

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43925
Docket No. MW-44460
20-3-NRAB-00003-170602**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass 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, beginning on November 6, 2014 and continuing, the Carrier assigned outside forces to perform Maintenance of Way track work (track surfacing, rail welding, dumping ballast and related work) between Mile Posts 22.9 and 25.7 at Smyrna, Tennessee on the Nashville Division (System File I59711414/ 2014-179153 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Scharer, W. Kelley, C. Sweatt, G. Davis, C. Logan, K. O=Neal, M. Curtis, J. Bagwell, D. Peters, G. Church, M. Green, D. Fults, W. Grogan, B. Davis, J. Maupin, J. Sapp, J. Ingram, C. Boyd, B. Brown, J. Brown, J. Robbins, H. Brown, J. Graham, D. Byers, T. Fann, T. Powell, C. Summers, M. Redfern and D. Green shall now each ‘... be paid an equal share of the total man hours made by the contractor, including overtime, beginning on November 6, 2014, and continuing until the violation stops, at their respective straight, and overtime rates of pay.’”**

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.

By letter dated November 26, 2014 the Organization submitted a claim on behalf of the Claimants alleging that the Carrier assigned a contractor to do scope-covered work between mileposts 22.9 and 27.7 near Smyrna, TN and failed to provide notice of intent to contract out. On January 24, 2015 the Carrier denied the claim stating notice was provided to Organization on January 3, 2014. The claim was conferenced at the July 18-20, 2016 claims conference. The Carrier subsequently submitted the corrected notice which described new track construction work between mileposts 00J 23.00 and 25.75 on the Chattanooga Subdivision. At the parties were unable to resolve this dispute the claim was advanced. The Claim is properly before this Board for final resolution.

The Organization contends that the Carrier violated the agreement when the Carrier assigned work reserved to the BMW-employees to outside forces. The organization asserts that the language of the Scope Rule reserves the work involved herein, track surfacing, rail welding and dumping of ballast was work in connection with the maintenance and repair of tracks and other structures used on the operation of the carrier in the performance of common carrier service and was thus reserved to Carrier's Maintenance of Way Employees. The Organization argues that the Carrier violated the agreement when the Carrier failed to notify the General Chairman regarding its plan to contract out the work. The Organization cites arbitral precedent that found that the Carrier is obligated to comply with its advance notification and good faith meeting requirements. The Organization argue that the Carrier has no valid defense, and argue that the claimed work was not new track construction. It is the position of the Organization that the claim be sustained.

The Carrier contends that the Organization failed to show the Carrier violated any rules or agreement. The Carrier argues that the claimed work was properly performed under MOA 1, Section 6 and the Organization failed to fulfill its burden of

proof the any subsequent maintenance, repair and rehabilitation work to place. The Carrier also contends that Labor Relations sent the Organization proper notice of intent to contract work in conjunction new track. The Carrier argues that the claimed work was performed in completion of and relation to the notified new track construction and would not have been performed but for the track being newly constructed. The Carrier also argues that every construction project requires some amount of quality control, rework or adjustments. The Carrier argues a catch 22, if the Carrier had allowed its own force to perform the completion of this new track construction, it would have lost the opportunity to hold the contractor accountable for future deficiencies. If the Carrier allowed the BMW forces to complete the project, the Contractor would have legitimate grounds to refuse to correct the defect as it did not control the entire installation process. The Carrier maintains that the claimed work was related to or in completion of the new track construction. Moreover the Carrier maintains that failed to meet its burden of proof inclusive of remedy, and the claim should be denied.

Applicable Agreement Provisions

The pertinent provisions of the Agreement Between CSX Transportation, Inc. and Its Maintenance of Way Employees Represented by the Brotherhood of Maintenance of Way Employees, effective June 1, 1999 are the 1981 Berge-Hopkins Letter (hereinafter “1981 Letter,” the Scope Rule, Rule 1, 4, 17, Section 6 of the Memorandum of Agreement (MOA 1) dated August 27, 2007, and Memorandum of Agreement dated January 23, 2012 (MOA 3). These rules and agreements are incorporated herein as if fully rewritten.

The Board has carefully reviewed the submissions, arguments and other matter of record. On December 10, 2013 the Carrier issued subcontracting notice NA-2014-002732 to the Organization. The notice reads:

“This letter is notification, pursuant to the 2007 Memorandum Agreement, of the Carrier’s intent to contract for specific work in conjunction with a new track construction project...”

The notice goes on to indicate the nature of the contractor’s work. The Carrier claims that during and shortly after new track construction, the track and roadbed will settle and need adjustments, and the subsequent work performed by the contractor was done in conjunction with the work cited in the notice. Notwithstanding, the

Organization asserts that once the new track was hooked up to the existing track and placed in operation, all work then belongs to BMWED-represented employees, and the claimed work should have been performed by BMWED-represented employees.

MOA #1, governs the agreement between the parties for new track construction. Section 6.C states in part “the work of connecting such newly constructed track (permanent or temporary shoofly) to the Carrier’s active tracks shall be performed by BMWED-represented employees and they shall perform all subsequent, repair and rehabilitation work on such trackage once the Carrier has begun operations thereon.” It is not disputed that the claimed work was done following the track being placed in operation. The Carrier argues that the claimed work was in conjunction with the project, and argues that the Carrier made a business judgement to protect its contractual interest in the work performed. The Carrier however did not notice and discuss these issues with the Organization prior to contracting out these services.

The Board finds that the claimed work was reserved to the BMWED-represented employees, and the Carrier violated the agreement when it assigned the work to outside forces.

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 5th day of March 2020.