

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44631  
Docket No. MW-46097  
22-3-NRAB-00003-200207**

**The Third Division consisted of the regular members and in addition Referee Jeanne Charles when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(New England Central Railroad, Inc.**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (ECI) to perform Maintenance of Way work (track protecting and flagging) in connection with bridge repair work between Mile Posts 14 and 16 on the Swanton Sub and the East Swanton spur on January 17 through 29, 2019 (System File NECR-FEB.2019-002 NCR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Montagne is now ‘\*\*\* due \$2,058.68 to make up for the lost work opportunity that the Carrier’s improper assignment of ECI to perform such resulted in him suffering financial loss. Kindly notify the undersigned and Claimant as to when he will or can expect payment to this claim.’ (Emphasis in original).”**

**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.**

**Claimant B. Montagne has established and holds seniority within the Carrier's Maintenance of Way Department. The Claimant was assigned as a Track Machine Operator at the time of this dispute.**

**This claim is based on the proper application of Articles 1 (Preamble), 2 and 13 of the Agreement. Article 1 is the Preamble which primarily sets forth the relationship between the parties. The pertinent parts of Article 2 and 13 are as follows:**

**Article 2 — Scope**

- 2.1 The rules contained herein shall govern the hours of service, working conditions and rates of pay of the Engineering Department employees represented by the Brotherhood of Maintenance of Way Employees Division ('BMWED') who are working on tracks on the New England Central Railroad ('Carrier'). These employees will perform the work generally recognized as maintenance-of-way work, such as inspection, construction, repair and maintenance of Track, Roadbed, and appurtenances thereof. It is also understood that work not covered by this Agreement which was being performed by Maintenance of Way Employees on the New England Central Railroad prior to this Agreement by past practice will not be removed from the scope of this Agreement and their regular work assignments and work that was previously done by others by past practice may continue to be done by others.**

**Article 13 - Establishing and Forfeiting Seniority**

- 13.1 All Employees covered by this Agreement will be placed on a single seniority roster in, the order of their date of hire.**

- 13.2 The seniority standing and rights of each Employee will begin on the date and time they first perform service for the Carrier under this Agreement. In cases where two or more Employees are hired on the same date, their seniority standing will be determined by their starting time on duty on that date, or if identical, then on the basis of their date of birth, oldest person first.

At issue is whether the Carrier violated the Agreement when it assigned an outside contractor, ECI ("ECI") to perform track protection and flagging work for bridge repairs between Milepost 14 through 16 on the Swanton Sub and the East Swanton spur instead of assigning such work to the Claimant. On the dates of January 17, 2019, through January 29, 2019, the Carrier assigned an outside contractor, ECI ("ECI") to perform track protection and flagging work for bridge repairs between Milepost 14 through 16. This work was performed on the Swanton Subdivision from January 17, 2019, through January 25, 2019, and on the East Swanton Spur from January 28, 2019, through January 29, 2019. During this time, the Claimant worked a different assignment removing snow and ice from the St. Albans yard and Burlington subdivision. The dates the Claimant worked that coincided with the ECI flagging work were January 17, 18, 23, 24, 25, 28, 29, 2019.

By letter dated February 4, 2019, the Organization filed a timely claim on behalf of the Claimant stating that the Carrier improperly assigned ECI to perform this work and should have provided preference to the Claimant ahead of ECI. The claim was properly handled by the Parties at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for resolution.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. As the moving party, it was the Organization's responsibility to meet its burden to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). After careful review of the record, the Board finds the Organization has met its burden.

The record establishes that Carrier employees historically performed the work. As reflected in a statement provided by Matthew Page, he was engaged in flagging work as far back as 1996. Additionally, the Carrier does not dispute that

the covered employees performed flagging work. It just interprets Article 2.1 of the CBA to permit it to assign the work to a contractor if the contractor also historically performed the work. The Board cannot agree. It has been a long-standing arbitral view that, exclusivity in performance of the work is not a necessary element to be proven by the Organization in contracting claims. PLB 7096 Award 1 and Third Division Award 30944. That said, we do not interpret the challenged CBA language to permit assignment of the disputed work to contractors without first offering it to employees. Relying on other boards of the Third Division, "In the absence of a specification of the classes of work reserved by a collective agreement, we are of the opinion that it reserves all work usually and traditionally performed by this class of employees who are parties to it. Clearly this was the intent of the parties, otherwise a specification of included and excluded work would have been required in the scope rule of the agreement." Third Division, Award 2701.

With respect to the Carrier's argument that the Claimant was not the most senior employee and, therefore, not entitled to a remedy, "As noted in Third Division Award Number 32440, where the Board has found a violation, 'the Organization is privileged to name any Claimant it chooses to be compensated for this Agreement violation.'" PLB 7097, Award 2.

### **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 15<sup>th</sup> day of December 2021.