

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42096  
Docket No. MW-42294  
15-3-NRAB-00003-130296**

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

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(National Railroad Passenger Corporation (Amtrak)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it allowed outside contractors to perform Maintenance of Way work (installed brackets to catenary poles) on January 18, 19, 20, 23 and 24, 2012 in Sunnyside Yard, Queens, New York (System File NEC-BMWE-SD-5054 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Electric Traction Linemen headquartered in Sunnyside Yard, New York at the time of the violation shall now be compensated an equal and proportionate share of the hours the outside forces spent performing electric traction duties on the claim dates.”**

**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.

On January 27, 2012, the Organization filed this claim asserting that the Carrier had violated the Scope and Work Classifications Rule of the Parties' Agreement and the Labor Clearance Agreement (hereinafter referred to as the LCA), dated September 28, 2007, when it permitted outside contractors to perform work reserved to Maintenance of Way Electric Traction (ET) Linemen working in Sunnyside Yard, New York. The LCA was agreed to by the Parties to facilitate the progression of the East Side Access (ESA) Project by the New York State Metropolitan Transportation Authority (MTA) and the Long Island Rail Road, as well as the third party contractor forces working in the Carrier's Sunnyside Yard. The Organization asserts that the Carrier improperly permitted the outside contractors to install hardware brackets to catenary poles.

The claim was progressed on the property in the usual and customary manner, including placement before the highest officer of the Carrier designated to handle such matters. Following a conference discussion on September 20, 2012 and denial of the claim by the Carrier, the Organization filed a timely Notice of Intent with the Third Division. The claim is now properly before the Board for adjudication.

The following contract language from the SCOPE AND WORK CLASSIFICATIONS provision of the Agreement and from the LCA is relevant to the resolution of this dispute:

**"A. SCOPE**

These rules, subject to the exceptions herein, shall constitute the agreement between National Railroad Passenger Corporation, hereinafter referred to as 'AMTRAK,' and its respective employees of the classifications herein set forth, represented by the Brotherhood of Maintenance of Way Employees, hereinafter referred to as Brotherhood, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repairs and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, including catenary system, third rail, substations and transmission in connection with electric train operation, and work which as of June 1, 1945, was

being performed by these employees, such as station lighting, power lines, floodlights, on elevators and drawbridges, and shall govern the rates of pay, rules and working conditions of such employees.

**B. WORK CLASSIFICATION RULE**

**ARTICLE III – ELECTRIC TRACTION DEPARTMENT – except Northern District**

The description of each position title outlined in this Article is intended to cover the primary duties of that position and, in addition, it is understood that each title comprehends other work generally recognized as work of that particular classification.

\* \* \*

18. Lineman - constructs, installs, maintains and repairs high voltage transmission and catenary systems, (attaching appurtenances, relocating away from existing lines, shifting poles requiring new foundations, installation of anchors and foundations, shifting under traffic, moving poles with wires attached, splicing existing poles to increase height, rearranging guys, brackets and other appurtenances, installation of new foundations, painting, and certain designated power lines, signal transmission systems and protects workmen and work equipment in proximity of high tension line, catenary or apparatus).”

**LABOR CLEARANCE AGREEMENT of September 28, 2007**, in pertinent part reads,

“Notwithstanding the foregoing, we believe that our discussions have resulted in an understanding for the breakdown of work associated with this phase of the project, as follows:

\* \* \*

**Catenary Work:**

Involved catenary work for this phase consists of approximately 109 +I- new structures within the previously defined area for Phase #1 construction and the replacement of existing lattice poles within Harold Interlocking. The work will be completed in the same manner as has historically been done on other projects in the Metropolitan Division. Contractor forces will support Amtrak ET forces performing work of boring the holes, setting the cans, pouring concrete, positioning anchor bolts and setting the poles with the use of a rental crane if necessary. Amtrak forces will also perform installation of all static wire, guy wire, insulators, hardware, cables, wires, terminations and cutovers in connection with these structures and all 12K v terminations. As agreed and needed, ET Line Gangs will be assigned to work with each of the involved contractors during the construction of the catenary structure work associated with Phase #1 construction.” (Emphasis added.)

The Organization argues that the Scope and Work Classification provisions and the LCA reserved the task of installing the hardware brackets onto the catenary poles to the ET Linemen assigned to the Carrier’s Metropolitan Division. The Organization cites the Carrier’s denial letter of June 18, 2012 wherein it states, “The Carrier concedes that the attachment of hardware brackets was work reserved to BMW electric traction forces.” Based on the foregoing, claims the Organization, there is no dispute that the outside contractors improperly performed the work. The Organization contends that it has met its burden of proof and the Board should reject the Carrier’s defense that it is not in control of the contractors who performed the work and - among other things - that the Maintenance of Way employees should have stopped the contractor from performing the work and not waited until the work was completed to notify supervision.

The Organization cites numerous Awards in support of its contention that there is a well-established principle in the industry that work reserved for the craft by the Agreement cannot be contracted out. It also relies on Awards, which indicate that the Carrier is liable even if it was not aware that the outside contractor was performing the work in dispute. The Organization asserts, however, that the Carrier knew of previous occurrences where contractors performed ET Linemen work and, therefore, cannot contend that it had no knowledge.

Conversely, the Carrier contends that the Organization failed to meet its burden to prove that the Carrier violated the Scope and Work Classification provisions of the Agreement or the applicable sections of the LCA. It argues that the work in dispute was performed without its knowledge by outside contractors hired by the MTA and was, therefore, outside its control, expense, and direction. It cites several Awards wherein it was determined that where the Carrier has no control over outside contractors, it cannot be liable for violations. The Carrier also contends that once it learned that the work was being performed, it took immediate steps to have the MTA cease and desist, confirming that it did not have control over the contractors. Further, it contends that the Organization did not bring the matter to the Carrier's attention until January 24, 2012, which was the last day of the five days covered by the claim. Meanwhile, asserts the Carrier, the photographs submitted by the Organization indicate that it was aware that the outside contractors were performing the work before January 24, 2012, and, therefore, it should have provided notice sooner. The Carrier provides numerous Awards in support of its assertions.

In the final analysis, the Board finds that the Organization met its burden of proof with substantial evidence that the Agreement and the LCA were violated when outside contractors performed work reserved for BMW-represented ET Linemen. The clear and unambiguous language of the Scope Rule, the Work Classification provision and the LCA preserves the work of attaching hardware "brackets" on catenary poles to the Carrier's Maintenance of Way personnel headquartered in Sunnyside Yard. No other meaning can be derived from the provisions. In addition, the Amtrak Revised Responsibility Matrix – Catenary and Signal Tower, which defines the interaction between the different work forces assigned to the ESA Project, specifically states, among other things, that "ET HANDLES TAG LINES AND INSTALLS CROSS ARMS, BEAMS & BRACKETS AND TIGHTENS BOLTS." As noted above, the record indicates that the Carrier acknowledges that, on more than one occasion, the work in dispute should have been assigned to the ET Linemen.

The Carrier's assertion that it was not in control of the outside contractors or aware of their activity is rejected. The Carrier has a contractual obligation to insure that certain functions on the project are performed by its personnel regardless of who retains the outside forces. The LCA was adopted as part of the Carrier's participation in the ESA Project for the purpose of defining the work responsibilities of its employees therein. The record does not support the Carrier's

contention that it did not know of such activity by the outside contractors. Moreover, even if it did not have knowledge or control over the third party contractors, the Carrier is obligated to insure that the other parties to the project do not contract out work reserved to ET Linemen. The Carrier's duty to fulfill its contractual requirements even where it has no knowledge of third party activity is addressed in Third Division Award 29509 wherein the Board held:

**"Carrier is not privileged to have strangers to the Agreement, in this case non-employees, enter upon its tracks and perform required repairs and then seek to be excused from payment of resulting claims on the basis that the work was unauthorized and/or that it was unaware that it was being completed. Such conduct would erode a basic premise that such work is reserved to employees within the Craft and could effectively nullify Agreement viability. In situations where Carrier is desirous of having outsiders perform repairs on its tracks it must resort to the procedures agreed upon for contracting out such work. A failure to do so cannot be excused on the basis that it was unauthorized and unknown."**

Also appropriate is Third Division Award 25402 wherein the Board held:

**"Though Carrier has exhibited no bad faith here, the Board concludes that an affirmative duty rests on [sic] Carrier to enforce the Scope Rule. By reason of the breach of its Lease Agreement, Carrier would appear to have recourse, which [sic] Organization does not, against the Lessee for damages, if any, resulting from that breach."**

See also Third Division Award 37901.

The failure to name each Claimant here is not fatal to the claim. See Third Division Award 40551, as well as Awards 1, 2 and 3 of Public Law Board No. 6671 between the Parties. The nature of the claim in the instant matter, as opposed to other types of claims, is not materially defective by the absence of such information.

The Carrier's contention that the claim must be dismissed because it was submitted well after the ET Linemen became aware of the work being performed by the outside contractors is not supported by the record. There is no indication when

the photograph referred to by the Carrier was taken. The photographs, and the Carrier's own admissions, confirm that the work was performed by the outside contractors, and there is no dispute that it occurred on the days claimed. The only issue raised is that the ET Linemen knew of it before the January 24, 2012 date. The burden of proof on the Carrier to show that the claim is flawed must be supported with more than mere assertions. Here, there is no evidence that confirms the Carrier's contention.

We also reject the Awards cited by the Carrier to support its proposition that because it did not have control, expense, or direction over the use of the outside contractors it cannot be held liable for the violation of the applicable Agreements. The Awards are distinguishable for several reasons, but the one most salient is that they do not involve the type of arrangement and terms defined in the LCA as part of the Carrier's involvement in the ESA Project.

There is no basis, however, to award overtime pay as part of the remedy. The claim requests that the ET Linemen be "compensated an equal and proportionate share of the hours the outside forces spent performing electric traction duties on the claim dates." The record indicates that 280 hours were expended by the third-party forces during the claim period. The numerous Awards cited by the Organization are factually distinguishable from the dispute in the instant case regarding the appropriate remedy. There is no evidence that the ET Linemen lost overtime opportunities, nor is there any claim that there was a violation of the overtime provisions of the Agreement.

Based on the foregoing, the Carrier shall compensate the ET Linemen a total of 280 hours of straight time pay at the applicable rates in accordance with the Parties' Agreement. The matter of identifying the appropriate Claimants and the appropriate rates of pay is remanded to the Parties for a joint determination.

### **AWARD**

**Claim sustained in accordance with the Findings.**

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**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 13th day of July 2015.**