

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43942
Docket No. MW-44680
20-3-NRAB-00003-180154**

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 the Carrier assigned outside forces (PCL Civil Construction) to perform Maintenance of Way Bridge and Building (B&B) Department work at the bridge in the vicinity of MP SAC 19.1 on the Raleigh Rocky Mount Seniority District of the Florence Division beginning on October 1, 2015 and continuing (System File B17816015/2015-198395 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants G. Powell, J. Cockrell, J. Walker, T. Harris and A. Hall shall now ‘... each be compensated with an equal portion of the straight time and overtime hours that are expended by the outside contractor employees until this violation stops, at their appropriate rates of pay in effect during the period claimed 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.

By letter dated November 30, 2015, the Organization submitted a claim on behalf of the Claimants alleging that the Carrier violated the Agreement when the Carrier assigned outside forces to perform the work of repair and replacement of turn bridge lock wedges. By letter dated January 21, 2015, the Carrier denied the claim stating there was no violation. The parties conferenced the claim on November 15-18, 2016. The parties were unable to resolve the dispute, and the matter was advanced. The Claim is now before this Board for final adjudication.

The Organization contends that the Carrier violated the Agreement when it utilized outside forces to perform the claim worked and failed to comply with the mandates of MOA #2, Section 5.B.5. The Organization asserts that the claimed work is reserved to Maintenance of Way forces pursuant to the language of the Scope Rule and MOA #2. The Organization asserts that even though the MOA #2 does allow the Carrier to assign outside contractors to perform the claimed work, in order to do so, the Carrier is required to assign at least the same number of BMWED-represented employees as the contractor employs to work on a given project. The Organization argues that the Carrier failed to assign an equivalent number of employees to the project. The Organization argues that Carrier did not refute the evidence that no employees were assign to the project. Moreover, the Organization contends that the appropriate remedy is to allow each of the Claimants compensation at their respective assigned rates of pay for all hours expended by the outside forces in the performance of the work. The Organization argues that the remedy makes the Claimants whole for the lost work opportunity and serves protect the integrity got the Agreement. It is the position of the Organization that the claim should be sustained.

The Carrier contends that the Organization failed to show that the Carrier violated any rules or agreements. The Carrier argues that the work is permitted under MOA 2, Section 5 and the Organization was properly notified. On June 10, 2015, the

Carrier sent the Organization notice of intent to subcontract the Hopewell Bridge near milepost SAC 19.0; the claim worked was listed on the contracting out notice and conferenced with the Vice Chairman. The Carrier contends that the Organization never alleged that the work was not permitted under MOA2 nor did it allege that the Carrier did not use BMWWE employees to assist the contractor. The Carrier asserts that the company has met all obligations to properly contract out the claimed work. The Carrier maintains that there was no violation of the Scope Rule or MOA 2, and the other cited rules are superfluous. Further the Carrier contends that the Organization failed to meet its burden of proof. Moreover, the Carrier contends that the Organization provided no evidence as to remedy or to substantiate the hours demanded in the Statement of Claim. Lastly, it is the position of the Carrier that the claim should be dismissed.

Applicable Agreement Rules

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 Scope Rule, Rule 1, Rule 3, Rule 11, Rule 17 and Section 5 of the 2009 Memorandum of Agreement (MOA 2). The rules and agreement are incorporated herein as if fully rewritten.

The Board has carefully reviewed the submissions, arguments and other matter of record. The Board notes that there is no dispute regarding whether notice was given to the Organization. The Boards finds that the MOA 2 Section 5.B.5 provides that the Carrier is required to assign at least the same number of BMWED-represented employees as the contractor employs to work on a given project. Although the Carrier provided notice of intent to contract out the work, the Carrier did not introduce evidence that an equal number of BMWED-represented employees were actually assigned to the job.

The Carrier argues that the Organization never alleged in the original claim that Section 5.B.5 was in issue. The Carrier points out that it is not until the "second letter" that the allegation, which is a material fact in the dispute, is raised. It is not disputed that even though the new information and facts were asserted in the second letter, the record was not closed in accordance with the terms of the parties' Agreement. The Carrier had the opportunity to refute the fact and did not. The Board now accepts the alleged fact as true. The Board finds that the evidence of record establishes a violation of the Agreement.

Claim sustained. The remedy in this case should not overlap time period covered in the remedy in Claim 20-3-NRAB-0003-180153.

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.