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

Award No. 44685
Docket No. MW-45752
22-3-NRAB-00003-190645

The Third Division consisted of the regular members and in addition Referee Pilar Vaile when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (American Steel Carport) to perform Maintenance of Way and Structures Department work (assembling a shed) at Mystic Junction near Somerville, Massachusetts on April 26, 2018 (Carrier's File BMWE 12/2018 KLS).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier's plans to contract out the work referred to in Part (1) above and when it failed to assert good-faith efforts to reach an understanding concerning said contracting out as required by Rule 24 of the Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. O'Brien, R, Shanley and D. Mullaney shall now…be compensated eight (8) hours of straight time as well as three (3) hours of their appropriate time and one-half rates of pay as well as all credits for vacation and all other benefits for the date claimed for their missed work opportunity."

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.

Claimants C. O'Brien, R, Shanley and D. Mullaney established and hold seniority in the Carrier's Maintenance of Way Department.

On April 26, 2018, the Carrier assigned outside forces (American Steel Carport) to erect a 20'x23' shed on an existing slab, at Mystic Junction near Somerville, Massachusetts. The record developed on-property provides substantial evidence that the Claimants were qualified for the "substantial amount of work" in question, which was "typical Maintenance of Way work" that "has ordinarily and traditionally been assigned to and performed by the Carrier's Maintenance of Way Forces and is contractually reserved to them under Rules 1, 5, 7, 11 and 24 of the Agreement." Notably, the Carrier does not refute the statement signed by 15 BMWE employee that the work entailed in erecting the boat shed is typical Maintenance of Way work. These employees confirm working on a slew of similar jobs over the years, including eight projects involving the footing and slab work, and erection and/or assembly of shop or other buildings; and three projects involving the remodel and/or rebuilding of buildings and other structures.

The Organization timely filed a claim under the Railway Labor Act, 45 USC §§ 151, *et seq*., which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

In addition to the foregoing facts, the Organization argues that the Carrier "openly admits it did not give notice or afford the Organization any opportunity to

meet and discuss the subject work", instead erroneously relying on an alleged installment/purchase and warranty agreement. However, Board authority is clear that due notice is a threshold requirement to contracting out work; and these types of installation/warranty purchase agreements typically do not trump seniority or work scope rules. In any event, the Carrier failed to submit the purchase agreement into the record below; as such, it fails to establish its affirmative defense. Finally, the Organization argues, the Board regularly allows a monetary remedy – typically payable at the overtime rate – in contracting out cases such as these.

As already alluded, the Carrier denied the Claim based on "an installment agreement with building manufactures which includes the company certified Technicians under the warranties claims and purchase agreement of the building." In essence, the Carrier asserts use of the seller's technicians to install the product is required under the sales contract to preserve the building's warranty. It also argued that the work was not reserved to the Claimants because none had installed a metal shed of this nature before. Lastly, the Carrier challenges the remedy request. On one hand, it asserts that the work was performed during ordinary business hours so an overtime remedy would not be warranted even if the claim is sustained. However, it also challenges any remedy at all, citing to that line of Board cases that reject payment of a monetary remedy absent evidence of willful a malicious breach, or specific proof of lost overtime opportunities. *See, e.g.*, *Int'l Bhd. of Electrical Workers and Massachusetts Bay Commuter Railroad*, PLB 7350, Case No. 16 (O'Brien 2016) (the Board denied the appeal in a camera installation subcontracting case where there was no evidence the employees would have worked overtime if assigned).

Upon consideration of the whole on-property record, and authority cited by the Parties, it is evident that there is not substantial evidence to support the denial of the Claim. It is clear under the record that the Carrier violated the Agreement, first by patently failing to give due notice of its intent to contract out the work; and then by contracting out work that the on-property record shows is "customarily" performed by B&B employees. *See, e.g.*, Third Div. Award No. 40788, *BMWD – IBT Rail Conference* (Knapp 2018) ("[t]he purpose of the notice provision is to set the stage for the parties to engage in "a good faith attempt to reach an understanding" and "[t]hat purpose is frustrated if the scope of the proposed contracting is not revealed in the notice"; also, that allegations regarding improper outsourcing were sufficient to enable the Carrier to research the records to see if they disputed the factual allegations); and Third Div. Award No. 27628, *BMWE and*

Union Pacific Railroad **(Zusman 1988) (Organization's allegations regarding qualifications stand as fact where unrefuted).**

Additionally, the Carrier failed to establish its asserted affirmative defense, since it did not submit the purchase/installment agreement into the record during the on-property handling, or otherwise establish a valid exception under the agreement for contracting out work. ***See, e.g.*****, Third Div. Award Nos. 19623 (Brent), 20950 (Sickles), and 28430 (Benn) (all rejecting Carrier affirmative defense type claims of extraneous agreements or lack of control due to lack of document or other proof of such);** ***see also*** **Third Div. Award No. 44511,** ***BWED – IBT Rail Conference and National Railroad Passenger Corporation (AMTRAK)*** **(Deinhardt 2021) (rejecting a similar argument about warranty work, stating that "[t]he existence of a warranty is not listed as an exception to the Scope Rule", and noting that "such an argument would allow the Carrier to seek such a performance warranty…and thereby evade the language of the Scope Rule").**

However, the Organization in turn failed to establish all of the facts necessary to support its full remedy request, on which it bore the burden of proof. ***See*** **Third Div. Award No. 29856,** ***BRS and CSX Transportation, Inc. (former Louisville & Nashville Railroad Company)*** **(Eischen 1993) ("[i]t** ***is*** **part of the Organization's burden of proof to establish compensable damages") (emphasis in original).**

As such, the Board determines that the Claimants are entitled to three (3) hours of overtime each. ***See, e.g.*****, Third Div. Award No. 39141,** ***BMWED - IBT Rail Conference and CSX Transportation, Inc.*** **(Klein 2008) ("[i]t is well established that compensatory remedies have been awarded by numerous Boards in the past in order to preserve the integrity of the agreement, notwithstanding arguments by the Carrier that the claimants were fully employed during the period at issue"); Third Div. Award No. 30970,** ***BMWE and CSX Transportation, Inc. (former Seaboard System Railroad Co. (*****Eischen 1995) ("[t]o reward the blatant disregard of the Rule [24] notice requirements…would render that Agreement provision a nullity").**

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 28th day of January 2022.