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

Award No. 42128
Docket No. SG-42391
15-3-NRAB-00003-130358

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of W. W. McFarland, D. E. Mount, B. S. Scheef and S. E. Waller; Claimants W. W. McFarland and D. E. Mount for 16 hours each at their respective straight-time rates of pay, including skill-pay; Claimant B. S. Scheef for 24 hours at his respective straight-time rate of pay, including skill-pay; Claimant S. E. Waller for 64 hours at his respective straight-time rate of pay and 16 hours at his respective overtime rate of pay, including skill-pay; account Carrier violated the current Agreement, particularly the Scope Rule and the Subcontracting Letter of Agreement dated June 1, 2007, when on March 19-28, 2012, it allowed EMI Products LLC, an outside contractor to perform work on existing signal towers at various locations on the Avard Subdivision which in turn denied the Claimants the opportunity to perform work exclusively reserved to them by the Agreement. Carrier's File No. 35-12-0038. General Chairman's File No. 12-023-BNSF-129-S. BRS File Case No. 14896-BNSF."

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 is one of two companion claims regarding the same issue; the other is Third Division Award 42127.

At the time of the relevant events in this case, Claimants McFarland, Mount and Scheef were Signal Maintainers on the Avard Subdivision Line Segment 1047, and Claimant Waller was assigned to a Signal Electronic Technician position on the Springfield Subdivision. In 2008, new safety provisions in the federal Railroad Safety Improvement Act were enacted, requiring the installation of Positive Train Control (PTC) systems on all major railroads by the end of 2015. The new law necessitated, among other things, the installation of new radio antenna towers across the Carrier's entire system. On June 1, 2007, the Carrier and the Organization had entered into a separate Sub-Contracting Agreement that temporarily eased the normal Rules pertaining to work performed by outside contractors. In 2010, pursuant to the Sub-Contracting Agreement, the Carrier entered into an agreement with EMI Products to install the towers. As is typical, EMI warranted the equipment. In April 2011, EMI subsequently notified the Carrier that some of the winches in the towers that they had installed were defective and required replacement. Starting immediately, Signal Management began to identify the towers with defective winches and EMI started to replace them as required by their warranty.

This case arose as a result of the campaign to replace the defective tower winches. In a letter dated May 18, 2012, the Organization submitted the instant claim on behalf of the Claimants alleging that the Carrier had violated the Parties' Agreement between March 19 and March 28, 2012, when it permitted contractors from EMI to "repair winch cables" on 82 radio antenna towers that were already in service between Mile Post 428 and Mile Post 596.2 on the Avard Sub-division. According to the Organization, the work of replacing the winches was reserved to

BRS-represented employees by Rule 1, the Scope Rule, in the Parties' Labor Agreement and by the Sub-Contracting Agreement that had allowed EMI to install the equipment in the first place. The Parties having been unable to resolve the dispute through the on-property grievance process, the matter was submitted to the Board for a final and binding decision.

According to the Organization, the special contracting agreement allowed EMI to install the radio towers, but once the towers were installed and operational, they became part of the signal system under the Scope Rule, and the Carrier is compelled to use BRS-represented employees to perform all maintenance tests, inspections and repair work on signal equipment once it is placed in service. The towers were in service, and per the Agreement, contractors may not perform any maintenance or repair work on in-service signal equipment. The Scope Rule would be eviscerated if contractors were permitted to come onto the property to perform work on equipment still under warranty. If the Carrier had wanted to preserve the right for the contractor to perform warranty work, it needed to negotiate that with the Organization. Even if the work were considered construction work, the Carrier failed to give the Organization the required 15-days' advance notice of its intent to use a contractor.

Conversely, he Carrier contends that the Organization failed to carry its burden of proof to establish that there was a violation of the Parties' Agreement. There is no evidence whatsoever that the Carrier's signal forces had ever performed warranty replacement of radio antenna tower winches. Moreover, at most, only one of the towers mentioned was actually in service when EMI replaced the defective winch. All of the other towers were not yet in-service, and the 2007 Sub-Contracting Agreement exempted any work on equipment that had not been placed in service. Also, the disputed work did not take place on the dates claimed and the claim should accordingly be withdrawn: two employees from EMI worked on March 9 and 10, 2012, to repair the winches, not on March 16, 17 and 18, as stated in the claim. Warranty work like this is not covered under the scope of the BNSF/BRS Agreement; rather it falls under the provisions of the warranty contained in the Purchase Agreement between the Carrier and EMI.

Each of the Parties submitted prior Awards that support its position in this case. The June 1, 2007, Sub-Contracting Agreement reads, in relevant part, as follows:

> **"2. Under this Agreement, contractors will perform only construction work, which will include the installation of new equipment, replacement of existing equipment, removal of equipment no longer in service, and the initial post-construction testing of the new or replacement equipment – but not to include routine maintenance duties. For purposes of this Agreement, 'post-construction testing' means testing on equipment that has not yet been placed in service or connected to any in service signal equipment or circuits. Performance of such work may occur at any time of the day or night, and shall not be subject to labor claims for 'calls' or overtime work by the Carrier's employees. BNSF-BRS employees will perform all future maintenance, tests, inspections and repair work to equipment covered under the scope of the parties' existing Labor Agreement, after it has been placed in service on the property . . . .**
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> **3. BNSF-BRS Signal personnel will perform required tests and inspections to place new equipment in-service ('cut-over'). Contractors will be restricted from connecting the new equipment to signal circuits that are in-service, and from performing work in signal housings or bungalows containing in-service equipment. Contractors will not perform any maintenance or repair work on in-service signal equipment. Contractors will perform work only related to their defined project(s), and will not handle equipment which is not associated with such project(s)."**

In the Sub-Contracting Agreement, the Parties set clear parameters bounding the work that could be subcontracted. Basically, contractors were limited to the installation and initial testing of the new or replacement equipment that they installed. They were expressly prohibited from performing any "routine maintenance duties."

Once the equipment became a functioning part of the signal system, responsibility for "future maintenance, tests, inspections and repair work to equipment covered under the scope of the parties' existing Labor Agreement" reverted to BRS-represented employees. The Sub-Contracting Agreement draws a "bright line" between the contractor's initial installation and testing of equipment on the one hand, and what happens after the equipment has been integrated into the rest of the signal system on the other.

The result in this case thus depends on the nature of the work that EMI performed with respect to the defective winches. EMI and the Carrier entered into a contract for EMI to provide and install a number of new radio antenna towers for the PTC system that had been federally mandated. Given the thousands of miles of track owned by the Carrier, it was a huge project that required considerable time to complete. At some point after installation had started, EMI discovered that the cable winches on some of the towers were defective, and it contacted the Carrier to alert it to the fact and to make arrangements to replace the defective winches.[1] By memorandum dated August 5, 2011, the Carrier notified its Signal Managers of the problem and how to handle it:

> **"EMI has identified an issue with certain tilt down tower winches. These winches have an improper bearing assembly that can lead to an uncontrolled tower descent if the winch mechanism is disengaged at the 90 degree position during tilt up/down. The winches have date codes ranging from 2610 to 3310 and 4110 to 4410.**
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> **Please plan to verify the date codes on all EMI tilt down towers winches . . . . If the winch falls within one of the defective date code ranges, contact EMI . . . EMI will schedule a site visit to change out the winch.**

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[1] In processing the claim on the property, the Organization referred to the winches being "repaired." The only evidence in the record indicates that they were replaced – not simply repaired.

Until replacement is completed any winch identified within these date codes shall be tagged out of service . . . ."

As the memorandum makes clear, the work that was done was not "routine maintenance," which is what the Sub-Contracting Agreement focuses on. Nor is it warranty work as that term is ordinarily understood, i.e., the product is warranted to be free from defects for a certain period of time following its installation. The winches at issue here were determined to have been defective when they were installed, and that is critical to the Board's analysis in this case. The Sub-Contracting Agreement permitted contractors to install and test equipment. If the winch defects had been discovered in the initial post-installation testing, there would be no question but that EMI had the obligation and the right to replace the defective winches to bring the equipment up to the fitness-for-duty standard. EMI was not immediately aware of the problem, however. Given the duration of the project, some of the radio antenna towers had been installed and were on-line when EMI became aware of the defect and took steps to correct it. The Organization contends that because the towers had been installed and put into service, under the terms of the Sub-Contracting Agreement, BRS-represented employees, not EMI forces, had the right to perform any repairs to the winches.

The Organization's position is not persuasive. There is a difference between a product that requires replacement because it was defective when it was installed, and one that requires repair due to ordinary use and the wear and tear that occurs over time. The latter is routine maintenance and repair, while the former is more akin to correcting the initial installation of the equipment to bring it to the condition that it should have been in when originally installed. EMI sold, and the Carrier purchased, equipment that was supposed to meet certain performance standards. As it happened, some of the winches on the radio antenna towers were defective and did not perform as represented. In fact, the nature of the defect presented a significant safety hazard that required the towers with defective winches to be taken out of service. The defect required that the affected winches be replaced – not just repaired. In essence, the winches needed to be re-installed, bringing the work back under the terms of the Sub-Contracting Agreement. Per that Agreement, EMI had the right to "install new equipment" and to test it immediately after installation, in order to make sure that it was working properly. So when it was discovered that some of the winches were defective, the Sub-Contracting Agreement permitted EMI to replace the winches with

new ones and to test them to make sure they were working. This is not a case where equipment that was performing satisfactorily required routine maintenance and/or repair. There was a specific defect here that required actual replacement of the equipment. It was important that EMI, not BRS-represented employees, perform the work, including initial post-repair testing,[2] so that EMI as the manufacturer could be sure that the defect had been corrected and there would be no more problems with the winches.[3]

The Organization has not met its burden of proof to establish that the Carrier violated the terms of the Parties' Labor Agreement or the June 2007 Sub-Contracting Agreement when it permitted EMI to re-install defective tower winches on the Avard Sub-division in March 2012. Accordingly, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 2015.

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[2] The Board understands that the testing is the work that the Organization contends should have been assigned to Claimant Waller, an Electronic Technician.

[3] This is not to imply that BRS-represented forces were not capable of doing the work – far from it. They certainly have the skills necessary to have performed the work. Rather, EMI was contractually obligated to replace the defective products that it sold to the Carrier, and it was entitled to use forces under its own control to do so, using its installation equipment and following its prescribed work methods.