being assigned to and performed by members of the bargaining unit, could not have

been timely performed by the bargaining unit workforce. This Board's decision is necessarily based upon the specific facts and circumstances developed in the record in this and the six related cases presented by the Parties here. As previously noted, the Organization failed to establish that the contracting out in question was motivated not by legitimate business objectives, but instead by a desire to undermine the status of the Organization, the bargaining unit, or any specific provisions of the negotiated Agreement. Nor was the contracting out in question shown to have had those effects.

In light of the holding above, it is unnecessary to address the Organization's arguments regarding the Carrier's assertion that its equipment was inoperable and therefore unavailable, as the facts developed on this record were not sufficient to find that the contracting out at issue here, even if supported solely by the Carrier's assertions regarding the need for additional forces, violated the Agreement. It is similarly unnecessary to address the Carrier's allegations regarding the nature of the Organization's participation in the Article 3 process concerning this work.

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 28th day of April 2020

CARRIER MEMBERS' CONCURRING OPINION
To
Third Division Award No. 44002; Docket No. MW-45312
Third Division Award No. 44003; Docket No. MW-45313
Third Division Award No. 44004; Docket No. MW-45330
Third Division Award No. 44005; Docket No. MW-45331
Third Division Award No. 44006; Docket No. MW-45332
Third Division Award No. 44007; Docket No. MW-45349
Third Division Award No. 44008; Docket No. MW-45350

Referee Keith D. Greenberg

Article 3 pertains specifically to contracting out. **Article 3** states in its entirety:

"*3.1 In the event the Company plans to contract out work within the scope of the Agreement, except in emergencies, the Company will notify the General Chairman involved, 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.*

3.2 If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization representatives will make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.

Note: The provisions of paragraph 3.1 above will not apply to contracting out of work expected to last one day or less with the understanding that such exception will be limited to 3 or less instances per calendar month."

The ability to contract out work falling within the scope of the parties' Agreement is an important contractual right of this Carrier. Even though "…*the Organization may file and progress claims in connection therewith...*" (Article 3.2), the Organization nevertheless bears the burden, as it does in any rules case, of proving that a violation of an existing provision of the parties' Agreement occurred. Here, despite the Organization's insistence that Article 1, 3, 4, 5, 6, 10, 27 and 30 of the parties' Agreement were violated, the Board properly concluded that the *"…Organization failed to establish that the contracting out in question was motivated not by legitimate business objectives, but instead by a desire to undermine the status of the Organization, the bargaining unit, or any specific provisions of the negotiated Agreement. Nor was the contracting out in question shown to have had those effects.*" Accordingly, we concur with the underlying holding of these Awards.

Anthony Lomanto

Anthony Lomanto
Carrier Member

Jeanie L. Arnold

Jeanie L. Arnold
Carrier Member

April 28, 2020

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 44002, DOCKET MW-45312; AWARD 44003, DOCKET MW-45313;
AWARD 44004, DOCKET MW-45330; AWARD 44005, DOCKET MW-45331;
AWARD 44006, DOCKET MW-45332; AWARD 44007, DOCKET MW-45349; and
AWARD 44008, DOCKET MW-45350
(Referee Keith Greenberg)

I must concur and dissent with the Majority's findings. Initially, the Majority correctly held that "… Article 3 does not allow the Carrier to contract out work without limitation so long as notice and discussion takes place first. Rather, once work is found to be within the scope of the Organization's recognized work jurisdiction, there exist implied limitations on the right of the Carrier to contract out that work. ***" I must concur with this finding. However, my concurrence must stop here.

While the Majority held that there were implied limitations on the Carrier's contracting out, it did not explain what those limitations were that nonetheless allowed the Carrier to contract out the claimed work. This decision is inexplicable in light of the undisputed facts, which the Board highlighted within its decisions. Specifically, it was established in the record that the Carrier's workforce had dropped from 251 to 186 between 2014 and 2018. This equates to a nearly 26% reduction in forces over a four (4) year period. Moreover, the Carrier did not recall any of the twenty (20) furloughed BMWED members until it served its July 7, 2017 notice of intent to contract out this work. The Carrier then used the fact that everyone was working and there were no furloughs as its justification for contracting out work. However, this ignores the fact that there was no requirement that this work be done at a specific time period. The Carrier should have either hired to keep up with its attrition rates; or assigned its existing workforce to complete the project instead of furloughing twenty (20) employes; or planned the project to be completed over a longer period thereby keeping the work within the bargaining unit. It should be noted that the NRAB has consistently held that the lack of sufficient available employes due to a carrier's failure to adequately staff or train its forces is no excuse for violating the Agreement and assigning work to outside forces. Typical of the NRAB's holdings on this issue are Third Division Awards 4765, 4869, 6234 and 19268.

The Carrier also referenced that it lacked some equipment to perform the claimed work. However, the Organization established that the Carrier possessed adequate equipment to perform the work but was abolishing its equipment repairmen and allowing its equipment fleet to fall into disrepair. In these cases, every justification relied on by the Carrier was solely self-created. Essentially, the Majority authorized the Carrier to continue allowing its workforce to deplete and remove reserved work from the Agreement. Under this logic, the Carrier could simply never hire

another Maintenance of Way employe and use the fact that everyone is working as a justification for assigning the work to outside forces. This would essentially allow the Carrier to eliminate its organized workforce. This Board has already rejected such actions from Carriers in Third Division Award 40666. For the reasons specified herein, I must respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member