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

Award No. 45487
Docket No. 47911
25-3-NRAB-00003-230199

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 (Donald Duguay - NRSS) to perform Maintenance of Way work (track protection and flagging) for other third party contractors replacing bridge deck timbers at approximately Mile Post 59.6 in Monson, Massachusetts on or about January 10, 2022 and continuing (System File NECR-FEB.2022-001 NCR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. Hicks shall now be compensated '… for ALL hours worked by contractor NRSS (Mr. Donald Duguay, or any other NRSS employe who may subsequently replace him at this location for the same work) beginning on Monday, January 10, 2022 and going forward until NRSS is removed from the project and the Claimant and/or BMWED employes are assigned, or the project work is completed and NRSS is no longer assigned as result of completion, whichever happens first. As of today's date, the Carrier's liability to the Claimant is equivalent to eighty (80) hours ST and twenty (20) hours OT (Covering 01.10.22 through 01.21.22) for a total of $3,344.00 which will only continue to grow while the Carrier continues this violation and as claimed as ongoing, inclusive and continuous. *' (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.

This dispute involves the Carrier's assignment of contractor employee Donald Duguay to perform track protection and flagging for other third party contractors replacing bridge deck timbers at approximately Mile Post 59.6 in Monson, MA.[1] The Organization claims that Claimant should have been afforded preference before Mr. Duguay for this work, which occurred on or about January 10, 2022, and continuing.

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

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[1] In the formal time claim, Mr. Duguay was identified by name as being with NRSS—National Railroad Safey Services. It appears that Mr. Duguay was actually an employee of another contractor—Engineers Construction, Inc.—and the parties did not discover this discrepancy during the on-property handling of the claim.

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." Further, the Carrier argues that the track protection and flagging work performed by ECI is a small part of a larger on-going capital project—the NECR MassDOT Build Grant—and did not necessitate the assignment of any additional flagging duties to Claimant or entitle him to this work, as numerous boards have held that carriers are not obligated to piecemeal portions of larger projects even when special skills or equipment are not required.

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.

The Carrier also argues that the claimed flagging work is a small part of a larger on-going capital project—the NECR MassDOT Build Grant—and did not necessitate the assignment of any additional flagging duties to Claimant or entitle him to this work, as numerous boards have held that carriers are not obligated to piecemeal portions of larger projects even when special skills or equipment are not required. Third Division Awards 5521, 20899, and 43259. This argument is based on awards that typically address whether the use of outside forces has met contractual conditions such as whether the project is of a sufficient magnitude that the carrier is not adequately equipped to do the work, or whether special skills or equipment are required. Third Division Awards 44416, 43258, 42535, 41223 and 40224. There is no language in the parties' Agreement that explicitly authorizes contracting, although the last sentence of Scope Rule 2.1 could be interpreted to permit contracting of "work that was previously done by others by past practice." However, even if that language could serve as an affirmative defense for the Carrier under the theory that the alleged large-scale flagging job that ECI was contracted to perform was of a sufficient

magnitude that the Carrier was not adequately equipped to perform the work, that defense must be rejected because there is no evidence the Carrier first offered the work to BMWED-represented employees. In addition, there is insufficient evidence in the on-property record to support that defense.

There remains the issue of determining an appropriate remedy. The Organization seeks to have the Claimant compensated for all hours worked by Mr. Duguay from January 10, 2022, and going forward, which it claimed to be equivalent to 80 hours of straight time and 20 hours of overtime covering the period from January 10, 2022, though January 21, 2022. The requested remedy raises several issues, the first being whether it is appropriate to compensate the Claimant when he worked his regular schedule and accrued overtime during the time period identified in the claim. 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.

The Organization's requested remedy also presents the issue of whether damages should be assessed for a continuing violation "going forward" from the date raised in the claim. Another principle applicable to awards of damages for proven violations is that they should not be for punishment, but for remediation of past violations and discouragement of future violations. Third Division Award 33148. Consistent with this principle, damages for a continuing violation shall not be awarded for the following reasons. To begin, the parties had a relatively brief bargaining relationship at the time of the violation and the Carrier had a reasonable—albeit misguided—belief that engaging the contractor was consistent with its contractual ability to do so through past practice. In addition, there is a dearth of evidence to support an award of continuing damages. The Organization did not provide any evidence that Mr. Duguay or any NRSS employee performed the disputed work after January 21, 2022.

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 Organization seeks to have the Claimant compensated for work performed by Mr. Duguay or the contractor beginning on Monday, January 10, 2022, and going forward.

The Carrier did not dispute the Organization's claim that during the period from January 10, 2022, though January 21, 2022, Mr. Duguay performed flagging work for 100 hours—80 hours that the Claimant would have been compensated at straight time and 20 hours that he would have been compensated at an overtime rate. 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 for 100 hours at straight time for the flagging work performed by Mr. Duguay.

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.