CASE NO. 5
AWARD NO. 5

SPECIAL BOARD OF ADJUSTMENT
BMWED-UP FLAGGING ARBITRATION BOARD

PARTIES TO THE DISPUTE: **BROTHERHOOD OF MAINTENANCE WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE**

And

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (RailPros) to perform Maintenance of Way work of providing on-track safety (Form B track protection for Carrier right of way) and other incidental work thereto (inspecting track) for a special project that could potentially disrupt Carrier track structure, interrupt train operation and/or damage Carrier right of way between Mile Posts 97 and 97.60 on ALL tracks on the Greeley Subdivision on June 15, 16, 17, 21, 22, 23, 24 and 25 2021 (System File JN-2152U-1646/1762139 UPS).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the assignment of outside forces to perform the work referred to in Part (1) above and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant L. Valdivia shall now be allowed '*** **seventy-three (73)**

> **hours** at Claimant's respective straight time rate of pay and all overtime that was acquired. ***' (Emphasis in original)."

STATEMENT OF FACTS:

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 on June 21, 1934.

This Special Board of Adjustment has jurisdiction over the dispute involved herein.

The Carrier conducts its operations within 23 states, which includes approximately 32,000 route miles of track and nearly 30,000 active road crossings. As a result of this significant footprint, the Carrier regularly receives requests from outside entities seeking permission to enter onto, or otherwise access, some portion of the Carrier's 1,000,000 acres of land. The requests frequently come from public transportation departments, public utility companies, city or state agencies, surveyors, and various private businesses. The requested permission, as in this case, is to access Carrier property to perform certain construction, repair and/or surveying work on or adjacent to the Carrier property.

When the third-party entity requests access to Carrier property, the Carrier prepares a Right-of-Entry Agreement ("REA") to ensure the Carrier's operations and property interests are protected. Since the third-party work in question often takes place on or adjacent to the Carrier's tracks, the Carrier has always insisted (and FRA safety standards require) that flagging protection is present to ensure the safety of workers, the public and the efficient operation of the railroad. The Organization represents that its members have always performed the flagging protection work on these third-party projects, with the third-party reimbursing the Carrier for this personnel cost. The Carrier has presented no evidence to the contrary.

However, more recently, due to an alleged lack of adequate personnel, the Carrier began inserting language in the REA placing the obligation on the third-party to arrange for flagging protection, and to pay for the same. Initially, given the scarcity of flagging contractors in certain geographic areas, the third-party was limited to using only one

flagging contractor – RailPros. More recently, in most geographic areas the third parties have more flagging contractor options to choose from.

The record further shows that when flagging protection is necessary, it is attained by requesting track authority (over a specific section of track where work will be performed) from the Carrier's Train Dispatchers, Control Tower Operators, or other employees designated by the Carrier. When track authority is granted, the flagman is granted track authority over a section of Carrier tracks and is responsible for the safety of the general public, work crews, equipment and trains. This includes the coordination of the safe movements of men/equipment, monitoring and inspection of the track structure, ensuring appropriate remedial action is taken when the track structure is damaged, contacting the Train Dispatchers, Control Tower Operators, or other Carrier employees designated by the Carrier to release the track authority at conclusion of the on-track protection.

In response to the Carrier no longer utilizing Organization employees to provide flagging protection on these special third-party projects, the Organization submitted claims contending that the Carrier violated various Agreement rules, including the Scope and Subcontracting provisions. Many of these claims have already progressed to arbitration, some of which will be further discussed below.

Turning to the instant special project, in 2019 the Carrier entered into an REA with Reiman Inc., a construction company retained by the Wyoming Department of Transportation to perform the following work:

RECITALS:

Contractor has been hired by Wyoming Department of Transportation for deck repairs, rigid concrete overlay, joint modification, paint repair, concrete repair, bridge railing repair, erosion repair simple maintenance of the grade separated public road crossing DOT 810581L at Mile Post 97.25 on the Greeley Sub in Cheyenne, Laramie County, WY, in the general location shown on the Railroad Location Print marked **Exhibit A**, attached hereto and hereby made a part hereof, which work is the subject of a Consent Letter dated 11/21/2019, between the Railroad and the Wyoming Department of Transportation.

The Railroad is willing to permit the Contractor to perform the work described above at the location described above subject to the terms and conditions contained in this Agreement

The REA also provides as follows:

ARTICLE 4 - ALL EXPENSES TO BE BORNE BY CONTRACTOR; RAILROAD REPRESENTATIVE.

A. Contractor shall bear any and all costs and expenses associated with any work performed by Contractor (including without limitation any CIC), or any costs or expenses incurred by Railroad relating to this agreement.

B. Contractor shall coordinate all of its work with the following Railroad representative or his or her duly authorized representative (the "Railroad Representative"):

Gregory F. Berning
515/451-2975

C. Contractor, at its own expense, shall adequately police and supervise all work to be performed by Contractor and shall ensure that such work is performed in a safe manner as set forth in Section 7 of **Exhibit B**. The responsibility of Contractor for safe conduct and adequate policing and supervision of Contractor's work shall not be lessened or otherwise affected by Railroad's approval of plans and specifications involving the work, or by Railroad's collaboration in performance of any work, or by the presence at the work site of a Railroad Representative, or by compliance by Contractor with any requests or recommendations made by Railroad Representative.

ARTICLE 5 - SCHEDULE OF WORK ON A MONTHLY BASIS.

The Contractor, at its expense, shall provide on a monthly basis a detailed schedule of work to the Railroad Representative named in Article 4B above. The reports shall start at the execution of this Agreement and continue until this Agreement is terminated as provided in this Agreement or until the Contractor has completed all work on Railroad's property.

* * *

ARTICLE 9 - DISMISSAL OF CONTRACTOR'S EMPLOYEE.

At the request of Railroad, Contractor shall remove from Railroad's property any employee of Contractor who fails to conform to the instructions of the Railroad Representative in connection with the work on Railroad's property, and any right of Contractor shall be suspended until such removal has occurred. Contractor shall indemnify Railroad against any claims arising from the removal of any such employee from Railroad's property.

With respect to flagging work, Exhibit B to the REA provides as follows:

Section 1. NOTICE OF COMMENCEMENT OF WORK - RAILROAD FLAGGING - PRIVATE FLAGGING.

A. Contractor agrees to notify the Railroad Representative at least ten (10) working days in advance of Contractor commencing its work and at least thirty (30) working days in advance of proposed performance of any work by Contractor in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track.

B. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad approved flagman is provided to watch for trains. Upon receipt of such thirty (30)-day notice, the Railroad Representative will determine and inform Contractor whether a flagman need be present and whether Contractor needs to implement any special protective or safety measures.

C. Contractor shall be permitted to hire a private contractor to perform flagging or other special protective or safety measures (such private contractor being commonly known in the railroad industry as a contractor-in-charge ("CIC")) in lieu of Railroad providing such services or in concert with Railroad providing such services, subject to prior written approval by Railroad, which approval shall be in Railroad's sole and absolute discretion. If Railroad agrees to permit Contractor to utilize a CIC pursuant to the preceding sentence, Contractor shall obtain Railroad's prior approval in writing for each of the following items, as determined in all respects in Railroad's sole and absolute discretion: (i) the identity of the third-party performing the role of CIC; (ii) the scope of the services to be performed for the project by the approved CIC; and (iii) any other terms and conditions governing such services to be provided by the CIC. If flagging or other special protective or safety measures are performed by an approved CIC, Contractor shall be solely responsible for (and shall timely pay such CIC for) its services. Railroad reserves the right to rescind any approval pursuant to this Section 1, Subsection C., in whole or in part, at any time, as determined in Railroad's sole and absolute discretion.

* * *

Section 7. SAFETY.

A. Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of any work on Railroad property performed by Contractor. Contractor shall be responsible for initiating, maintaining and supervising all safety, operations and programs in connection with the work. Contractor shall, at a minimum, comply with Railroad's then current safety standards located at the below web address ("Railroad's Safety Standards") to ensure uniformity with the safety standards followed by Railroad's own forces. As a part of Contractor's safety responsibilities, Contractor shall notify Railroad if Contractor determines that any of Railroad's Safety Standards are contrary to good safety practices. Contractor shall furnish copies of Railroad's Safety Standards to each of its employees before they enter Railroad property.

* * *

Section 8. INDEMNITY.

A. TO THE EXTENT NOT PROHIBITED BY APPLICABLE STATUTE, CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD, ITS AFFILIATES, AND ITS AND THEIR OFFICERS, AGENTS AND EMPLOYEES (INDIVIDUALLY AN "INDEMNIFIED PARTY" OR COLLECTIVELY "INDEMNIFIED

PARTIES") FROM AND AGAINST ANY AND ALL LOSS, DAMAGE, INJURY, LIABILITY, CLAIM, DEMAND, COST OR EXPENSE (INCLUDING, WITHOUT LIMITATION, ATTORNEY'S, CONSULTANT'S AND EXPERT'S FEES, AND COURT COSTS), FINE OR PENALTY (COLLECTIVELY, "LOSS") INCURRED BY ANY PERSON (INCLUDING, WITHOUT LIMITATION, ANY INDEMNIFIED PARTY, CONTRACTOR, OR ANY EMPLOYEE OF CONTRACTOR OR OF ANY INDEMNIFIED PARTY) ARISING OUT OF OR IN ANY MANNER CONNECTED WITH (I) ANY WORK PERFORMED BY CONTRACTOR, OR (II) ANY ACT OR OMISSION OF CONTRACTOR, ITS OFFICERS, AGENTS OR EMPLOYEES, OR (III) ANY BREACH OF THIS AGREEMENT BY CONTRACTOR.

* * *

Section 12. ASSIGNMENT - SUBCONTRACTING.

Contractor shall not assign or subcontract this agreement, or any interest therein, without the written consent of the Railroad. Contractor shall be responsible for the acts and omissions of all subcontractors. Before Contractor commences any work, the Contractor shall, except to the extent prohibited by law; (1) require each of its subcontractors to include the Contractor as "Additional Insured" on the subcontractor's Commercial General Liability policy and Umbrella or Excess policies (if applicable) with respect to all liabilities arising out of the subcontractor's performance of work on behalf of the Contractor by endorsing these policies with ISO Additional Insured Endorsements CG 20 10, and CG 20 37 (or substitute forms providing equivalent coverage; (2) require each of its subcontractors to endorse their Commercial General Liability Policy with "Contractual Liability Railroads" ISO Form CG 24 17 10 01 (or a substitute form providing equivalent coverage) for the job site; and (3) require each of its subcontractors to endorse their Business Automobile Policy with "Coverage For Certain Operations In Connection With Railroads" ISO Form CA 20 70 10 01 (or a substitute form providing equivalent coverage) for the job site.

The Organization submitted the instant claim on August 11, 2021, after Reiman, Inc. retained RailPros to perform flagging work at the rail crossing where the road work was taking place in Cheyenne, WY. It asserted that the Carrier violated the Scope Rule and the notice provisions of the Agreement's Contracting Out language. On September 17, 2021, the Carrier denied the claim. It contended that flagging work is not covered under the Scope Rule and that the contracting out provisions of the Agreement do not apply because the "work has nothing to do with BMWED projects or Carrier operations."

POSITIONS OF THE PARTIES:

The Organization contends that this dispute involves the Carrier's decision to assign ordinary and traditional Maintenance of Way Department work to outside forces. It maintains the flagging process is in place to ensure that work taking place within the track authority will not result in an on-track collision between pieces of equipment, personnel and/or members of the public in the area. That this work falls within the scope

of the Agreement is evidenced by Appendices "DD" and "EE," which are letters of agreement recognizing the Organization's responsibility to provide the Carrier with on-track safety protection while protecting the track structure and specifically identifying special project flagging as a certain type of BMWED flagging. This work is also covered by Rule 9 of the Agreement, since the work involves maintenance and inspection work and "other work incidental thereto." Additionally, it is undisputed that the Organization's workforce has historically, customarily and traditionally performed the subject flagging work. *See, Awards 1, 2 and 4 of Special Board of Adjustment BMWED-UP Flagging Arbitration Board (Missouri Pacific Agreement).*

Furthermore, the Organization insists that the Carrier violated the clear and unambiguous provisions of Rule 52 and the December 11, 1981 National Letter of Agreement, when it failed to notify and confer with the General Chairman for the purpose of entering into good-faith discussions prior to the time the work was contracted out. Rule 52 provides as follows:

RULE 52 - CONTRACTING

(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization

> representatives shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

The Organization also submits that in the December 11, 1981 National Letter of Agreement, the parties recommitted to use the advance notification and conference provisions contained in Rule 52 and that such provisions be "strictly adhered to." Here, the Carrier did not meet these mandated preconditions and has improperly removed the flagging work from the scope of the Agreement and allowed it to be assigned to outside forces creating a clear loss of work opportunities reserved to Maintenance of Way forces. The Claimant must be compensated for his lost wages. *See, Awards 1, 2 and 4 of Special Board of Adjustment BMWED-UP Flagging Arbitration Board (Missouri Pacific Agreement) as well as Awards 2, 3 and 4 of Special Board of Adjustment BMWED-UP Flagging Arbitration Board (Union Pacific Agreement and former Chicago and Northwestern Transportation Agreement)*; *Third Division Award 40964*. Carriers are not excused from the foregoing requirements simply because a third-party may control the work. *Third Division Award 24173*.

The Organization rejects the Carrier's defense that Rule 52 is inapplicable because the Carrier did not control, instigate, benefit or pay for the work. It points to numerous provisions within the REA showing that the Carrier retained authority and control over the flagging work. The Organization distinguishes the awards cited by the Carrier, inasmuch as they involved work where the Carrier did not maintain control over the project. It also disputes Carrier's claim that third party flaggers do not inspect track. Flaggers are FRA 213.7 qualified and thus are trained to inspect track and protect men and equipment. There would be no need to train and qualify employes performing flagging duties in FRA 213.7 (A) Track Repair, FRA 213.7 (B) Track Inspection, and FRA 213.7 (C) Continuous Welded Rail Inspection, if flaggers do not inspect track and provide on-track protection to men and equipment. The Carrier has failed to offer any evidence whatsoever to support

its proffered affirmative defense, let alone any evidence which could allow a reasonable mind to conclude the Carrier did not benefit from the subject work, did not control the subject work, did not instigate the subject work or did not pay for the subject work.

The Organization also submits numerous awards to support its argument that the principle of exclusivity is not relevant or applicable here. Rule 52(a) only requires a showing that the Organization has "customarily" performed the flagging work, not that it "exclusively" has performed it. Finally, it contends the fact an employe may be fully employed is not a defense to an award of monetary damages, nor does it diminish the fact that BMWED employees lost work opportunities. Any time the Carrier siphons off work accruing to BMWED-represented employes and assigns it to non-Agreement employes, the result is a loss of work opportunity that damages BMWED employes. The Carrier made no effort to assign BMWED employes in their existing positions or to bulletin new positions to perform the work. The Carrier cannot assign this work that is customarily and historically performed by BMWED employes to outside forces and then contend that no work opportunity has been lost by the contracting out of bargaining unit work. *See, NRAB Third Division Award 39139 and Award 9 of PLB No. 7101*.

The Carrier contends the Organization has not established a violation of any controlling agreements. The grieved work was not performed at Carrier's instigation; not under its control; not at its expense; and not for the exclusive direct benefit of the Carrier. Thus, numerous referee awards have established the "No-Cost / No-Benefit" principle, holding that a carrier does not violate a scope rule where the work performed by a third-party is totally unrelated to the carrier's operations. *See, Third Division Award No. 19957*. All services provided by RailPros here were done on an independent basis for non-railroad personnel, vehicles, and/or equipment. The service was not performed at the direction of Carrier and does not benefit Carrier, nor were the RailPros employees employed, directed, or paid by Carrier. The Carrier reiterates that this work "has nothing to do with Engineering Department projects or further Carrier operations." The record

contains multiple statements from Carrier officials (Messrs. Gehringer, Wimmer, Hawthorn, Shepherd, Murray, and Koff) supporting this assertion, which the Organization has failed to rebut.

The Carrier especially relies on an award involving the instant parties by Arbitrator Patrick J. Halter. *Public Law Board 7705, Award No. 1.* The identical issue presented here was addressed by the neutral when a third-party (Lewis Energy) utilized another third-party (RailPros) to provide crossing protection for oil field county trucks traversing Carrier property. In reviewing the evidence of record, the Board determined the central issue was whether the flagging work performed by RailPros was related to the Carrier's operations. Relying on prior awards for the appropriate criteria to decide the issue, the Board looked at which party instigated, controlled, and benefited from the work. In finding for the Carrier, the Board held that "f[]lagging services were provided by the RPI [RailPros] employee for LE's [Lewis Energy] truck operations and not for the Carrier's railroad operations. This work, at LE's expense and control, benefit LE." The same principles were more recently affirmed in *Award No. 3 of Special Board of Adjustment BMWED-UP Flagging Arbitration Board (Missouri Pacific Agreement).* In reaching a decision favorable to the Carrier, the Board found that where the Organization failed to challenge the Carrier on its "No-Cost / No-Benefit" argument, the principles and ruling of *PLB 7705* governed.

According to the Carrier, there are a litany of arbitration awards clearly holding that flagging work on the Carrier has never been exclusively reserved for BMWED workers. Indeed, the Scope Rule is only a general provision, and although it incorporates Rule 4 (Seniority Group and Classes), it simply lists undefined job titles within each of Sub-departments. The Rule does not provide that only BMWED members may perform the types of work identified with the parties' Agreement. *See, Third Division Award No. 28789; Third Division Award No. 37959*. The Carrier also dismisses the Organization's reliance on Attachments "DD" and "EE." "These letters of understanding did not exclusively reserve the duties of flagging to the Organization. They merely clarified rates of pay when their members participate in such work." Indeed, the record shows that

"Managers, Supervisors, Trainmen, Signalmen, Bridge Department Employees, Welders, Shop Craft Employees, and contractors have all performed flagman duties and used various types of on-track safety mechanisms."

Furthermore, the Carrier maintains that all the Organization's arguments pertaining to Rule 52 are not applicable to this case. The Carrier is not required to provide notice or justify the reason of the contracting when it does not fall within the purview of the Scope Rule. Finally, the Carrier emphasizes that the Organization's remedy demand is not supported by fact and seeks compensation that is excessive and incorrect. There is no evidence of the hours of work performed by the RailPros employee on the dates in question, nor would the Carrier ever have possession of the records to determine the actual length of the contracted work. Ther Carrier was not involved with this third-party project. Additionally, the Claimant remained fully employed during the claim dates and was otherwise unavailable.

In *Third Division Award No. 32352* (BMWED v. UP, Former MoPac), Referee Marty E. Zusman ruled:

> However, we deny Part (3) of the claim for compensation as the Claimant was fully employed and we can find no evidence in this record of any wage loss suffered (Third Division Awards 31835, 31273).

Furthermore, the Carrier submits that the Organization is requesting overtime pay for hours which the Claimant never worked. It is well-established that overtime and arbitraries are reserved only for work that has actually been performed. They are not warranted for time not worked. *See, Public Law Board 3012, Award No. 1* (Referee David Dolnick).

DISCUSSION:

This case involves yet another dispute between the parties over whether the Carrier can permit flagging work to be performed by non-BMWED workers on third-party special projects, without first satisfying the Agreement's contracting out notice provisions.

It is undisputed that BMWED work forces historically and customarily performed these flagging duties prior to the Carrier requiring that the third-party hire an outside contractor to perform the work. In those prior instances, the Carrier was simply reimbursed by the third-party for the personnel costs associated with the flagging work. This changed within the last decade, when the Carrier determined that its personnel needs necessitated that the third-party contract for flagging services. It justified this action based on the "No Cost/No Benefit" principle – that the Carrier did not initiate the special project, the projects were totally unrelated to Carrier operations and the Carrier incurred no cost, nor received any benefits, from the involved work.

This issue and these parties do not come before this Board on a clean slate. The Carrier directs the Board to be guided by the 2016 Halter Award finding that the No Cost/No Benefit rule warranted a dismissal of the Organization's claim that the flagging work on special projects belonged to the BMWED. The Organization insists the 2018 and 2020 Malin Awards govern this matter to the extent these Awards distinguished the Halter Award and concluded the Carrier had an obligation to comply with the Agreement's notice provisions prior to contracting out flagging work on special projects.

Whether viewed as a Scope Rule case or a Rule 52 contracting out case, this Board agrees with Referees Halter and Malin that the ultimate question of whether the flagging work at issue falls within the purview of the Agreement turns on whether the "No Cost/No Benefit" rule applies to the facts of this case. For the following reasons, we find that, on balance, the Organization has adequately rebutted the Carrier's contentions that it had no control over the special project/flagging work herein and that the work had no relation to the Carrier operations.

First, from a practical standpoint it is difficult to see how a grade separation project (which typically involves a third-party constructing or maintaining a bridge or underpass that crosses the Carrier's tracks) is unrelated to the Carrier's operations. This was not, for example, a private party building a warehouse along a siding. It is a project that had the potential of severely compromising the Carrier's operation, exposing the workers and

the track itself to serious injury or damage. Indeed, this is the reason the Carrier requires flagging on these projects. Flagging duties would be unnecessary if the special project had nothing to do with Carrier operations.[1] In this regard, the Board agrees with the following observation made by the Organization in its appeal of the Carrier's denial of the instant claim:

> It is well established that flagging is to ensure employee and public safety by directing train movements to avoid collisions and other fatal incidents (protecting and inspecting Carrier property and right of way). Trains operate on Carrier right of way, hauling hazardous material but not limited to soda ash, oil, and other environmental sensitive material which can put small towns, protected environmental areas (such as rivers and lakes) and other populated regions at high risk of destruction if the track is not properly protected (flagged). The facts remain, the work of flagging for a special project took place on Carrier property, protecting Carrier assets, as consequence, it is the Carrier's responsibility to protect it, under that circumstance, it is your obligation to adhere to the Agreement and assign this work in accord with the current Agreement and populated seniority rosters.

This practical observation is fully supported by the REA language itself. The REA makes clear that "[t]he safe operation of Railroad train movements and other activities by Railroad takes precedence over any work to be performed by Contractor" (REA Ex. B, Sec. 7A). To sustain the Carrier's operational priority in this regard, the REA acknowledges the amount of control the Carrier maintains not only over the project itself, but over the flagging work. Thus:

- The Contractor must coordinate "all of its work" with the Carrier's authorized Railroad Representative ("the Rep"), who is present at the worksite (Article 4b).

- The Carrier must approve all work plans, and the contractor must provide Carrier with a monthly detailed schedule of work (Articles 4c; 5).

- The Contractor must remove any employee who fails to follow the Rep's instructions, and work is suspended until such removal (Article 9).

[1] The parties dispute whether the RailPros flaggers inspected the track. Regardless, we do not believe the answer to this question is dispositive as to whether the instant flagging work violated Rule 52(a).

- The Carrier has prior approval authority of any flagmen used, and the Rep determines when flaggers are required "and whether Contractor needs to implement any special protective or safety measures" (Exhibit B, Sec. 1B).

- The Carrier has "sole and absolute discretion" over the flagging operation, its scope and "any other terms and conditions governing such services to be provided" (Exhibit B, Sec. 1C).

- The Contractor must comply with all the Carrier's safety standards (Ex. B, Section 7).

- The Contractor cannot assign the REA to any other contractors without the Carrier's consent (Ex. B, Sec. 12).

- The Contractor must indemnify and hold the Carrier harmless (without limitations) for any loss, damage, injuries or deaths arising out of any work, acts/omissions, or breaches of the REA by the Contractor (Ex. B, Sec. 5B; Sec. 8). [2]

The Board acknowledges that, from a contracting perspective, the foregoing provisions are necessary when permitting a third-party entry to Carrier's property to perform work in proximity to its tracks. But having insisted on these provisions, the Carrier cannot then purport that it has no control over third-party's work to escape its obligations under Rule 52. Based on the foregoing, the Board concludes that the Carrier's decision to contract out the flagging work to outside forces without providing the Organization adequate notice violated Rule 52(a) of the Agreement.[3]

Referee Halter's award in *Public Law Board 7705, Award No. 1,* relied on by the Carrier, is not at odds with this outcome. That award involved the Carrier's outsourcing of flagging work to a contractor to prevent its trucks from crossing the track while a train

[2] The REA also contemplates that Agreement-covered employees might be utilized to perform the flagging work. It ensures that the Contractor will pay established wage rates for any such work. (REA Ex. B, Sec. 1F.)

[3] To the extent that third parties wishing to enter Carrier's right-of-way do not always provide sufficient notice to provide the 15-day notice required in Rule 52(a), the rule provides for shorter notice periods in "emergency time requirements cases."

approached. Halter concluded on the facts of that case that the "No Cost/No Benefit" principle prevented the Organization from claiming the Carrier controlled the third-party work and its action violated the Agreement's scope provisions. Here, as evidenced above, the Board finds that on the facts of this case the Organization has prevailed on its contention that the "No Cost/No Benefit" rule cannot apply here given the amount of control retained by the Carrier over the project.

This Board finds *Third Division Award No. 24173* to be more on point. There, the Board addressed the question of whether the Carrier's contracting out track work to a third-party violated the agreement's contracting out notice provisions. In dismissing the Carrier's contention that the work was done exclusively for the benefit of the state, the Third Division concluded that the parties' contracting-out provisions applied. The award quotes from a prior *Third Division Award No. 22783* (involving – like here -- grade separation work) where the Board stated that

> … [I]t seems apparent that ***the Carrier had to agree to the grade separation as well as the method by which such work, including the shoofly and that subsequent permanent track -- to be performed by others -- would be accomplished on its property***. Consequently, we conclude that such decision ***was within the authority of the Carrier, as evidence by the contracts between Carrier and the municipality in the record***. We also conclude that based on the foregoing the work as set out in the Claim ***was work normally and typically performed by the track forces and that prior notice should have been given*** under Article IV."

(*Award No. 24173* at p. 2.) (Emphasis added.)

Similarly, this Board concludes that the REA herein demonstrates the Carrier maintained sufficient authority over the instant third-party grade separation project, so as to require it to give prior notice under Rule 52(a) to the Organization, whose members customarily performed this flagging work in the past.

Finally, the question of whether the Claimant (who did not lose any compensation) is entitled to a monetary remedy has already been decided on this property under identical

circumstances. As recently set forth in *UP/BMWED Special Board of Adjustment, Case 2, Award 1*:

> [W]e believe that the better reasoned authority and the weight of authority in contracting out cases finds it appropriate to make claimants whole for lost work opportunities even where they were fully employed on the dates in question. Accordingly, we shall sustain the claim.

(Award No. 1 at p. 5.) This Board finds no compelling reason to stray from this recent precedent involving the identical parties.

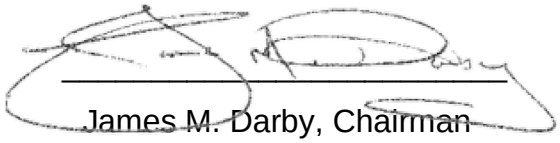
Accordingly, the claim is sustained.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the award effective within sixty (60) days following the date two members of the Board affix their signatures thereto.



James M. Darby, Chairman

Kevin Evanski

Kevin Evanski, Organization Member

I DISSENT - Attached C.M. Bogenreif

C.M. Bogenreif, Carrier Member

SPECIAL BOARD OF ADJUSTMENT
Flagging

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
(DIVISION/IBT
(
(
(AND
(
(
(UNION PACIFIC RAILROAD COMPANY

CARRIER DISSENT

The Carrier must dissent from the Board's Award because it is inconsistent with existing arbitral precedent and the historic application of the Agreement. Moreover, the Board's Award incorrectly finds the Carrier maintained control of the work, and states that it is undisputed that BMWED forces customarily and historically performed these flagging duties prior to requiring a third party to hire an outside contractor. The Carrier vehemently disagrees with both positions.

First, the Board's award improperly recognizes a distinction between work that is not exclusively reserved to BMWED employees and work that is "customarily performed" by BMWED employees. Flagging work is not scope covered, nor has it been customarily and historically performed by BMWED employees. The Carrier provided numerous awards from on property and across the industry that show time and time again, the issue of scope coverage and flagging work has been resolved in favor of the Carrier. Despite the evidence provided, the Board somehow strayed for that long line of arbitration to craft their own definition of the work, control, and scope. The awards cited by the Carrier were penned between the early 1990's to present. That alone is proof that this work has not been customarily and historically performed by BMWED members. Third Division Awards 29052, 38014, 39279, 40662, 40663, 41167, 43431, 32646, and PLB 7705 – AWD 1 all conclude the flagging work is not scope, and that work that is not scope does not require notification to the General Chairman.

Third Division Award 29052; BMWED vs UP (SP) 1991; Vernon:

> The second basis of the claim was the Scope Rule. Regarding Rule No. 1; it is the opinion of the Board that it is ambiguous with respect to any exclusive jurisdiction concerning flagging work. As such, the Organization would have to show that foremen customarily performed the work by practice. This has not been done. On the contrary; the Carrier asserts, without rebuttal, a practice whereby many crafts including management have provided flagging services.

Third Division Award 32646; BMWE vs UP; Referee Walin (1998):

> Flagging was done to ensure that the contractor's equipment did not foul Carrier's main line or otherwise jeopardize safety. Our review of the Agreement provisions cited by the Organization does not reveal any language that explicitly entitles Claimants to the work in dispute to the exclusion of all others. Moreover, **there is no proof in the record to show such entitlement by custom, tradition or historical practice.** Accordingly, we must conclude that the Organization has failed to sustain its burden of proof.

Third Division Award 43431; BMWE vs UP; Referee Betts (2019):

> After careful consideration of the record, the Board finds the Organization failed to meet its burden. First, **the Board has previously found that flagging is not exclusive to a specific craft, and arbitral precedent supports the Carrier's position.** Both sides here presented employee / supervisor statements in support of their respective positions, Form 1 Award No. 43431 Page 3 Docket No. MW-43496 19-3-NRAB-00003-160209 which also lends **support to the Carrier's claim that flagging is not scope covered work and can be performed by any qualified employee**.

Third Division Award 40662; BMWED vs BNSF; Referee Gordon (2010):

> To the extent BMWE-represented employees previously may have done some comparable work, they have not customarily performed it. **At most, there has been a mixed practice that permits the use of contractors.**
>
> **In short, the disputed work is not reserved for BMWE forces under the Agreement's scope clause. Therefore, the Carrier was not required to notify the Organization or assign BMWE-represented employees the disputed work.**

Third Division Award 40663; BMWED vs BNSF; Referee Gordon (2010):

> In sum, subcontracting not performed at the Carrier's initiative, not under its control or at its expense but which may result in an indirect benefit **is outside the Agreement's scope and notice provisions. It is not subject to the Carrier's promises to the Organization.** See Third Division Award 40501.

Third Division Award 41167; BMWED vs BNSF; Referee Knapp (2011):

> It is not routine track work, and it **does not meet the definition of work "customarily performed" by BMWE-represented employees. Because it does not meet that definition, it is not covered by the Note to Rule 55.** The work in dispute here was undertaken pursuant to state and federal environmental regulations and had to be completed in a manner that complied with those regulations. As a result, it was not routine track work of the type customarily performed by BMWE-represented employees, and it was not subject to the Note to Rule 55. **Therefore, the Carrier was not obligated to give notice, and it did not violate the Agreement when it contracted out the work.**

Third Division Award 41101; BMWED vs UP (SPWL); Malamud (2011):

> Moreover, the Board has previously found that flagging work has been performed by various work classifications on this property (Third Division Award 29052). There is no evidence in the record to indicate that the practice with regard to the performance of flagging work in place on this property has changed since the issuance of Award 29052. Consequently, the Board is compelled to conclude that the Organization failed to meet its burden to prove that the Claimant's seniority rights were violated and/or that the Claimant was deprived of any work opportunity.

Third Division Award 32141; BMWED vs UP; Eischen (1997):

> This is not a case of first impression. In Third Division Award 29753 we denied a virtually identical claim, holding: 'Since the Carrier had no obligation to provide the services. the provisions of Rule 52 are not operative in this matter, and we find that the Carrier is not in violation of the Agreement." Again, in Third Division Award 31282, the same dispute involving the same school crossing duties at the same intersection in Lawrence, Kansas, again resulted in a denial "in the interest of stability." Now, all undaunted, like the Phoenix rising from the ashes, another identical claim is presented for our edification and determination. In paraphrase of Justice Oliver Wendell Holmes' observation on the subject of finality and authoritative precedent, we conclude that even the most protracted litigation between the most adamant of protagonists eventually must come to a conclusion.

PLB 7705 Award 1, BMWED vs UP (MOPAC); Halter (2016):

> Applying this precedent to the claim in this proceeding, the Board finds that the claimed work on June 7, 2013 was not performed at the Carrier's instigation, the claimed work was under LE's control, the claimed work was not at the Carrier's expense nor was it exclusively for the Carrier's benefit. Given these findings, RPl's performing the claimed work on June 7, 2013 does not constitute a violation of the scope rule within the Agreement. Therefore, the claim is denied.

Next, the Board errs by finding that the Carrier's REA (Right of Entry Agreement) somehow shows that the Carrier maintained control over the project in question. This could not be further from the truth. As explained during oral arguments, the Carrier maintains no control over

these situations. These projects, that do not benefit the Carrier in any manner, are more detrimental to operations as they cause disruption in the normal manner which the Carrier conducts operations. If the Carrier had the choice, they would simply deny right of entry to any Company seeking to encroach on its property lines and operations, but that is not an option, nor is it feasible. Federal laws give third parties the ability to access Carrier property under the threat of condemnation or simply compel access to the Carrier's property.

The provisions in the REA cited by the arbitrator in no way support the conclusion that the Carrier controls the work in question. Simply requiring a party to provide qualified resources to ensure the safety of the public and the parties does not amount to control. Letting the carrier know that the party will be entering our property at a particular time is not control. Coordinating the work that the third party is performing on the Carrier's property is not control. Regardless, the Carrier will review the language of its REA to address the elements that the Board cited as evidence of control. To suggest that the Carrier must maintain staff to provide flagging coverage for the thousands of projects initiated, funded and controlled by various third-party entities who apply for entry to their right of way each year would impose an undue and heretofore unknown burden on the Carrier.

It is not a violation of the Agreement for the Carrier to make evaluations of those Companies that are performing work on and around their property, or to ensure those companies understand the safety requirements working around Carrier structures, nor does it indicate that the Carrier has control of the project. The only "control" the Carrier maintains in these instances is ensuring that whoever is entering Carrier's property to perform their work (not related to Carier work), is making sure those people are qualified so that they do not interfere with or jeopardize the safety of the Carrier's actual operations.

Surely, the Board is not suggesting that the Carrier could avoid "controlling" the work simply by removing any requirement in its right-of-entry agreements that third parties entering its

property supply flaggers or by eliminating any qualifications or standards for flaggers that a third party chooses to employ in connection with its project. The absence of flaggers or the removal of the expectation that flaggers be familiar with railroad operations would lead to decreased safety for employees of the Carrier and the third party and the general public. That is not an acceptable result.

The Board further errs by determining that building an overpass is somehow related to railroad work. Third Division Award 26212 crafted a set of criteria for determining whether contracted work falls within the scope clause and set forth the criteria to be applied for determining whether work is related to railroad operations. These criteria were applied by the Board in Third Division Award 35364, and were reiterated in PLB 4768 Award 12, and again in Third Division 37468. Those criteria are as follows:

> (1) Where the work, while perhaps within the control of the Carrier, is totally unrelated to railroad operations.
>
> (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operation of others on the Carrier's property and is undertaken at the sole expense of that other party.
>
> (3) Where the Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

Following those rulings, Referee Halter applied the same language in his award (PLB 7705 Award 1) regarding flagging performed by contractors. Applying these well-established criteria in this case leads to one conclusion only: there was no scope violation.

This award suggests that a private party building a warehouse along Carrier property is unrelated to Carrier's operations yet somehow concludes that building a highway overpass over Carrier property is related to Carrier operations. Neither are related to Carrier operations. Neither involve the employees who operate a train, or the maintenance of Carrier's track and structures. Award 37648 involved contractors building an underpass under Carrier's trackage. That work also included building a shoo-fly, and the work was found to be unrelated to railroad operations. The Board, in that case, held that the prior awards were not palpably erroneous and stated that the work

in question did not constitute contracting within the meaning of the Scope Rule. Additionally, the Board found that the work was performed by the contractor so the Carrier could continue to maintain its operations without service disruption, due to the underpass construction.

Incorrectly, the Board directs us to review Third Division Awards 24173, and 22783, contending that those awards are more on point with the operation at hand. Reliance upon these awards to decide that flagging work requires notice is improper. Both cases cited by the Arbitrator involved track work. The Organization filed claims on a contractor building track, not flagging of that work. Track work arguably may be work that has been historically and customarily performed by BMWED members, therefore the Board held that notification to the Organization, for the track work, was required. The weight of the competing awards about shoo-fly construction is clearly in favor of the Carrier considering the awards cited above. Again, the issue of "related to railroad operations" was clearly defined, affirmed, and reiterated multiple times over, and in favor of the Carrier. There should be no question that this project, nor any of the thousands of other third-party projects that occur on or around Carrier property have no relation to Carrier work.

This award gives rise to a new claim theory that will likely create numerous future disputes between the parties. In finding that the Carrier failed to provide notice in the instant case under Rule 52 related to contracting out, the Board essentially requires notice of contracting out whenever any non-BMWED employee performs work that BMWED employees may have participated in at some point in history – regardless of whether BMWED employees "own" the work. Participation in work does not mean the work is scope covered or reserved to a craft of employees. Indeed, the Board's interpretation of when notice is required under Rule 52 renders the Scope provision superfluous and will lead to numerous future disputes as the parties attempt to define the boundaries of what other types of work may have been "customarily performed" by BMWED employees.

The Board's Award requires the Carrier to provide notice of contracting out of work that it is not, in fact, contracting out. The Carrier is not contracting the flagging work that takes place on its property, nor is the Carrier contracting the work that the flagging company is protecting. If the Carrier is not contracting any of the work being performed, there can be no contention that the Carrier has control over the work, or that the contracting provisions of the CBA apply. **Rule 52 only applies "in the event the Company plans to contract work." The record in this case conclusively demonstrated that the Carrier did not plan to contract any of the work in question, whatsoever**. Even if the Carrier agreed that the work was customarily performed by the Organization (which it does not), the Carrier did not plan to contract any work.

The Board's creation of a new notice requirement in cases when third parties request access to the Carrier's property raises questions about how the Carrier would comply with such an obligation. In the case of future instances where third parties request access to the Carrier's property, the Carrier will begin providing a notice to the Organization that a third party has requested access to its property and is being asked to provide suitable protection for its employees.

Finally, the Board's awarding of a remedy to "maintain the integrity" of the Agreement is inappropriate in this case and in any future cases considering claims that were filed prior to the issuance of this Award. Damages are not appropriate based on the arbitrator's improper and erroneous determination of what constitutes control by the carrier, or what work is or is not related to carrier operations.

This new requirement to notify the Organization of contracting transactions that are not scope covered is inconsistent with the existing and valid precedent that the Carrier has relied on prior to the issuance of the Award. Additionally, in awarding a make-whole payment where employees have not been financially harmed, the Board is imposing a punitive remedy that punishes the Carrier for relying on that valid arbitral precedent and the award creates a windfall for the employee(s). In multiple awards across the industry, the Carrier was warned that a notice

must be provided before being penalized for failure to provide a notice. In cases where the Carrier has previously been warned that they are required to provide notice for the work in question, and failed to comply, the Board assessed a monetary remedy. Those awards mostly dealt with work that arguably could be considered customarily and historically performed by BMWED employees, unlike the work at hand. In this instance, there has been no requirement to provide notice for non-scope covered work, and none of the arbitral precedent on the subject has ever required or ordered the Carrier to provide notice for this work. As the Board has chosen to create this new requirement, the Carrier should have been allowed the opportunity to comply moving forward and should not have been penalized for violating a previously unrecognized obligation.

Third Division 37352 (Benn); Picking up and Hauling Tie Plates for Carrier Use;

> "The Carrier was therefore on notice of the potential consequences of its failure to give the required or proper notice before contracting work. Yet, it again failed to give the mandated notice. A full remedy is therefore required."

Third Division 28513 (Benn); Cutting Brush

> "However, those Awards do not address the situation presented in this case where the Carrier failed to the degree demonstrated by this record to follow the previous admonitions of this Board over the requirement to give notice. The Carrier's continued failure to abide by the terms of the 1968 National Agreement and its advancement of arguments that this Board has previously and repeatedly rejected require us to do more than again find a contractual violation with no affirmative relief. As a result of the Carrier's failure to give notification to the General Chairman in this case as required by the 1968 National Agreement, the Carrier again frustrated the purpose of Article IV."

Third Division 31720 (Malin); repairing bridge seats and cracked piers

> "Similarly, the instant case arose in 1990, i.e., prior to the Awards placing Carrier on notice of its potential liability for monetary damages to fully employed claimants for notice violations. Accordingly, under all of the circumstances, we conclude that monetary relief in the instant claim should not be awarded."

There are thousands of cases held in abeyance to this claim, and in every case, it was proven that there was no loss of work, the work is not scope covered, the work was not related to Carrier operations. Numerous tribunals have counselled against providing inappropriate windfalls. The

Carrier noted numerous instances in their correspondence. (3rd Division 32352, 37103, 31284, 31171, 41044, and 40810, as well as PLB 1844 Award 13) Again, no rational basis exists to justify this conclusion.

In short, the Board's conclusions are not justified by established relevant arbitral precedent surrounding the issue or any established practice. Moreover, the issue of flagging has been ruled on many times prior to this claim, and the work of flagging has never been found to be scope covered (See 29052 issued in 1991 then the Board following this ruling and citing 29052 in 41101). The Carrier does not control this work, as found in this award, and reviewing qualifications and providing criteria to be on Carrier property does not constitute control over the work, or the flagging of that work. Overwhelming evidence shows that work of this nature is not scope covered or related to railroad operations. The damages imposed by the arbitrator in this award are improper and illogical. Accordingly, I dissent from the Board's Award.

Chris Bogenreif
April 7, 2025

LABOR MEMBER'S CONCURRENCE AND RESPONSE TO
CARRIER MEMBER'S DISSENT
TO
CASE NO. 5 - AWARD NO. 5
OF
SPECIAL BOARD OF ADJUSTMENT -BMWED-UP
FLAGGING ARBITRATION BOARD

(Arbitrator James M. Darby)

A concurrence is required in this case because the majority provided well-reasoned answers to all the questions the parties put before it. A response to the Carrier Member's dissent is required to shine a light on reality.[1]

First and foremost, every argument made in the Carrier's dissent was presented to the Special Board of Adjustment panel and rejected. Moreover, despite the Carrier's confusing dissent trying to imply otherwise, no part of the Majority's decision is an anomaly because it relied on prior precedents involving these parties, this agreement, and even this same issue to reach its conclusion. Carrier award citation referenced in its dissent involved other properties and other issues. Specifically, National Railroad Adjustment Board (NRAB) Third Division Award 29052 did not involve Union Pacific, but a dispute occurring in 1986 on the Southern Pacific Western Lines, well before the SPW was absorbed into Union Pacific; NRAB Third Division Award 32646 involved blacktop patching under the Chicago Northwestern Agreement; NRAB Third Division Award 34279 involved transporting vehicles under the CSX Agreement; NRAB Third Division Award 40662 involved demolition work under the Burlington Northern Agreement; NRAB Third Division Award 40663 involved installing a switch under the Burlington Northern Agreement; NRAB Third Division Award 41167 involved hauling old ballast under the Burlington Northern Agreement; and NRAB Third Division Award 37648 was an overtime dispute on the Southern Pacific Western Lines. The aforementioned do not even reference the term "flagging" and, as such, are obviously not dispositive to this case. The rest of the awards cited by the Carrier were considered and rejected by the Board.

The Majority correctly held that the special project flagging work was customarily performed by Maintenance of Way forces. Indeed, the record shows that special project flagging was performed by BMWED for fifty (50) years. The Carrier Member's dissent takes issue with the fact that it was undisputed that Maintenance of Way forces "customarily performed" the special project flagging work. However, the reality is that it was not only undisputed during the on-property handling, but it was also conceded to by the Carrier Member in an oral argument on September 25, 2024, that Maintenance of Way customarily performed this work up to 2015. Of course, 2015 is when the Carrier began contracting out special project flagging based on the newly minted contentions of "lack of control." We acknowledge that the Carrier continually argued that flagging work, in general, was not "exclusively" performed by Maintenance of Way forces, but it

[1] Awards cited in Bold involve the same Collective Bargaining Agreement addressed by this Award.

did not dispute customary performance by BMWED forces for decades prior to the Carrier unilaterally determining to give the work to contractors in and around 2015.

The Organization provided hundreds of pieces of documentary evidence outlining countless instances of special project flagging work for third parties performed by Maintenance of Way forces and assigned by the Carrier. Furthermore, the Organization pointed to agreement rules carefully crafted to outline how special project flagging work would be assigned to Maintenance of Way forces (*an endeavor that would make no sense if Agreement employes did not traditionally perform the work*). The Majority did not find it necessary to comment on the volumes of evidence further because the Carrier conceded that the work was customarily performed by Maintenance of Way. Regardless, the Organization clearly demonstrated countless instances of special project flagging for third parties being performed by Maintenance of Way forces and all the Carrier could point to was one on-property award that involved non-special project flagging work being assigned to another craft. It should be noted that the Carrier reliance on NRAB Third Division Award **43431** (an inter-craft dispute) was rejected as controlling precedent in the assignment of outside forces to special project flagging work in Cases **2**, **3**, 4 and now **5** of this Special Board of Adjustment.

Therefore, the Board was on solid ground when it held that the claimed work customarily performed by Maintenance of Way forces was within the scope of Rule 52(a) and required advance notification and an opportunity for a conference. This Award, like many before it involving this Agreement, fully sustained the claim because the Carrier failed to provide the required advance notification and opportunity for a conference. This outcome is supported by, if not required by, NRAB Third Division Awards **36966, 38349**, **40964**, **40965**, **41052**, **41054**, **42102**, **42112** and **42113** (Organization's Submission – Employes' Exhibit "C").

These are a fraction of the Awards with the same findings under this agreement. After finding that BMWED forces customarily performed the work and that the Carrier maintained control over the work, this was all that was needed for the Majority to fully sustain the instant claim based on customary performance and Rule 52(a) requirements.

Next, the Carrier's dissent states: "*First, the Board's award improperly recognizes a distinction between work that is not exclusively reserved to BMWED employees and work that is 'customarily performed' by BMWED employees*. ***" It is hard to make sense of this statement, but the bottom line is that exclusivity is not a necessary element to be demonstrated under Rule 52(a) because that provision unambiguously states "customarily performed." Additionally, dozens of arbitration decisions under this agreement and many others have rejected the exclusivity doctrine when the work involves the assignment of outside forces. The Carrier's desperate reference to Awards involving other agreements from fifty (50) years ago, as well as class and craft disputes, are not on point.

Because much of Carrier's circular arguments during the on-property handling, and in its dissent, revolve around the theory of exclusivity, we are compelled to point to the Organization's

well-articulated position that exclusivity is not relevant when claimed work involves outside forces. The Organization's position was presented early in this dispute (as well as hundreds of ongoing and past disputes). Moreover, Awards 1, 2 and 4 of SBA - BMWED-UP Flagging Arbitration Board as well as **Awards 2, 3** and 4 of this SBA, all rejected exclusivity in establishing whether flagging work was within the scope of the Agreement. Additional Awards rejecting exclusivity in the use of outside forces under this Agreement include NRAB Third Division Awards **36966**, **38349**, **42112** and **42113** (Organization's Submission – Employes' Exhibit "C"). Also, NRAB Third Division Awards **38349**, **39301**, **Awards 1** and **14 of PLB No. 7096**, **Award 14 of PLB No. 7099** and **Award 41 of PLB No. 7661** all rejected exclusivity in scope claims involving the Carrier's use of outside forces. **Award 14 of PLB No. 7099** and **Award 41 of PLB No. 7661** in part held:

> **AWARD 14 - PLB NO. 7099:**
>
> "Finally, while the Carrier maintains that the Organization has failed to demonstrate that it has 'exclusively' performed the challenged work, it is well accepted that the Carrier's reliance on an exclusivity test is not well founded. While the exclusivity test may very well be an appropriate standard in jurisdictional disputes, here, the Carrier is obligated to provide a Rule 52 notice where work to be contracted out is 'within the scope' of the Organizations Agreement. (See, e.g., Third Division Award No. 27012). In the instant matter, there can be no dispute that the transporting work at issue is work customarily and historically performed by BMWE represented forces. ***"
>
> **AWARD 41 - PLB NO. 7661:**
>
> "The Organization has shown that this work, transporting MOW materials and equipment, is Scope-covered work. The Carrier acknowledges that its forces have performed this work in the past, arguing that there was a 'mixed practice' on the property of assigning this work to the MOW and to contractors. However, as against contractors, the BMWED is not obligated to show that its members performed this work to the exclusion of all others. ***"

The bottom line is that the party's use of the phrase "customary performance" in Rule 52(a) is clear and unambiguous and not subject to misinterpretation. Customary does not mean exclusive, and the parties knew this when they adopted that language, considering the scores of awards between these parties dissecting the differences between customary performance and exclusive performance before Rule 52(a) was adopted. The Carrier has been attempting to use the arbitration process to write "customary performance" out of the agreement in favor of "exclusive performance" for years, and once again, its attempts were rejected. Despite the Carrier's false consternation otherwise, there is no new claim theory; if the Carrier fails to meet the requirements and restrictions of Rule 52 for work customarily performed by Maintenance of Way forces, the

Organization will enforce the Agreement like it has since the first day Rule 52 was adopted in 1973.

Our next point is in connection with the Carrier implying that it was unaware that it might have to compensate the claimants for the lost work opportunity. This is nonsensical because the Organization has told the Carrier since day one that there was a financial liability due to not following the Agreement, as it has thousands of times before. No one was lying behind the log; the Carrier gambled on a precarious and out-of-the-norm defense despite continual pleadings from the Organization not to do so. Moreover, the Carrier continued to do so even after two (2) arbitration awards under this agreement were fully sustained with a monetary remedy for the Carrier assigning this work to outside forces (**Awards 2** and **3** of this SBA). It is almost as if the Carrier is operating in an alternative universe.

Unfortunately, a reading of the Carrier's dissent leads a reasonable mind to conclude that despite this award, the Carrier is going to try and find a way around its contractual obligations. Instead of complying with the Agreement going forward, the Carrier asserts that it will just change the wording of the right-of-entry agreement in what can only be considered an attempt at subterfuge to avoid its agreement requirements. The Carrier's dissent reads: "*** *Regardless, the Carrier will review the language of its REA to address the elements that the Board cited as evidence of control*. ***" Clearly, the Carrier has every intent on manipulating documents to try and continue this charade. Inevitably, the Carrier's manufactured evidence and defenses will again be rejected and the Carrier will complain about how unfair the world is when it has to pay liability for undermining the Agreement.

Next, the Carrier states: "*** *To suggest that the Carrier must maintain staff to provide flagging coverage for the thousands of projects initiated, funded and controlled by various third-party entities who apply for entry to their right of way each year would impose an undue and heretofore unknown burden on the Carrier*." Again, it is unquestionable that for approximately fifty (50) years, Maintenance of Way forces were assigned to this work. The assignment of Maintenance of Way to the claimed work spanned numerous rounds of bargaining where the Carrier never once hinted that the thousands of projects assigned to its forces were not Maintenance of Way work. In this regard, the Carrier always had sufficient staff to handle these projects and the only undue hardship came when the Carrier declared industrial warfare on its employes and unilaterally created a new theory to try to remove the work from the Agreement. It is the Carrier that created this situation, all the while under constant protest from the Organization that it must stop. There is no hardship in continuing to operate in this manner as the parties have for decades.

Lastly, the idea that the Carrier could not easily continue to plan and schedule for these projects is nonsensical. The Carrier's submission on Page 7 in pertinent part reads: "*** *Due to the complexity of some of the third-party projects, the requests to access Carrier property can occur months or years prior to the actual on-property presence*." All the Carrier must do now is stop trying to manipulate facts and evidence and follow the agreement as outlined by two (2)

different arbitrators. If it continues to try and find ways to subvert its obligations, the Organization will move to enforce the Agreement.

The Majority reached all the key points in a logical way based on well-established precedent, requirements of clear rules, and the facts of this case, and thus, a concurrence was required to recognize that fact. The Carrier's dissent is filled with arguments that were made and rejected by the Board and condescending remarks that appear to highlight the Carrier's desire to continue to violate the Agreement instead of engaging with the Organization in good faith. Therefore, a response to the Carrier Member's dissent is also required.

Respectfully submitted,

Kevin D. Evanski
Labor Member