

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42991
Docket No. MW-43064
18-3-NRAB-00003-150300**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(Delaware Hudson Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (JMG Construction Corporation) to perform Maintenance of Way work (excavation, grading, drainage, pipe installation, culvert extensions and associated duties) in connection with the Ballston Spa 2nd Main Track Expansion Project between Mile Posts 33 and 35 on the Canadian Subdivision beginning on March 4, 2013 through April 11, 2013 and continuing (Carrier’s File 8-00919 DHR).
- (2) The Agreement was further violated when the Carrier failed to provide a proper advance notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and ‘Appendix H’.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Jackson, C. Vincent, B. Hammac, W. Cremo, D. Thomas, C. Kelly, L. Gifford, D. Turner and D. Fowler shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning on March 4, 2013 through April 11, 2013 and continuing.”

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.

The Carrier asserts that under its contract with the Department of Transportation, the work in question was required to be completed by the end of the year 2012. Due to this requirement, it maintains it lacked available forces to complete the work on time and therefore had no reasonable alternative to contracting out. In its view this is the type of exception mutually contemplated by the parties.

In the Organization's view, the first violation occurred when the Carrier failed to comply with the advance notification and conference provisions. It argues a second violation occurred when the Carrier failed to assert good-faith efforts to reduce contracting out and increase the use of Maintenance of Way forces as required by the December 11, 1981 National Letter of Agreement. It contends the parties' Agreement was breached a third time when the Carrier assigned this scope covered work to outside forces with no work rights under the Agreement.

The Organization notes that in this instance, the work performed was track construction work and related duties, which is inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed. It concludes the work involved in this dispute is Maintenance of Way department work clearly encompassed within the language of Rule 1.1. To support this conclusion, the Organization provided photographs of unit employes performing this work from the Kenwood Global Project in 2010 and the 2013 Glenridge Road NYSDOT Project.

The Organization counters the Carrier's assertions about funding, pointing out that the alleged contract with the Department of Transportation is found nowhere in the record. It notes that as of the writing of the Organization's April 16, 2013 claim letter, the work was still ongoing. On this basis, it concludes there was no end of year deadline in 2012 and the Carrier's rationale cannot stand.

As noted in Third Division Award 40455, Rule 1.1 expressly reserves to BMW-represented employees the work of track construction. This is precisely the type of work at issue in this case. The Board finds the work here involved to be scope covered. As a result, the Carrier was required to provide the Organization with notice and an opportunity to confer about the matter. It failed to do so in violation of the Agreement.

The Carrier bears the burden of substantiating its defense regarding the unavailability of adequate forces to perform the work. Yet it has not supplied the contract with the Department of Transportation or any other substantiation for the argument that the urgency of completing the work mandated the decision to subcontract. Evidence of a 2012 deadline is inadequate and cannot support a finding that such a deadline existed. The Organization's contention that the work was still in process in the spring of 2013 stands unrebutted, and effectively counters any assertion that it had to have been completed by the end of the year. The Carrier's defense of necessity is has not been established. The Organization has met its burden in proving this claim. Accordingly, the claim is sustained in full.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of March 2018.