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

**Award No. 45493**
**Docket No. 48009**
**25-3-NRAB-00003-230415**

**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 (R.J. Corman) to perform Maintenance of Way work (tamping/surfacing in connection with crossing rehabilitations which included the installation of panels and requirement to raise the elevation of the track to meet the new crossing installations) in Essex Junction, Vermont at Mile Post Location 108.3 on Saturday, June 25 and Sunday, July 10, 2022 (System File ARSF-NECR-DEB.2022-003 NCR).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant M. Page shall now be compensated '… for the cumulative twenty (20.0) hours worked by contractor R.J. Corman employes on Saturday, June 25, and Sunday, July 10, 2022 at time and one-half rates of the applicable rates of the positions so claimed for a total of $912.00 due to Claimant Page. ***' (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 R.J. Corman Railroad Group, L.L.C. ("RJ Corman") to perform weekend surfacing work in connection with crossing rehabilitation including panel installation and other work (hereinafter referred to as "surfacing work") at Milepost 108, in Essex Junction, VT on June 25, and July 10, 2022, and that Claimant M. Page should have been afforded preference before RJ Corman for this work.**

**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 surfacing 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.**

**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 has performed surfacing work in the past, however, it contends that such work is not exclusive to the BMWE workforce and is not reserved in the Agreement, and contractors have also performed such 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 surfacing work at issue is a small portion of the Crescent Connector Project, a large capital project funded in part by the State of Vermont for safety upgrades to the Carrier's tracks and crossings located in Essex Junction, VT, which included the use of various contractors to perform overall construction and maintenance of the NECR's infrastructure and its magnitude was far beyond the MOW workforce's ability to complete on its own, given the volume of work required, and that 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 surfacing 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 surfacing work 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 surfacing work—which the Carrier does not dispute—therefore, the Organization has met its burden to**

**establish that surfacing work 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 surfacing 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 addressing other MOW 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 surfacing 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 surfacing 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 surfacing work at issue is a small portion of the Crescent Connector Project, a large capital project funded in part by the State of Vermont for safety upgrades to the Carrier's tracks and crossings located in Essex Junction, VT, which included the use of various contractors to perform overall construction and maintenance of the NECR's infrastructure and its magnitude was far beyond the MOW workforce's ability to complete on its own, given the volume of**

**work required, and that 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 project that RJ Corman 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 that the Carrier first offered the work to BMWED-represented employees. For this reason, it is unnecessary to address the Organization's claim that certain invoices that could be treated as evidence of the existence of the alleged past practice or the Crescent Connector Project were not included in the on-property handling of the case and, if so, whether that evidence was sufficient to establish a large magnitude project defense.**

**There remains the issue of determining an appropriate remedy. The Organization seeks to have the Claimant compensated for the cumulative 20 hours worked by contractor R.J. Corman employees on Saturday, June 25, 2022, and Sunday, July 10, 2022, at the time and one-half rates of the applicable rates of the positions claimed. The requested remedy raises the issue of whether it is appropriate to compensate the Claimant when he accrued over 35 hours of overtime during the weeks of each pay 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.**

**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 the cumulative 20 hours worked by contractor R.J. Corman employees on Saturday, June 25, 2022, and Sunday, July 10, 2022, at the time and one-half rate of the applicable rates of the positions claimed. The evidence shows that the Claimant worked his regular schedule and over 35 hours of overtime during the four week period that included the weekend covering the Claim, but it does not establish that he worked that on the weekend dates in question. Therefore, the Claimant shall be compensated for 20 hours at the time and one-half rate of the applicable rates of the positions claimed.**

## AWARD

**Claim sustained.**

## 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.**