

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43484
Docket No. MW-44367
19-3-NRAB-00003-170481**

The Third Division consisted of the regular members and in addition Referee David P. Twomey 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 beginning on June 3, 2015 and continuing when the Carrier assigned outside forces (M.P. Dory Co.) to perform Maintenance of Way work (removal and installation of fence) from Mile Posts PLM 15.3 to PLM 17.9 near Glassport, Pennsylvania on the Mon Subdivision (System File ContraBDC.115/2015-189967 CSX).**
- (2) As a consequence of the violations referred to in Part (1) above, Claimants R. Fairbaugh, D. Vitullo, S. George, B. Baumann, R. Gelpi, S. Hardy and D. Burga shall be compensated ‘... for *all hours worked by contractor forces, to be divided equally and proportionately each claimant*, at the Claimants (sic) time and one half rates of pay for June 3, 2015 and continuing....’ (Emphasis in original).”**

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 Claimants in this case maintain seniority in various classifications within the Maintenance of Way Department and perform work such as construction, maintenance and repair of right-of-way fencing. Beginning on June 3, 2015 and continuing, the Carrier assigned outside forces, the M.P. Dory Co., to perform the removal and installation of fencing on the Mon Subdivision between Mile Posts PLM 15.3 and PLM 17.9. The work involved removing existing fencing then installing new fencing. The Organization states this work was along the Carrier's right-of-way and it claims that the outsourcing of this work contractually reserved to the Maintenance of Way Department was in violation of the parties' Agreement.

I.

We find that the Carrier violated the fourth paragraph of the Scope Rule when it failed to give advance notice regarding its intention to use outside forces to perform the work involved in this case of removing an existing fence and installing a new fence between MP PLM 15.3 and PLM 17.9. We find that all of the Carrier's contentions that the Carrier was not required to provide notice for this work under MOA3 are devoid of merit.

II.

During the handling on the property the Organization sought specific documents which would resolve defenses raised by the Carrier, such as, "the fence in question belongs to the city of Glassport". The Carrier failed to present any of the documents requested which would show that the fence was not owned by the Carrier as it asserted.

III.

MOA #3, Section 6, states:

“Section 6 – Fencing

- A. All work in connection with the construction, maintenance and repair of right-of-way fencing* shall be performed by BMWED-represented employees and shall not be contracted out or assigned to others.

[*Note: ‘Right-of-way fencing’ is defined as fencing that separates CSXT right-of-way from adjoining property that CSX chooses to erect or is required to be erected by federal, state or local statutes].

- B. CSXT may contract out for the construction of other than right-of-way fence (e.g., security fence around yards, water treatment facilities, parking lots, radio towers, or other facilities).
- C. If a dispute rises as to whether a particular fence is a right-of-way fence, the presumption is that it is a right-of-way fence and the Carrier shall have the burden of proving it is not”. (Emphasis in original).”

Right-of-way fencing is defined above in the note to Section 6.A as fencing that separates CSXT right-of-way from adjoining property that CSXT chooses to erect or is required to be erected by federal, state or local statutes. The fence runs between MP 15.3 and 17.9. The Carrier’s own evidence admits that the fence runs along the Carrier’s right-of-way across former road crossings: “Fence used at areas that use to be crossings that are gone” (August 5, 2015 Carrier’s Exhibit K, page 1). Section 6.C explicitly requires that if a dispute arises as to whether a particular fence is a right-of-way fence, the presumption is that it is a right-of-way fence, and the Carrier shall have the burden of proofing it is not. The Carrier failed to meet its burden of proof in this case. We are compelled to sustain this claim.

AWARD

Claim sustained.

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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 1st day of March 2019.