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

Award No. 43129
Docket No. MW-43303
18-3-NRAB-00003-150440

The Third Division consisted of the regular members and in addition Referee Amedeo Greco when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

"1. The Agreement was violated when, on December 10, 11, 12, 13, 16, 20, 21 and 23, 2013 and January 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23 and 24, 2014, the Carrier assigned outside forces to perform Maintenance of Way work (tear down and build a paint shed) at Mile Post AN 587.7 in Rice Yard on the Jacksonville Division of the Atlanta Waycross Seniority District (System File B14900914/2014-160555 CSX).

2. As a consequence of the violation referred to in Part (1) above, Claimants T. Boyd, J. Mizzell, G. Shirley, V. Strickland and D. Steedley shall '…be compensated One Thousand Five Hundred Fifty (1550) hours straight time and Fifty (50) Hours Overtime, to be divided equally, at their respective rates of pay and all time be credited to vacation and retirement, account of the carrier's violation of the rules of the working agreement and this obvious loss of work opportunity.'"

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 on December 10, 11, 12, 13, 16, 20, 21, 2013 and January 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23 and 24, 2014, assigned an outside contractor to demolish and build a new paint shop which was about 30,500 square feet.

The Organization states that the work is reserved for BMWE members under the Scope Rule, and that the Carrier has failed to meet its burden of proving that the new building contains hazardous materials, or an inside bathroom, or whether a HVAC system exists because the Carrier did not produce any such information at the local conference. The Organization also states that it is not limited to getting needed information from the Carrier during a local conference; that it is not required to walk into the building to ascertain what is going on; and that it can challenge the absence of needed information later.

The Carrier states that it does not bear any such burden and that the Organization could have gotten information by simply asking for it.

Section 2 of the September 1, 2009, Memorandum of Agreement, ("MOA"), states:

> **"<u>Section 2 – New Building Construction</u>**
>
> **A. The work of constructing new "non-occupied" buildings and related structures or facilities used in the operation of the Carrier in the performance of common carrier service on property owned by the Carrier shall be performed by the BMWED-represented forces and the Carrier shall not contract out such work. "Non-occupied buildings are buildings such as pole barns, sheds, garages, and other storage facilities that are**

not equipped with HVAC systems or bathroom facilities because they will not be used for offices, shops, or other human habitation.

B. The Carrier may contract out the construction of all new "occupied" buildings. "Occupied" buildings are buildings such as offices, shops or other facilities intended for regular human habitation that are equipped with HVAC systems and bathroom facilities."

Section 4 of that MOA states:

"<u>Section 4 – Building Demolition</u>

A. Building demolition shall be performed as follows:

1. The Carrier may contract out the demolition of: (a) all buildings which require hazardous material abatement measures, including wet demolition*, as an integral part of the demolition work; and (b) the demolition of buildings over one story [twenty-five feet (25') measured by ceiling height] or over 10,000 square feet even where there are no hazardous material abatement measures required. . . . [*NOTE: Wet demolition is required when a building contains sufficient hazardous materials that they cannot be removed independently and where the structures must be kept completely wet using a high pressure water supply to ensure no particulates become airborne.]"

The Carrier has produced photos showing that paint, which contains hazardous materials, is used to paint locomotives in the paint shop. Section 2 of the MOA gives the Carrier the right to contract out work for new buildings which are occupied and which are equipped with HVAC systems and bathroom facilities, and Section 4 gives the Carrier the right to contract out work involving hazardous materials such as paint.

The Organization states that such matters were not discussed at the local conference. The Carrier, however, on July 10, 2012, provided notice to the

Organization of its intent to contract out the demolition of the existing paint shop and to construct a new paint shop. The Organization thus had the opportunity at the local conference to ask questions about the contracting out and it could have gone into the new paint shop to ascertain whether the contracting out had met the criteria in Sections 2 and 4 above. It apparently did not do so.

The Scope Rule preserves work involving the construction or dismantling of buildings and other work and states in pertinent part:

. . .

> **"The following work is reserved to BMWE members: all work in connection with the construction, maintenance, repair, inspection or dismantling of tracks, bridges, Buildings, and other structures or facilities used in the operation of the carrier in the performance of common carrier service on property owned by the carrier. This work will include … distribution and collection of new and used track, bridge and building material; operate machines, equipment, and vehicles; … rough and finish carpentry work; concrete and masonry work; operate machines, equipment, and vehicles; … and any other work customarily or traditionally performed by BMWE represented employees. In the application of this Rule, it is understood that such provisions are not intended to infringe upon the work rights of another craft as established. It is also understood that this list is not exhaustive."**

. . .

This provision, however, does not stand alone. Rather, it must be read alongside Sections 2 and 4 of the MOA which give the Carrier the right to subcontract out the kind of work herein when the Organization has failed to prove that those two Sections do not apply.

The Organization therefore has not proven that the Carrier has violated the MOA.

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 30th day of May 2018.

LABOR MEMBER'S DISSENT
TO
AWARD 43129 DOCKET MW-43303
(Referee Amedeo Greco)

In this case, the Majority seriously erred when it held that the Organization failed to prove that Sections 2 and 4 of Memorandum of Agreement (MOA) #2 do not apply. In placing the burden of proof on the Organization, the Majority failed to apply the clear language of the Agreement. Specifically, Section 14 of MOA #2 reads as follows:

> "Sections 2, 3, 4, 5, 6, 7, 8, 9 and 13 all provide that the Carrier may contract out specified types of work pursuant to the express terms of these respective sections. If the Carrier plans to contract out work pursuant to the terms of one of these sections the Carrier will, except in emergencies, notify the applicable General Chairman, in writing, at least fifteen (15) days in advance of the transaction. If the General Chairmen involved question the applicability of the terms the Carrier relies on to support the contracting, **the Carrier shall have the burden of proving that those terms apply to the work in question**.
>
> *[Example – If the Carrier notified the General Chairmen that it planned to contract out for the demolition of a building because it required hazardous material abatement measures as stipulated in Section 4. A. 1 and the General Chairmen questioned the presence of hazardous materials in the building, the Carrier would have the burden of proving the presence of the hazardous materials.]"* (Emphasis in italics in original)

The bolded language quoted above stands in direct opposition to the Majority's decision. Accordingly, the Majority improperly applied the burden of proof. For this reason, I strongly dissent to the Majority's findings in this case.

Respectfully submitted,

Zachary C. Voegel
Labor Member