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

Award No. 44879
Docket No. MW-47031
23-3-NRAB-00003-210891

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it allowed outside forces to perform Maintenance of Way work (distribute ties along the right of way) at various locations on the field side of Number 4 Track between Park Interlocking and Glen Interlocking on the Philadelphia to "Harrisburg line on February 19, 24, 26 and 28, 2020 and again on March 2, 3, 4, 5, 6 and 8, 2020 (System File BMWE-158747-TC AMT).

(2) The Agreement was further violated when the Carrier failed to comply with advance notification and conference provisions in connection with the Carrier's intent to contract out the subject work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Keenan and J. Thornton shall now '* receive an equal share of compensation for the one hundred (100) hours of loss of work opportunity as referenced herein, and payable at the Claimant's (sic) respective rate (sic).'""**

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 dispute involves the Carrier's assignment of outside forces to allegedly perform Maintenance of Way work at various locations on the field side of Number 4 Track between Park Interlocking and Glen Interlocking on the Philadelphia to Harrisburg line on February 19, 24, 26 and 28, 2020, and again on March 2, 3, 4, 5, 6 and 8, 2020. The Organization alleges that while performing this work, the employees of the outside forces, who hold no seniority rights under the Agreement, utilized ordinary Maintenance of Way equipment to perform customary track work—distribute ties along the right of way—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 the Scope Rule in Agreement. Further, the Organization alleges that the Carrier did not comply with the advance notice and discussion requirements in the Agreement. Based on these allegations, the Organization submits that the Claimants are entitled to the remedy requested in Paragraph (3) above.

The Carrier submits that the Scope and Work Classification Rule is not applicable in this situation because the parties decided to create the GREX Agreement that would be specific to GREX Slot Machine Rentals, and therefore, removed GREX Slot Machine rentals from being controlled by the general Scope and Work Classification Rule. Further, the Carrier submits that the advance notice provisions of the Scope and Work Classification Rule do not apply under the applicable GREX Agreement, so there is no obligation to provide notice of a GREX employee operating the Slot Machine as part of their work of training Carrier employees and it did not commit a violation by not giving formal notice of the GREX employees on the property.

Finally, the Carrier asserts that the Organization did not select proper claimants and the remedy requested is not appropriate.

A GREX Slot Machine was put into use distributing ties along the right of way in this case, so it is clear that the parties' GREX Agreement was intended to cover these circumstances. That being stated, the mere fact that a GREX Slot Machine was put into use does not mean that the provisions of the Agreement's Scope Rule are irrelevant. Rather, for the Scope Rule to not cover these circumstances, the Carrier must adhere to the provisions of the GREX Agreement.

Pursuant to the GREX Agreement, the Carrier may use the GREX Slot Machine under certain conditions, including that all operation of the machines will be performed either by a BMWE-represented employee being trained under the direction of a GREX employee or by a qualified BMWE-represented employee. The GREX Agreement also includes provisions on how vacant Slot Machine positions shall be filed. Of particular relevance to this case, one of those provisions allows the Carrier to force assign qualified employees to a vacancy if no qualified employees bid, but if that happens the position shall be put up for bid and if no qualified employees apply, the position will immediately change to a training position and be awarded to the senior applicant. Once that successful applicant had been trained and qualified to operate the Slot Machine, the employee who was force assigned will be permitted to exercise seniority and the newly qualified employee will be awarded the position.

In the instant case, the Carrier advertised positions to operate the GREX Slot Machine three different times leading up to its use. There were eight employees qualified on the Slot Machine, including the Claimants, but none of the qualified employees chose to bid the positions. Since there were no qualified bidders, the Carrier advertised Slot Machine training to create a more robust roster of qualified Slot Machine operators, but it chose not to force assign anyone to the Slot Machine positions. Instead, the Carrier upgraded the pay of the two most senior employees out of the Tie Gang units to the operator/training rate on every day the Slot Machine was in operation.

One of the issues concerning whether simply upgrading the pay of the two most senior employees out of the Tie Gang units was enough to comply with the GREX Agreement is whether these upgraded employees were actually being trained in the operation of or operated the Slot Machines. There are statements from these two employees indicating that they were not involved with the Slot Machines on the dates at

issue, and otherwise there is insufficient record evidence to establish that they or any other employees were being trained in the operation of or operated the Slot Machines on those dates. Under these circumstances, the Organization has proven that the Carrier did not comply with the GREX Agreement, which also means that the Carrier ran afoul of the Scope Rule provisions of the Agreement by using outside forces to perform work within the scope of the Agreement without providing advance notice to the Organization and giving the Organization an opportunity to discuss matters relating to the contracting.

Turning to the issue of a remedy, the Carrier argues that the Organization has failed to prove damages because the Claimants were improper and they were unavailable for the claimed work because they were fully employed during the claim period at another work location. For the following reasons, the Board finds that the Organization proved that the Claimants are entitled to the remedy requested, with the clarification that the pay awarded shall be at straight time.

It is an axiom in the law that there is no right without a remedy. Consistent with that principle, compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the Claimants may have been fully employed at the time of the violation. Third Division Awards 29592, 28185, and 27614.

As to the contention that the Claimants were improper because they were not the most junior employees on the GREX Slot Machine Roster, there is also ample precedent for the view that the Organization may select the claimants to recover compensation for a violation of the Agreement. As the Board explained in Third Division Award 18557:

> **This question of monetary payment to an unavailable Claimant has also been passed on by this Board in favor of the Organization. See Awards 10575 (laBelle) and 6949 (Carter). These Awards hold that one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The essence of the claim by the Organization is for Rule violation and the penalty Claim is merely incidental to it. The fact that another employe may have a better right to make the Claim is of no concern to Carrier and does not relieve Carrier of the violation and penalty arising therefrom.**

See also Third Division Awards 40563, 29313, and 32440.

Compensation awarded should be reasonable in view of the record evidence and realistically related to the amount of work actually contracted that represents the loss of work opportunity for the members of the craft. Public Law Board 6204, Award 32. In this case, the Organization's claim that the work of contractor forces over a ten-day period resulted in 100 hours of loss of work opportunity is reasonable and was not refuted by the Carrier. Public Law Board No. 4768, Award 1 (claimants are entitled to compensation as claimed unless the Carrier can demonstrate that the requested number of hours of pay does not conform to the amount of work performed by the contractor).

The claim seeks compensation at "Claimant's respective rate," so it is unclear whether it is seeking to compensate the Claimants at their respective straight time or overtime rates. There are many on-property loss-of-work-opportunity Awards that favor damages at straight time rather than the punitive overtime rate. Third Division Awards 44560, 44511, 44355, and 43618. See also, Public Law Board 4549, Award 1 and Awards cited therein. In addition, there is no evidence in this record that the contractor forces were paid at overtime rates. Third Division Award 44271. Under these circumstances, the Claimants shall receive an equal share of compensation for one hundred (100) hours at their respective straight time rates of pay.

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 10th day of March 2023.