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

Award No. 44127
Docket No. MW-45419
20-3-NRAB-00003-190263

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Norfolk Southern 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 and Structures Department work (installation of new cross ties at crossings) within the limits of the East Binghamton Yard and at Phelps Street Crossing on July 13, 14, 25, 26 and 28, 2016 (System File NS-DHS-NESF-2016-038/MW-HARR-16-76-LM-826 SOU).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman of its plans to contract out the work referred to in Part (1) above and failed to discuss the contracting out in an attempt to reach an understanding as required by Rule 59.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant G. Lawyer shall now be compensated for forty (40) hours at the applicable straight time rate of pay and for fifteen (15) hours at the applicable overtime rate of pay and Claimants J. Hoag, D. McDonald, J. Ambrose, D. Noldy, B. Hinkley and A. Stoker shall now be compensated for fifty (50) hours at the applicable straight time rates of pay and for five (5) hours at the applicable 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.

In 2015, the Carrier, Norfolk Southern Railway (NSR), purchased what are known as the D&H South Lines from Canadian Pacific Rail. The territory had been subject to a collective bargaining Agreement between BMWED and CP Rail. Norfolk Southern was already party to an Agreement with BMWED on its existing territory, the BMWED-Southern Agreement, effective October 1, 1972. The two Agreements were administered under different BMWE regions and General Chairmen. In preparation for Norfolk Southern assuming control of the D&H South Lines, NSR and BMWED negotiated and entered into an Implementing Agreement on April 6, 2015. The Implementing Agreement provided that the existing BMWED-Southern Agreement would apply to the newly acquired D&H South Lines, effective September 19, 2015. On that date, the BMWED-Southern Agreement became the governing agreement for Maintenance of Way work performed on the D&H South Lines. The prior Southern Agreement territory was broken into four regions, which were represented by a single "Southern System" General Chairman. In the Implementing Agreement, the parties agreed that while the D&H South Region would still be represented by the Southern System Chairman, BMWED members on the former D&H South Lines would continue to be represented by their previous Northeastern System Federation General Chairman rather than the Southern System Chairman.

As part of its initial takeover of the D&H South Lines in April 2015, the Carrier inspected the tracks and used Sperry trucks to identify defects that needed repair. The timing of the takeover was such that the Carrier's 2015 Program Maintenance schedule was already set. According to the Carrier, some of the maintenance and repair work done on the D&H South Lines in 2015 was performed by Carrier forces, but more was

performed by outside contractors because it was unable to divert any of its own Designated Program Gangs (DPGs) to work on the D&H Lines. Beginning in the Spring of 2016, the Carrier's DPG gangs began rail renewal on the D&H Lines.

This dispute arose on July 13, 2016, when the Carrier assigned an outside contractor to rehabilitate road crossings within the limits of the East Binghamton Yard. On July 25, 2016, the contractor began working at the nearby Phelps Street Crossing. In both instances, the contractor installed new cross ties. The Organization filed this claim on August 25, 2016; it is one of multiple claims on the same issue for multiple locations and jobs. Claimant Lawyer, a Machine Operator, was actively employed at the time, but the remaining Claimants were on furlough status.

Because of the importance of the issue on both sides, the parties engaged in extensive correspondence and a series of discussions and meetings in an effort to resolve the claims on a global basis. On October 16, 2017, they agreed to extend the deadline for submitting the cases to a Board of Adjustment until March 31, 2018. In mid-March 2018, the deadline was extended to September 30, 2018, in response to the Carrier's desire to submit more background information. By letter dated August 8, 2018, the parties agreed to another extension, to January 31, 2019:

> **"The parties have further discussed the possibility and benefit of an additional extension for such cases so as to allow for each party, or either, if they desire, to further supplement the record with any additional information or evidence in support of our respective positions, as well as serve to allow the parties to make good faith attempts to resolve some of the outstanding issues/disagreements that the parties currently have in connection with the nature of these disputes during meeting that we are in the process of scheduling to discuss such matters."**

The parties met in Harrisburg, Pennsylvania on September 19, 2018, and discussed several issues, but reached no resolution. They then scheduled another meeting for February 27-28, 2019, in Atlanta, Georgia, with a number of principles from both sides to attend. Notably, the Carrier did not request, and there was no additional agreement, to extend the deadline for submitting cases to the NMB beyond January 31, 2019.

By letter dated January 31, 2019, the Carrier submitted to the Organization information documenting that contractors had performed work on territories governed

by the Southern Agreement between 2012 and 2017. By letter dated February 14, 2019, the Carrier submitted additional information, including more than 3,000 invoices for contractor backhoe services and more than 2500 invoices for contracted dump truck services conducted between 2014 and 2017 on the Carrier's Alabama, Georgia and Piedmont Divisions. In the interim, however, beginning in early January 2019, the Organization had begun progressing the outstanding claims to arbitration. As the Organization explained at the arbitration hearing, without another extension it had to act in order to preserve its ability to take the claims to arbitration or risk losing that opportunity.

Position of the Organization:

The work in dispute—crossing rehabilitation and general crossing repair (absent paving work, which is not at issue here)—is within the scope of the Agreement. Even the Carrier acknowledges that its MoW forces have performed the work in the past, as attested to by numerous employee statements in the record. As a result, the Carrier was required by Rule 59 to notify the General Chairman in writing, not less than 15 days in advance, of its plans to contract out this work. The Carrier failed to provide any notice, which in and of itself requires a sustained award. Moreover, the scope-covered work is customarily and historically performed by MoW employees, and the Carrier is restricted from contracting out this work unless it has a compelling reason to do so. Once the Organization shows the work to be within the scope of the Agreement, the burden shifts to the Carrier to prove that it did not improperly assign outside forces to the work. The Carrier has failed to establish an acceptable reason for contracting the work at issue. The Carrier contends that the parties agreed in the Implementing Agreement that the BMWED South Agreement *and existing practices* would apply to Maintenance of Way work on the former D&H South Lines operated by NSR, and that it has a long history of contracting out crossing rehabilitation work, without notice. But there is nothing in the Implementing Agreement that makes any specific reference to existing practices or their transfer. The Organization was not aware of the so-called practice the Carrier now contends exists. Moreover, the Carrier has failed to prove the existence of the practice upon which it relies, and any practice that may have existed under the original Southern Agreement on the Carrier's original territory does not apply to the D&H South Lines territory, which is hundreds of miles away and was not part of the Carrier's operations when any "practice" was established. Finally, the Carrier objects to the named Claimants who were on furlough being awarded any remedy because they were furloughed when the contractual violation occurred. There is no question that, being on furlough, those Claimants lost a work opportunity, and

they are entitled to a monetary remedy regardless of their employment status during the claim period. Similarly, Claimant Lawyer, who was working, also lost a work opportunity and he should be compensated.

Procedurally, the Organization objects to the introduction of the evidence on past practice that was set forth by the Carrier in its letters of January 31, 2019, and February 1, 2019, because it was submitted after the claims had already been progressed to arbitration. The Board has previously ruled that such new evidence cannot be considered.

The Position of the Carrier:

The Carrier acknowledges that contractors were used to perform the claimed work. It contends that under the April 6, 2015, Implementing Agreement, all rules *and practices* under the original Southern Agreement went into effect on the new D&H South Seniority Region. Under the Southern Agreement, crossing rehabilitation work has not been exclusively performed by BMWED-represented employees, but has been performed by contractors for decades, beginning in 1955, at thousands of locations under the coverage of the Southern Agreement, without notice and without dispute. The Implementing Agreement that placed the former D&H South Lines under the Southern Agreement did not include any express listing of tasks to be reserved to BMWED employees. A Carrier's right to continue contracting out work, without notice, where the Scope Rule is general in nature and there has been a long-established practice of using contractors is a well-recognized principle in the railroad industry. The contractors here were assisting BMWED-represented employees during the claimed period, by replacing and cribbing ties in crossings ahead of T&S Gang 23, a Designated Program Gang that was performing rail and timber renewal and surfacing on the D&H South Line. There is no express language in the Southern Agreement reserving road crossing repair/replacement and the associated tasks such as cribbing, and ballast and tie replacement within a road crossing to the BMWED craft. Thus the work is not within the scope of the agreement, and no notice is required. Additionally, in the absence of any agreement language restricting the Carrier from contracting out the work, any claim that such a restriction exists must be supported by evidence of a system-wide past practice of such regularity, consistency, and predominance as to warrant a finding a customary and historic performance that is sufficient to reserve the work to the craft. No such evidence has been presented in this case. The replacement of ties in crossings has historically been performed by contractors on property covered by the Southern Agreement without notice to the Organization, and the claim should be denied.

The evidence presented by the Carrier in its letters of January 31, 2019, and February 14, 2019, is material to this case and should be considered. It has in fact been the essence of this dispute from Day 1. The substance of the evidence was discussed throughout the progression of the claims. The parties had scheduled a meeting for February 27-28, 2019, to discuss the evidence. The Organization knew that the information was forthcoming before that meeting. The evidence was discussed at the February 27-28 meeting. So this is not "new" evidence that comes out of nowhere, which is the type of evidence that is meant to be excluded, and the Board should consider it.

Discussion and Opinion:

This claim represents a classic case of contract interpretation where the parties to a bargain believed that they had reached agreement, but came to find out later, during implementation of their contract, that in fact, they had different underlying understandings of the terms of their agreement.

But there are procedural arguments raised by the Organization that must be addressed first.

Rule 59 of the Southern Agreement, Contracting Out, states:

> **"(a) In the event carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall 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 15 days prior thereto.**
>
> **(b) If the General Chairman, or his representative, requests a meeting to discuss matters relations to the said contracting Transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.**
>
> **(c) Nothing in this Rule 59 shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the**

> **General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith."**

Rule 59 requires the Carrier to give written notice in advance to the Organization of its intent to contract out work "within the scope of the applicable schedule agreement." The Carrier argues that the crossing work at issue is not within the scope of the Agreement, because it has historically been performed under the Southern Agreement by outside contractors, indeed for decades. The Scope Rule, Rule 1, is general in its language:

> **"These rules govern the hours of service, working conditions and rates of pay of employees represented by Brotherhood of Maintenance of Way Employees employed in the seniority sub-departments in the Maintenance of Way and Structures Department as hereinafter identified in this agreement."**

The standard for determining whether work is covered by the Scope Clause and subject to Rule 59 is whether the work is arguably within the scope of the Agreement. Is the work at issue here within the scope of the Agreement? The work involved the removal of ties and ballast and cribbing of new ballast. This is work of the sort that is traditionally performed by Maintenance of Way employees. Moreover, there are statements in the record from employees who have performed similar work on the Carrier's property. The record includes statements from management employees acknowledging that Carrier's forces have done the work in the past. In light of the record, the Board concludes that the work in dispute is within the scope of the Agreement. The Carrier protests that it is not, because under the Southern Agreement the work at issue has historically been performed by outside contractors. Such a practice, if proven, would not remove the work from the scope of the Agreement. It would instead establish either a past practice or a mixed practice of scope-covered work being performed by outside forces, which could remove the practice from the notice requirement. However, that depends on proof of the prior practice by the Carrier—essentially an affirmative defense to its failure to provide notice—which brings us to the issue of the record before the Board.

The National Railroad Adjustment Board has promulgated rules of procedure for conducting arbitrations under its authority. (NARB Circular No. 1, as amended 2003) One of the principles recognized by the Board is that the record before the Board is limited to the evidence submitted and considered by the parties during their

processing of the claim on the property. Or to put it another way, new evidence may not be submitted at the arbitration hearing. This stricture is common in arbitration for two reasons: the more information the parties have during the grievance process, the more productive their discussions and efforts to resolve the dispute informally can be, and it avoids unfair surprises and sandbagging at arbitration. The Board has ruled on numerous occasions that the evidence in the record is limited to that which was produced during the parties' on-property discussions. In Award 12670 (Ives, 1964), which involved these same parties, the Board held:

> **"The Petitioner has included in its submission a number of statements from Maintenance of Way employes in support of its assertion that the work described herein is of the character which has been customarily and traditionally performed by the Carrier's Maintenance of Way and Structures Department. *The Carrier contends that such statements were not submitted to it when the dispute was being handled on the property, and, therefore, are not admissible here under Board Circular No. 1. We find no evidence in the record to refute the Carrier's statement that the data had not been presented to it on the premises and have concluded that such statements submitted by the Organization must be excluded from our consideration*." (Emphasis added.)**
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> **The Board affirmed this holding in Award No. 31928 (Wallin, 1997):**
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> **"Although Carrier's Submission contains the statement of the Supervisor who purportedly made the calls, the Organization objected to the exhibit as being new material. Our review of the on-property record supports the Organization's objection. *We find no reference to show that the Supervisor's statement was exchanged or discussed during the handling of the matter on the property. Because it is well settled that new material may not be considered by the Board, we have disregarded the Carrier's exhibit.* As a result, Carrier's affirmative defense must be rejected for lack of proof." (Emphasis added.)**

Here, the Organization agreed to several extensions of the time limits for processing the claims at the Carrier's request: it wanted more time to gather its evidence of past practice. The last extension ended on January 31, 2019. The Carrier did not seek another extension. Shortly before that date, the Organization began progressing claims to the NRAB for arbitration. The Carrier then submitted its evidence—records of

thousands of transactions—to the Organization by letters dated January 31, 2019, and February 14, 2019. But this claim had been progressed to arbitration before then. Because the evidence was not produced during the on-property handling, the Board is foreclosed from considering it. Accordingly, as stated by Referee Wallin in Award No. 31928, "Carrier's affirmative defense must be rejected for lack of proof." If it had been timely produced, it appears that the Carrier's evidence would have established, at a minimum, a mixed practice of outside contractors and its own forces performing the crossing rehabilitation work that is in dispute here, at least on the territory covered by the original Southern Agreement. But the evidence not having been produced before the claim was progressed to arbitration forecloses the Board's consideration of it. The Organization acted within its rights and within the timelines for moving cases to the next step in the grievance process. Had it not done so, there was the risk of the Carrier's contending that the claim was untimely moved to arbitration. That was a risk the Organization was not willing to take. In addition, this claim was filed in April 2016, some two years and nine months before the January 31, 2019 extension date. The Carrier had articulated its defense—an historical practice of contractors performing the work—from the beginning, but it had never produced evidence of the practice. And as the Board has held repeatedly, merely articulating an argument is not the same as providing evidence to support it.

Because it was not timely filed, the Board may not consider the Carrier's evidence of its prior practice of having contractors perform the work in dispute in this claim. The work falls within the scope of the Agreement, which triggers the Carrier's obligation to provide advance notice in writing of its intention to contract out scope-covered work. There was no notice given here. As a result, the Board must find that the Carrier violated Rule 59.

By way of remedy, the Organization seeks compensation for Claimant Lawyer for 40 hours at his applicable straight time rate of pay and 15 overtime hours. The Carrier objects, on the basis that he was working elsewhere and lost no work opportunity as a result; indeed, he was paid 11 four hours' overtime during the period that the contractor worked. For Claimants Hoag, McDonald, Ambrose, Noldy, Hinkley and Stoker, the Organization seeks 50 hours at their applicable straight time rates of pay and 5 hours' overtime. The Organization objects that they were on furlough and it had no obligation to recall them to perform the work.

The Board has ruled previously that Claimants who are on furlough may be compensated when there are violations of Rule 59. The Board has also ruled that

employees who working when the Carrier violates Rule 59 may be compensated. In Award No. 35773 (Wallin 2001), the Board held:

> **"The full employment defense is not effective where the Carrier has failed to fulfill its good faith efforts commitment to perform scope covered work with its own forces. If the required good faith efforts had been undertaken, any number of manpower deployment alternatives may have been developed. Given the Carrier's substantial control over the scheduling and capabilities of its forces, the Carrier's failure to undertake such good faith efforts creates the adverse inference that the employees did, indeed, suffer a lost work opportunity."**

In Award No. 32862 (Benn 1998), the Board addressed specifically compensation for cases in which the Carrier was found to have violated the notice provision of the contracting article:

> **"… [I]n failure to give notice cases, even though the Carrier may have ultimately been able to contract the work, even employees who were working could be compensated only because notice was not given…. [O]ur function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. Our discretion for fashioning remedies includes the ability to construct make whole relief. *The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement* (here, notice) to contract work within the scope of the Agreement. Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion." [Emphasis added.]**

This Board will follow these precedents. The Claim is sustained and the Claimants are entitled to monetary compensation. However, the matter shall be remanded to the parties to determine the hours actually worked by the contractor's forces on the dates set forth in the Claim and how they should be distributed among Claimants. In addition, the Board notes that several of the Claimants are named in a number of the claims on Deadlock List 841. While they may be entitled to compensation for a specific claim, they are not entitled to pyramid compensation (that is, to be paid

for more than one claim on the same date). As part of the remand, the parties are instructed to check Claimants and dates for all of the Claims on Deadlock List 841 to ensure that pyramiding does not occur.

AWARD

Claim sustained in accordance with the Findings.

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 11th day of August 2020.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARDS
44121, 44122, 44123, 44124, 44125, 44126, 44127, 44128, 44129

DOCKET Nos. MW-45348, 45403, 45404, 45412, 45413, 45418, 45419, 45420, 45421

(Referee Knapp)

I write in dissent to these Awards because the Board both failed to apply the proper burden of proof and failed to consider all of the relevant evidence in each of these cases before reaching its conclusion that the work in question was within the scope of the Agreement. If the proper burden of proof had been applied and all the relevant and admissible evidence considered, the records would be, at best, inclusive with respect to the issue of scope and the Organization's claims should therefore have been dismissed for failure to meet its burden of proof.

In each these claims, the Organization alleged that the Carrier violated the Agreement when it failed to give notice to the Organization prior to contracting out the work in question. The gravamen of the Organization's claims is that under Rule 59 of the Southern System Agreement, the Carrier was required to notify the Organization in advance if it intends to contract out work which was "within the scope of the Agreement." Accordingly, the threshold question in each of these disputes was whether the work in question was within the scope of the Southern System Agreement, which required an analysis of the Scope Rule before the application of Rule 59 could even be determined. If the work in question was <u>not</u> within the scope of the Agreement, then the Carrier was under no obligation to provide advance notice to the Organization in accordance with Rule 59. If there was no such obligation, then it follows that there was no violation of the Agreement.

The applicable Scope Rule is general in nature, and by its terms reserves no specific work to the craft. Moreover, the record contains the undisputed arbitral precedent established on this property that the listing of job titles and machines does not reserve work to the craft either. (The Carrier repeatedly stated these established principles throughout the handling on the property and the Organization never contested it.) Accordingly, the determinative factor in establishing whether work was within the general scope of the applicable agreement is not the language of the rules, but the history and the practices on the property governed by the Southern System Agreement.

In light of the foregoing, as the party alleging a violation of the agreement, it was the Organization's burden to prove that the history and the practice on the Southern System Agreement property supported its allegation that the work is within the scope of the Agreement. It cannot do so on these records. In fact, the only "evidence" that the Organization submitted in support of its allegation was a set of statements from former D&H employees- none of whom had either worked under the Southern System Agreement or had any knowledge of the contracting history and practices under the Southern System Agreement. In opposition to the Organization's allegations, the Carrier submitted several

statements from supervisors with more than 80 years of combined experience working under the Southern System Agreement, all of whom stated without contradiction that the work in question was not within the scope of the Agreement because- citing specific examples- it has been historically performed on the property by contractors without notice to the Organization. But none of that critical Carrier evidence on the issue of scope was considered or discussed in the Award.

What was discussed in the Awards was some documentary evidence that the Carrier offered to further elaborate on the statements from the Carriers' supervisors. However, that evidence was discussed only on the context of its rejection by the Board because it was presented to Organization after the appeal was progressed to the Board. (Even as the Board acknowledged that such evidence, had it been admissible, would have provided some support for the Carrier's position.) The evidence consisted only of specific examples in which the Carrier historically contracted out the work in question without notice. It was not "new" evidence. Rather, it was a continuation of a list of specific examples that already existed in the record before the appeal was progressed and are therefore part of the record on the property. The Carrier had already provided this information to the record on a smaller scale in the statements of its supervisors; the additional examples should have been allowed.

The Board cast the Carrier's late-proffered evidence as that of an "affirmative defense" to the Rule 59 notice requirement. However, that is not the case. Like the statements before it, the additional evidence was offered to contradict the Organization's unsupported threshold allegation that the work in question was within the Scope of the Southern System Agreement. And again, it was not the only evidence that the Carrier presented to contradict the Organization's allegation. Even without the additional evidence, the record still contained the statements and specific examples that directly dispute the Organization's allegation that this work is within the scope of the Agreement. That evidence should have shifted the burden of proof back to the Organization on the threshold issue of scope coverage. While the Organization continued to allege that the work was within the scope of the Southern System Agreement, it never presented any evidence to dispute what the Carrier's experienced supervisors said regarding decades of practice under the Southern System Agreement. If properly considered with the Carrier's statements, the Organization's statements served only to create an irreconcilable dispute in the facts, which was insufficient grounds on which the Board could make a determination on the threshold question of scope coverage. Based on decades of precedent, the Claim should be dismissed on that ground alone. With the Organization having thus not established that the work in question was within the scope of the Southern System Agreement and subject to Rule 59, there was no need for the Carrier to establish an "affirmative defense" in any of these claims with respect to its notice requirement.

For these reasons, I respectfully dissent.

Scott Goodspeed

Scott Goodspeed

Jeanie L. Arnold

Jeanie L. Arnold

August 11, 2019

LABOR MEMBER'S CONCURRENCE AND DISSENT
AND
LABOR MEMBER'S RESPONSE TO CARRIER MEMBERS' DISSENT
TO
AWARD 44121, DOCKET MW-45348
AWARD 44122, DOCKET MW-45403
AWARD 44123, DOCKET MW-45404
AWARD 44124, DOCKET MW-45412
AWARD 44125, DOCKET MW-45413
AWARD 44126, DOCKET MW-45418
AWARD 44127, DOCKET MW-45419
AWARD 44128, DOCKET MW-45420
AWARD 44129, DOCKET MW-45421
(Referee Andria Knapp)

The following is a partial concurrence, partial dissent, and response to the Carrier's dissent for above-referenced awards.

Concurrence

Initially, I must concur because the Majority followed basic contract interpretation principles for this industry in determining when work is within the scope of the Agreement. The Majority correctly held that: (1) the removal and installation of ties, (2) removal and replacement of stone ballast and crossings, (3) cribbing mud and ballast between ties, (4) removing crossing planks, (5) distributing track materials used in the repair and construction of track, (6) brush cutting around tracks, (7) repairing geometry defects, and (8) general roadway maintenance was within the scope of the Agreement. Moreover, the Majority correctly held that the Carrier was required by Rule 59 to notify the General Chairman, in writing, in advance of its plans to contract out this work and provide an opportunity for a conference. The decisions are consistent with hundreds of other arbitral decisions from the Third Division addressing this same issue under virtually identical agreement rules (Article IV of the 1968 National Agreement). A concurrence is also necessary for the Majority's rejection of the time-worn "fully-employed" defense which was consistent with decades of precedent in this industry for the same types of agreement violations. Lastly, the Majority properly excluded the Carrier's late evidence from the record as it was not exchanged during the on-property handling.

Dissent

Notwithstanding, the Awards require a dissent for two (2) reasons. First, the Majority improperly commented on the documentation that was not part of the record. Second, while the Majority rejected the Carrier's fully employed defense, it failed to compensate two (2) Claimants that were on voluntary furlough in Award 44122 and one (1) Claimant allegedly not qualified in Award 44128.

In connection with the first issue, it is necessary to remember that as an appellate forum, this Board should not comment on evidence that was not exchanged in connection with the dispute. The primary reason arbitration boards do not consider new evidence is based on the fact that one (1) of the parties has not had the chance to address that evidence. Therefore, it is improper for an arbitration tribunal to make prognostications about what precluded evidence might or might not show because one (1) party was not able to challenge or address that evidence. In these awards, what is even more perplexing was the Majority's description of the new evidence as invoices. It is perplexing because the Carrier had not supplied a single invoice. It provided vague listings of what the Carrier alleges are invoices, but not a single invoice was provided. If that was not bad enough, the vague list does not reference any location involved in the disputes involved herein. Perhaps most importantly, the Organization was never allowed to review and to address this new evidence on the record. For obvious reasons, it is best practice not to comment on precluded documentation more than is required to rule on its acceptability.

The second and final reason a dissent is required is the Majority's failure to allow compensation for Claimants on "voluntary furlough" in Award 44122 and its unusual decision not to pay an employe allegedly not qualified to operate the backhoe in Award 44128. In connection with voluntary furloughs, employes can only accept a voluntary furlough if work is not available to them in their home seniority district. Employes accept furloughs for a variety of reasons, including the work schedule, the location of the work, or the positions that are available. However, that does not mean they would not have accepted the claimed work that was on their home seniority district. After all, it was not as if the Carrier ever offered the Claimants this work on their home seniority district, and they turned it down. Additionally, the Carrier still violated the Agreement and removed the work from the scope of the Agreement and a monetary award is necessary to enforce the Agreement.

On the issue of qualifications, the fact remains if the Carrier has a problem with skills, then it is required to discuss these issues at conference after the Carrier serves an advance notification in writing of its plans to contract out the work. In any case, it appears the main reason for the Majority finding the way it did was the Organization's failure to refute this during the on-property handling. Thus, it is evident that the Organization should go further in arguing this point on claims in the future.

Response to Carrier Members' Dissent

At this point, it is necessary to address the Carrier Members' dissent. As we will now explain, everything presented in the Carrier Members' dissent was all presented to the Board and outright rejected.

Initially, I must point out the irrationality of the Carrier's contention that the Board should have been inconclusive on the issue of whether this fundamental track work is within the scope of

the Agreement. The work claimed was basic everyday Maintenance of Way work. As the Board correctly cited, the Organization provided statements, pictures, daily work summaries, and the Carrier conceded the work is performed by BMWED forces. There was nothing at all extraordinary about the Majority's findings on the scope issue, because common sense alone dictates that BMWED forces install ties, dump ballast, work on crossings, distribute track materials, and the record facts and additional evidence fully support it.

Next, the Organization vigorously objected to the Carrier's past practice contentions. Moreover, the Organization explained to the Carrier from the very beginning that its past practice analysis was misplaced in the determination of whether work was within the scope of the Agreement. While under some agreements, carriers may arguably be able to justify contracting out of work based on past practices after it has served notice and provided an opportunity for the conference, it does not affect whether the work is within the scope of the Agreement. Each award involved here held unequivocally:

> *"*** In light of the record, the Board concludes that the work in dispute is within the scope of the Agreement. The Carrier protests that it is not, because under the Southern Agreement the work at issue has historically been performed by outside contractors. Such a practice, if proven, would not remove the work from the scope of the Agreement. ***"*

Thus, all of the Carrier's pleadings of past practice under the Southern Agreement (which was unsubstantiated in the record) is irrelevant because Maintenance of Way employes perform the work bringing it within the scope of the Agreement requiring written advance notification and opportunity for conference. The language of Rule 59 is clear and mandatory and the Carrier must provide advance written notice and opportunity for conference.

Even if the Carrier had presented evidence of a past practice of contracting out work within the scope of the Agreement without advance notification and opportunity for conference (**which BMWED rejects**), it does not change the clear language of the Agreement. Third Division Award 32862 was cited in each of the Organization's submissions and while it involved Missouri Pacific Railroad, both Agreements have the same contracting rule (Article IV of the 1968 National Agreement). The pertinent part of that award reads:

> "Sixth, on the issue of remedy, in the past where the Carrier has failed to give advance notice to the Organization in contracting disputes, this Board has often fashioned limited remedies. Some Awards have limited relief to employees in furlough status. See e.g., Third Division Award 31285. The rationale behind those Awards flows from the fact that notwithstanding the clear language of Article IV mandating the Carrier to give notice, for years the Organization allowed contracting to go on without objection. It was not until a change of leadership in the

> "Organization on this property that Article IV became a focal point of hundreds of claims which served to put the Carrier on notice that the Organization thereafter intended to enforce the language in Article IV. For this Board to have required the Carrier to compensate non-furloughed employees after those initial claims were filed when the Organization previously allowed the wide spread contracting out of work falling 'within the scope of the applicable schedule agreement' would have been manifestly unfair.
>
> However, the language in Article IV concerning the Carrier's obligation to give notice to the Organization of its intent to contract work which falls 'within the scope of the applicable schedule agreement' is clear. See Third Division Award 31285 ('"[S]hall notify" is mandatory'). Through the persistent filing of claims, the Organization has put the Carrier on notice that it intends to enforce that language. This Board has repeatedly acknowledged that a point exists where the Carrier's reliance on the Organization's prior willingness to permit contracting of such work would no longer shelter the Carrier from liability in cases where the Carrier does not give the required notice. ***"

Accordingly, the Carrier was clearly put on notice that BMWED expected it to comply with its obligations under Rule 59 going forward when the instant claims were filed. Even if BMWED's message that it expected the Carrier to comply with Rule 59 was not clear from the early claims, it was unequivocally conveyed by the Organization within the March 19, 2018 letter (a matter of record in each of the cases involved here). This Carrier must recognize the well-established principle that either party can demand compliance with the Agreement at any time. While BMWED rejected the Carrier's contention that it has a past practice of contracting out work within the scope of the Agreement without written advance notification, even if the Carrier did have such a practice it can be required to comply with the Agreement upon notice which both BMWED System Federations provided unequivocally by the March 19, 2018 letter.

Even prior to the Organization's March 19, 2018 letter, the Carrier was put on clear notice when the Organization began filing claims for Rule 59 violations. In light of these claims, it is apparent this Organization had every intent of enforcing Rule 59 going forward. In other words, even if all the practice contentions put forward by the Carrier were accurate (which BMWED rejects) the Carrier was put on notice to comply with Rule 59.

The Majority answered the issue of scope coverage by agreeing with the Organization and the cited awards in its submission including 36514, 36516, 36517, 36966, 37001, 37720, 40346, 40377, 40456, 40965, 41643, 42889 and Award 7 of Public Law Board (PLB) No. 7201 which are awards involving eight (8) different collective bargaining agreements and numerous well-established arbitrators. The Carrier's indifference to its contractual obligations has now caused it this financial liability. The Carrier is absolutely on notice that the work involved here is within

the scope of the Agreement and requires advance notification and opportunity for conference. These awards should serve once again as notice to Norfolk Southern Railroad that BMWED expects the Carrier to comply with the clear and mandatory obligations under Rule 59.

Respectfully submitted,

Zachary C. Voegel
Labor Member