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

Award No. 45391
Docket No. MW-47502
25-3-NRAB-00003-220682

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Northern Tree) to perform Maintenance of Way and Structures Department work (stand-by storm coverage) on Carrier property near Wilmington, Massachusetts on November 30, 2020 from 3:30 P.M. until 11:00 P.M. (System File S-2124K-2414K2124/BMWE 20/2021 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 plan 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 T. Cormier, D. Nickerson and P. Smith must now '…be fully compensated all hours worked by contractor employees, to be divided equally and proportionately amongst all Claimed (sic) rates of pay, as well as all credits for vacation and all other benefits for their lost 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.

Factual Background

Claimants are employees of the Carrier and members of the Organization. Claimants have seniority in the Carrier's Maintenance of Way and Structures Department, and on the relevant dates pertaining to this claim, were assigned and working their respective positions.

On July 1, 2014, the Carrier contracted with Massachusetts Bay Transportation Authority ("MBTA"), a separate entity from Carrier, to operate and maintain commuter rail service.

On November 30, 2020, a storm swept through the Wilmington, Massachusetts area, where the Carrier operates. The storm downed several trees over power lines, causing considerable damage to the area. The Carrier called in all available employees and asked them to remain on property to address any weather-related emergencies. The Carrier also deployed its logging trucks and other equipment for use by Carrier employees to clear storm damage. Concerned that its available employees and equipment may not be sufficient to clear storm damage and protect the commuter rail track and infrastructure, the Carrier requested additional logging trucks from contractor Northern Tree to ensure continued operations. Northern Tree provided logging trucks possessing greater capacity than the Carrier's to remove larger oversized trees. Additionally, in the interest of efficiency, the Carrier instructed its crews to assist Northern Tree's employees in removing storm debris.

Position of Organization

The Organization maintains that the Carrier's retention of Northern Tree violates Rules, 1, 5, 7, 11 and particularly 24 of the Parties' Agreement. Rule 24 requires that the Carrier notify the General Chairman fifteen (15) days prior to the date of retaining a contractor. The Organization asserts that at no time did the Carrier notify the Organization of its intention to contract out this work and seeks contractual remedies for the Carrier's failure to comply with the Rules cited above.

The Organization contends that it is undisputed that the work performed by Northern Tree fell within the scope of work typically performed by its employees. The Organization cites awards that hold that the Carrier's failure to notify the Organization timely of a contractor's retention requires that its claim be sustained. It also asserts that the Carrier presented no valid defense to the Organization's claim.

Carrier's Position

The Carrier denies that it violated any provisions of the Parties' Agreement as claimed by the Organization. It maintains that the Organization has failed to satisfy its burden of proving that the Carrier violated the Agreement. The Carrier also contends that the work performed by Northern Tree exceeded the Carrier's resources to adequately clear the downed trees and other debris.

Analysis

This is a rules case. For that reason, the Organization has the burden of proving its case by a preponderance of the evidence. Generally, in rules cases, the Board will examine the facts brought forward by the Organization and compare and analyze those facts against the relevant agreement provisions at issue.

The burden was on the Organization to prove that the work made the subject of this claim was under the scope and authority of the Carrier. The Organization contends that the removal of downed trees and storm debris from rail property falls within the scope of work traditionally performed by Organization employees. The Carrier does not dispute that this work has, on occasion, been performed by Organization employees.

The Organization cited Third Division Award 5172 which holds

> **It is a fundamental rule that work of a class covered by an agreement belongs to those for whose benefit the contract was made. A delegation of**

> **such work to others not covered by an agreement is violative of the agreement. Under such rules, such work must be given to *available employees* within the agreement, even though overtime results, before it can be assigned to one outside the agreement. [Emphasis added.]**

The burden was on the Organization to establish that the Claimants were available on November 30, 2020 to perform the work assigned to the contractor. To establish this fact, it was incumbent on the Organization to provide actual evidence that the Claimants were available to perform the work assigned to Northern Tree. Simply stating that the work should not have been contracted out and that employees were available to perform the work is not evidence. Declaratory statements standing alone is insufficient. Third Division Award 42921.

The Carrier established that all employees, including the Claimants, were already assigned to clear fallen trees and other storm debris. The Carrier retained Northen Tree to supplement its already assigned employees with contract employees utilizing specialized logging trucks. Additionally, these contract employees were specially trained to remove large trees.

The Organization provided no evidence impeaching the Carrier's rationale for retaining Northern Tree to supplement its existing employees and equipment. To prevail, the Organization needed to establish that the Claimants were truly available and that they could perform the additional work tasked to Northern Tree adequately, safely and timely using only the Carrier's equipment. Because that evidence was lacking, the Organization failed to meet its burden of proof.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimants not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of December 2024.

LABOR MEMBER'S DISSENT
TO
AWARD 45391
(Referee Diego Jesús Peña)

The Majority erred in its finding when it held that the Organization was required to prove that the "*** Claimants were truly available and that they could perform the additional work tasked to Northern Tree adequately, safely and timely using only the Carrier's equipment. Because that evidence was lacking, the Organization failed to meet its burden of proof."

The Majority's holding that the Organization must show that employes are available for work which is required to be conferenced prior to being contracted, is putting the cart before the horse. The greater weight of arbitral authority has consistently held that full employment/ availability is not a viable defense in contracting disputes. In this regard, see Third Division Award 39141 cited in our submission in which it was held (as acquiesced by CSX) that the standard remedy in arbitration is that the Carrier "*** must, in effect, pay for the work twice. ***" Additionally, see Third Division Awards 20633, 35169, 40563, 40565, 40566, 40567, 40777, 40785, 40788 and 40798 addressing the issue of full employment under the Burlington Northern Agreement. See also Third Division Awards 14061, 28817, 36516, 40964, 40965, 41107, 42102, 42112, 42113 and Awards 6, 8, 10, 12 and 16 of Public Law Board (PLB) No. 6205 addressing the issue of full employment under multiple Union Pacific Agreements. Finally, see on-property **Awards 10 and 12 of PLB No. 7007** addressing the issue of full employment under the Massachusetts Bay Commuter Railroad Company Agreement in addition to recently decided Third Division Award **44685** addressing the issue of full employment under the Keolis/Massachusetts Bay Commuter Railroad Agreement. Relevant here, is **Award 10 of PLB No. 7007**, which held in pertinent part**:**

> "Once this Board has determined that there was a violation of the Agreement because of the failure to issue a notice, we next must determine what the remedy should be. In this case, the Organization requests 150 hours for four Claimants, for a total of 600 hours. There is no question that employees are entitled to pay, even if they were fully employed at the time of the subcontracting, for violations of this rule. ***"

From the foregoing, there can be no question that the widely held view in this industry including on the Massachusetts Bay Commuter Railroad property (on which Keolis employes perform work) is that full employment is not a bar to compensatory remedy for contracting violations of collective bargaining agreements.

We maintain, as stated by the Vice Chairman in his letter dated April 27, 2021, that "… rather than have the highly qualified BMWED forces remain on duty to perform any potential cleanup work as they have historically done, the Carrier sent those forces home and brought in a third party to perform this work." Regardless, the Organization was under no obligation to provide evidence of the Claimants' availability under Rule 24 to be entitled to notice and good faith conference under this Agreement. Furthermore, none of the Carrier's affirmative defenses were supported and, even

if the Carrier's defenses had any evidentiary support (they do not), the proper venue to discuss those defenses was during the contractually mandated good faith conference.

We submit that as the claimed work was established as ordinarily performed by Maintenance of Way employes it must continue to be performed by those employes. Nevertheless, the work claimed was performed by an outside contractor at the exclusion of those who ordinarily perform the work without any notice to the General Chairman, or subsequent good faith conference. Consequently, the Agreement was violated and remedy is due. The Majority's opinion otherwise under the facts and circumstances of this record elicits my respectful dissent.

Respectfully submitted,

John Schlismann
Labor Member