

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43910
Docket No. 45159
20-3-NRAB-00003-180675**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (AMTRAK)
(- Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, beginning in mid-December 2016 and continuing on a daily basis thereafter, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way Department work (installation of fencing) at locations within the Northeast Corridor while numerous BMWED represented employees were on furlough (System File NEC-BMWE SD-5533 AMT).**
- (2) The Agreement was violated when, beginning in mid-December 2016 and continuing on a daily basis thereafter, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way Department work (installation of fencing) at locations within the Northeast Corridor while numerous BMWED represented employees were on furlough.**
- (3) The Agreement was violated when, beginning in mid-December 2016 and continuing on a daily basis thereafter, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way Department work (installation of fencing) at locations within the Northeast Corridor while numerous BMWED represented employees were on furlough.**

- (4) As a consequence of the violation referred to in Part (1) above, on behalf of Claimants R. Dove, J. Williams, L. Scott, N. Hicks, A. Williams, J. Proctor, L. Wray, M. Mills, G. Staton, N. Turnbull, W. Barnes, M. Krannebitter, W. Brown, M. Troyer, J. Ingoglia, S. Rothe, S. Dugan, N. Kingsborough, S. Zielinski, W. Steffish, M. Yale, D. Gaultney, M. Graney, A. Roberto, M. Harris, T. Waldrop, D. Tucker, S. Longenecker, S. Duvernois, J. Przegon, J. Robinson, R. Saunders, P. Shiffler, N. Baker, V. Venezia, J. Stoltzfus, N. McKenzie, S. Onorato, M. Fosbenner, C. Orr, T. Seewald, M. Ratliff, T. Messier, J. Monaghan, S. Petrosky, B. Reall, M. Picarello, H. White, C. Wilburn, G. Morgan, J. Woodard and any employee who subsequently becomes furloughed prior to this claim being resolved:

Amtrak will immediately discontinue the use of Fencing Contractors on the Northeast Corridor or in the alternative immediately recall all furloughed employees to positions for which they are required to report. In addition, Amtrak will compensate each furloughed employee for all straight time wage loss they incur, at the rate of pay that they last worked, for every day in which they are furlough up until they are either recalled to a position they must accept under the agreement or the Fencing Contractors are removed from the Northeast Corridor. In addition, Amtrak will make the employee whole for whatever the employee has lost because of the contract violation. This includes, but is not limited to, vacation credits, retirement credits, health benefits etc.

- (5) As a consequence of the violation referred to in Part (2) above, on behalf of Claimants R. Dove, J. Williams, L. Scott, N. Hicks, A. Williams, J. Proctor, L. Wray, M. Mills, G. Staton, N. Turnbull, W. Barnes, M. Krannebitter, W. Brown, M. Troyer, J. Ingoglia, S. Rothe, S. Dugan, N. Kingsborough, S. Zielinski, W. Steffish, M. Yale, D. Gaultney, M. Graney, A. Roberto, M. Harris, T. Waldrop, D. Tucker, S. Longenecker, S. Duvernois, J. Przegon, J. Robinson, R. Saunders, P. Shiffler, N. Baker, V. Venezia, J. Stoltzfus, N.

McKenzie, S. Onorato, M. Fosbenner, C. Orr, T. Seewald, M. Ratliff, T. Messier, J. Monaghan, S. Petrosky, B. Reall, M. Picarello, H. White, C. Wilburn, G. Morgan, J. Woodard, D. Daniels and any employe who subsequently becomes furloughed prior to this claim being resolved:

Amtrak will immediately discontinue the use of Fencing Contractors on the Northeast Corridor or in the alternative immediately recall all furloughed employees to positions for which they are required to report. In addition, Amtrak will compensate each furloughed employee for all straight time wage loss they incur, at the rate of pay that they last worked, for every day in which they are furlough up until they are either recalled to a position they must accept under the agreement or the Fencing Contractors are removed from the Northeast Corridor. In addition, Amtrak will make the employee whole for whatever the employee has lost because of the contract violation. This includes, but is not limited to, vacation credits, retirement credits, health benefits etc.

- (6) As a consequence of the violation referred to in Part (3) above, on behalf of Claimant D. Daniels:**

Amtrak will immediately discontinue the use of Fencing Contractors on the Northeast Corridor or in the alternative immediately recall David Daniels to a position for which he is required to report. In addition, Amtrak will compensate David Daniels for all straight time wage loss he incurs, at the rate of pay that he last worked, for every day in which he is furlough up until he is either recalled to a position they must accept under the agreement or the Fencing Contractors are removed from the Northeast Corridor. In addition, Amtrak will make the employee whole for whatever the employee has lost because of the contract violation. This includes, but is not limited to, vacation credits, retirement credits, health benefits etc.”

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.

In July and September 2016, the Carrier provided to the Organization informational notices that the Carrier planned to engage contractors to perform fencing work at certain locations in the Northeast Corridor. There is no dispute that the Carrier provided these notices and that they contained the proper information.

Claimants, who were all qualified as Southern District Trackmen, had previously elected furlough after their positions were abolished or they had been displaced; there were Southern District Trackman vacancies available.

Rule 18 provides that when Claimants' positions were abolished or they were displaced, they had three options:

- (a) When the force is reduced, employees affected shall have the right, within ten (10) days after the effective date of such reduction, to elect to take furlough or to exercise seniority against a junior employee or to an available vacancy which is subject to or under advertisement.

There is no dispute that each of the Claimants here elected furlough.

The Organization filed a claim on February 22, 2017, alleging that the Carrier had improperly contracted out the installation of fencing while 51 Southern District

employees were furloughed. On March 2, 2017, the Organization filed another claim on behalf of 52 furloughed employees. Thereafter, on March 1, 2017, the Organization filed a third claim on behalf of the individual employee who was added to the first claim by virtue of the second claim. The Organization concedes that Claim 2 overlaps Claimants and dates from Claim 1 and Claim 3 and the Carrier argued against any duplication of remedies. Thus, it is the Organization's position that the Board should decide Claims 1 and 3 and deny Claim 2 because of this overlap. The claims were denied by the Carrier and consolidated. The parties were unable to resolve the claims on-property, so they are now properly before this Board for final adjudication.

Each claim asserts that the November 4, 2010 Fencing Agreement was violated when the Carrier continued to use outside contractors to install fencing while the Organization's members were on furlough. The Fencing Agreement states, in part:

1. In the application of the Scope Rule of the Northeast Corridor BMW Agreement, Amtrak and the BMW recognize that the installation of fencing is work covered by the Scope Rule which cannot be contracted out without the concurrence of the BMWED. This Article represents the concurrence of the BMWED that Amtrak may contract out fencing work as outlined below and that the use of outside contractors under this Article shall not constitute a violation of the Agreement or serve as the basis for claims against Amtrak:

There will be no BMWED furloughs in the Northeast Corridor while contractors are engaged in the installation of fencing....

The Organization contends that it has established a prima facie case that the November 4, 2010 Fencing Agreement has been violated. The Organization contends that the Fencing Agreement identifies fence installation work as reserved to BMWED forces and makes clear that it may not be contracted out without the Organization's concurrence. A previously agreed upon condition for contracting out the work is that no BMWED forces are on furlough. The Organization contends that the Carrier cannot meet its burden of showing that these conditions were satisfied.

The Organization contends that the clear and unambiguous language of the parties' Agreement does not distinguish between types of furloughs and that it would be improper for this Board to add such language to it. The Organization contends that the Carrier had the right to recall the furloughed employees to work and had they refused, they would have forfeited their seniority. As a result, the Carrier could have minimized its liability.

The claim demands that the Carrier either discontinue the use of the fencing contractors or immediately recall all the furloughed BMW employees. In addition, the claim seeks compensation for each furloughed employee for all straight time wage loss incurred for every day they are furloughed until recalled, or through to the date the fencing contractors are removed from the Northeast Corridor. The Organization also points out that after these claims were filed, the Carrier ceased using outside contractors to install fencing while the Organization's members were furloughed.

The Carrier contends that the parties did not intend for a voluntary furlough, in contrast to an involuntary furlough, to prevent the use of outside contractors to install fencing. The Carrier contends that the term "furlough" is commonly used in the railroad industry to refer to a carrier's lay off of employees, which is distinct from an employee electing a furlough under Rule 18 when there are positions available to the employee, but they choose not to accept them. The Carrier contends that if the parties intended to include voluntary furloughs in the Fencing Agreement, they would have said so. The Carrier contends that it would be an absurd result to permit employees' voluntary decision to not work to interfere with the Carrier's right to contract out the work. The Carrier contends that all Claimants were on voluntary furlough and the Fencing Agreement prohibition on contracting out fencing did not apply.

Finally, the Carrier contends that any remedy which is issued must be limited to a period beginning sixty days before the claims were filed on February 22, 2017.

In accord with long-accepted rules of contract interpretation, it is not this Board's province to read into the Agreement provisions that the parties themselves did not include. See, Third Division Award 24306, "This Board must be bound by the clear language of an Agreement. We cannot read into (the Agreement) anything except what it sets out in unmistakable clarity," citing Award 10239.

Here, the parties agreed that “[t]here will be no BMWED furloughs” while “contractors are engaged in the installation of fencing.” The agreed-on language does not distinguish between involuntary and voluntary furloughs, and this Board has no authority to add a distinction to an agreement when the parties did not do so. After a reduction in force, Rule 18 gives affected employees a choice to displace another less senior employee, to bid a vacant assignment, or to take furlough. As the Organization has argued, the Carrier has the right to recall employees who have been laid off, thereby returning to work those employees who elected furlough.

The Board concludes that the Organization has demonstrated that the Carrier violated the parties’ Agreement when it had contractors engaged in the installation of fencing while there were BMWED furloughs. Although multiple claims were filed, the Organization seeks a single remedy; Part 2 of the claim is denied as duplicative.

The remedy is limited to the period beginning sixty days prior to the filing of the first claim, or December 24, 2016, until the contractors were removed. The Claimants are entitled to an equal share of the hours worked by the outside contractors. The case shall be remanded for a joint check of the Carrier’s records to determine the number of hours worked by the contractors.

AWARD

Claim sustained in accord with the Findings.

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 28th day of January 2020.