

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 44052  
Docket No. MW-44117  
20-3-NRAB-00003-170227

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

(Brotherhood of Maintenance of Way Employes 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 on January 15 and 16, 2015 when the Carrier assigned outside forces (Charles Downey/Seizmore Excavating Companies) to perform Maintenance of Way work (grading roads) within the Clifton Forge Yard, at or in the vicinity of Mile Post CA 278.5 on the C&O Division of the Clifton Forge Seniority District (System File G31802415/2015-183043 CSX).
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the above-referenced contracting transaction as was practicable and in any event not less than fifteen (15) days prior thereto or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by the Scope Rule and the December 11, 1981 National Letter of Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Kimberlin shall “\*\*\* now receive (32) straight time hours at Claimant Kimberlin’s appropriate rate of pay in effect on the dates claimed.””

**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 Claimant has established and maintains seniority in various classifications within the Maintenance of Way Department and at the time of this claim was regularly assigned as a Vehicle Operator. On January 15 and 16, 2015, the Carrier assigned outside forces (Charles Downey/Seizmore Excavating Companies) to perform the work of grading roads within the Clifton Forge Yard.

The Organization filed this claim asserting that the Claimant was denied legitimate work opportunities, as the Carrier assigned outside forces, rather than the Claimant, to perform Scope-covered work. The Carrier denied the claim, stating that the work was not Scope-covered and the Organization had failed to meet its burden of proof. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

The Organization contends that the Carrier assigned outside forces to perform work which is contractually reserved to the Maintenance of Way Department. The Organization points to the Scope Rule, stating that it reserves to BMWE members all work in connection with the maintenance and repair of tracks and other structures or facilities used in the operation of the Carrier in the performance of common service on property owned by the Carrier.

The Organization further contends that there is no dispute here that Maintenance of Way forces customarily and traditionally perform the work of grading roads and that the Carrier never refuted its evidence that such a practice existed.

The Organization contends that the Carrier committed a further violation of the Scope Rule when it failed to give advance notice regarding its intention to use outside forces to perform the disputed work. The Organization contends that the Carrier has failed to show that any exception occurred that would permit it to contract out Scope-covered work.

The Carrier asserts the Organization failed to show the Carrier violated any rules or agreements. By the clear language of the Scope Rule, which does not mention grading roads, the claimed work is not scope-covered work. As such, the Carrier contends that the Organization must show that the work was performed exclusively by BMW-represented employees.

The Carrier contends that the Organization's fifth rebuttal and its attachments are inadmissible and should not be a consideration before the Board. The rebuttal was received just prior to the Organization submitting its Intent to File with the Board, preventing the Carrier from adequately responding to any new facts or arguments presented, including the attachments which were presented for the first time.

A review of the record confirms that while "road grader" is a machine listed in the June 1, 1999 Agreement, it does not specifically reserve the work of road grading to the Organization's members. Therefore, to prevail on its claim, it was incumbent on the Organization to present evidence that this is work customarily or traditionally performed by BMW-represented employees.

The evidence presented by the Organization purporting to show that this work was customarily or traditionally performed by BMW-represented employees was contained in its fifth rebuttal and shortly before the record was closed for submission to this Board. Presentation in this manner precluded the Carrier from an opportunity to respond to or rebut the evidence, yet the Organization argues that its evidence is unrebutted, ignoring the irregularities in its manner of presentation.

Previous Boards faced with a similar "last minute" presentation of evidence into the record have held that such evidence should be given little weight, as the opposing party was denied an opportunity to respond to it. In Third Division Award 20773, this Board wrote,

**"The timing of the submission of certain documents may have significant bearing on the credibility, or weight to be attached, especially if the timing**

suggests that the other party did not have reasonable opportunity to respond prior to submission to this Board.”

See also, Second Division Award 12702, wherein that Board considered evidence that had been submitted just prior to the Notice of Intent:

“This Board is constrained to give the evidence little probative value as it was not fully joined on the property. We conclude that the evidence was submitted momentarily prior to the Notice of Intent so as to preclude a rebuttal or the submission of evidence and argument by the Carrier sufficient to consider it properly before us.”

Following the direction of these previous Boards, we find that the evidence presented at the last moment should be given very little weight. As a result, when this record is viewed as a whole, the Board finds that the Organization has not presented sufficient evidence in this case that the disputed work of grading roads was customarily or traditionally performed by BMW-employees so to establish a violation of the Scope Rule.

**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 18th day of June 2020.