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

Award No. 45485
Docket No. 47539
25-3-NRAB-00003-220742

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

(Brotherhood of Maintenance of Way Employes 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 and ECC) to perform Maintenance of Way work (track protection and flagging) for other third party contractors performing work at a grade crossing at Mile Post 38.32 as well as protecting bridge inspectors and other work being performed on the Carrier's property at Mile Posts 29-30, 55-43, 33-34, 23-24, 30-32, 48-32 and 38-39 on or about June 21, 2021 and continuing through July 20, 2021 (System File NECR-JULY.2021-002 NCR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Fontaine shall now be compensated for '… any and all hours (*ST and what would be considered overtime if the Claimant was properly assigned to the work*) assigned to and worked by the employes of the private contracting firms identified above. *'"**

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 Engineers Construction, Inc. ("ECI") and ECC Corporation ("ECC") to perform track protection and flagging for bridge inspections and other track work at various locations, which was performed by ECI employee Doug Manson and ECC employee Gordy Norwood on the following dates: June 21, 2021 – ECI Flagger Doug Manson provided flag protection for inspection of Frog Bridge (MP 29 – MP 30); June 22, 2021 – ECC Flagger Gordy Norwood provided flag protection for contractors working between MP 55 and MP 43; June 23, 2021 – ECI Flagger Doug Manson protecting Bridge Inspectors between MP 33 and MP 34; June 24, 2021 – Doug Manson protecting Bridge Inspectors between MP 23 and MP 24; June 28, 2021 – Doug Manson protecting Bridge Inspectors between MP 30 and MP 32; June 30, 2021 – ECC flagging Crossing Work at MP 38.28; July 7, 2021 - ECC Flagger Gordy Norwood provided flag protection for contractors working between MP 14 and MP 18; July 14, 2021 - ECC Flagger Gordy Norwood provided flag protection for contractors working between MP 48 and MP 32; and July 20, 2021 - ECC Flagger Gordy Norwood provided flag protection for contractors working between MP 38 and MP 39.

The parties agree that the instant dispute is covered by Scope Rule 2.1, which states:

> **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 Employes 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.**

The Organization contends that Rule 2.1 provides that BMWED-represented employees "will" perform the work generally recognized as maintenance-of-way work, such as inspection, construction, repair and maintenance of track, roadbed and appurtenances thereto, and it is unrefuted that on-track protection and flagging work has customarily, historically and traditionally been assigned to and performed by the Carrier's MOW employes. For these reasons, the Organization argues that the work at issue is contractually reserved to those employes pursuant to longstanding arbitral norms, which were recently upheld in on-property Award 44631 involving a near identical case of contractor forces performing Maintenance of Way flagging duties.

The Carrier contends that the Organization failed to sustain its burden of proof that the Carrier violated any provision of the Agreement. The Carrier acknowledged that the BMWE workforce performed flagging duties in the past, however, it contends that flagging is not exclusive to the BMWE workforce and is not reserved in the Agreement, and contractors such as ECI have also performed flagging duties in the past. Thus, the Carrier contends that the work at issue complied with the controlling contract language in Article 2.1 that "work that was previously done by others by past practice may continue to be done by others."

In contracting cases, the Organization bears the initial burden to demonstrate a claim to the work under the Agreement, and to produce sufficient evidence to establish a violation of the Agreement. Third Division Awards 36208 and 41159. The Organization's claim to the flagging work at issue relies primarily on the second sentence of Scope Rule 2.1, which states that BMWED-represented employees "*will* perform the work generally recognized as maintenance-of-way work." (emphasis supplied). Regarding the Carrier's argument that flagging is not exclusive to the BMWE workforce, the Organization's claim to this work at issue is supported by awards from many previous boards holding that it is not necessary for the BMWED, as against contractors, to show that employees have exclusively performed the claimed work if they have customarily, historically, and traditionally performed the work. Third Division Award 32862; PLB 4402, Award 21; and PLB 7661, Award 41. The record evidence in this case establishes that BMWED-represented employees have customarily, historically and traditionally performed flagging work—which the Carrier does not dispute—therefore, the Organization has met its burden to establish that flagging is scope covered work and it has produced sufficient evidence to establish a violation of the Agreement.

Nevertheless, the Carrier relies on the end of the last sentence of Scope Rule 2.1—"work that was previously done by others by past practice may continue to be done by others"—to argue that the Agreement was not violated because it has a practice of contracting out flagging work. This argument is not persuasive because, as discussed above, it is not necessary for the Organization to prove that its members have exclusively performed the claimed work. Thus, even if the Carrier could prove that such work had been contracted out in the past, this would not defeat the Organization's claim to the work.

This conclusion is consistent with a recent on-property award also addressing flagging work and the Carrier's reliance on the last sentence in Rule 2.1, in which the Board concluded that, "we do not interpret the challenged CBA language to permit assignment of the disputed work to contractors without first offering it to employes." Third Division Award 44631. This holding suggests that if the Carrier had a past practice of contracting out flagging work and had reached out to the Organization to offer the disputed work to BMWED-represented employees—similar to the requirement to give advance notice and conduct a contracting conference with organizations under contract language that permits the use of outside forces under certain conditions—it may have been permissible under the parties' Agreement for the Carrier to contract out the work. Third Division Award 44398. In this matter, there is evidence that the Carrier contracted out flagging work to employees prior to the December 15, 2017 effective date of their Agreement and continued to do so in subsequent years prior to the instant claim. However, it is unnecessary to determine whether this evidence is sufficient to establish a clear, consistent and mutually acceptable past practice because there is no evidence that the Carrier communicated with the Organization to offer the disputed work to BMWED-represented employees before engaging the contractor.

There remains the issue of determining an appropriate remedy. The Organization seeks to have the Claimant compensated for any and all hours—straight time and what would be considered overtime if the Claimant was properly assigned to the work—that was assigned to and worked by ECI and ECC. The requested remedy raises the issue of whether it is appropriate to compensate the Claimant when he worked his regular schedule Monday through Friday and he also accrued overtime. It is an axiom in the law that there is no right without a remedy. It has also been recognized in the many cases discussing whether the pay status of a claimant should be taken into account that if there are no consequences for violating a labor agreement that violations are likely to continue. Third Division Awards 19899, 20633, 21340, 30970, 35169, 37470, 40567, and PLB 2206, Award 52.

Consistent with these principles, compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the Claimant may have been paid at the time of the violation.

Regarding the amount of compensation to be awarded to the Claimant, any 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. PLB 6204, Award 32. The Carrier did not dispute the Organization's claim that the contractor employees performed the flagging work identified in the claim. Under the circumstances presented in this case—where the Claimant was fully employed during the relevant period and worked overtime—damages at the overtime rate are unreasonably punitive. Therefore, the Claimant shall be compensated at the straight time rate for all hours worked by contractor employees on the dates listed in the claim and identified above.

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 30th day of July 2025.