

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44053
Docket No. MW-44118
20-3-NRAB-00003-170228**

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: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated on November 11, 2014 through November 18, 2014 when the Carrier assigned outside forces (SNC Solutions) to perform Maintenance of Way work (pouring concrete foundations) at Mile Posts CH 6.0 and CC 28.0 on the Chicago Division of the Detroit Seniority District (System File H46416114/2014-179928 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, Claimants D. Young, Jr., D. Robinson and B. Gibbons shall ‘... now be compensated for two hundred, ten (210) hours and forty-five (45) minutes, at each of their respective rates of pay, divided equally among the Claimants. Also, that all time be credited towards vacation and retirement. ***’”**

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 have established seniority in various classifications within the Carrier's Bridge and Building (B&B) SubDepartment within the Maintenance of Way Department. During the relevant time period, they were regularly assigned the work of pouring concrete, including ground and soil preparation, carpentry work associated with the forms that are required to be built, rebar installation for structural support, and the actual pouring and finishing of the concrete.

On November 11, 2014 through November 18, 2014, the Carrier assigned outside forces (SNC Solutions) to perform all duties associated with pouring concrete foundations for two CSX communication towers located on the right of way at milepost CH 6.0 and milepost CC 28.0 on the Detroit Seniority District, Chicago Division. The Carrier gave no advance notice to the Organization regarding this work.

The Organization filed a claim claiming that this work is regularly performed by its members and that the Claimants were available and willing to perform this work. The Carrier denied the claim, asserting that the Claimants had never poured concrete foundations for a Communication Department's radio tower install and this work had historically been contracted out. 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 violated the Scope Rule when it assigned outside forces to perform work expressly reserved to its forces:

“The following work is reserved to BMW members: all work in connection with the construction, maintenance, repair, inspection or dismantling of tracks, bridges, buildings, and other structures or facilities used in the operation of the carrier in the performance of common carrier service on property owned by the carrier. This work will include ... concrete and masonry work...”

During the on-property handling of this dispute, the Organization provided employee statements supporting its claim that outside forces had performed concrete work for the Communications Department. The Organization contends that even if the work were not specifically identified in the Scope Rule, this work would be reserved to BMW members because it is “work customarily or traditionally performed by BMW represented employees.”

The Organization contends that the Carrier violated the Scope Rule when it failed to give advance notice regarding its intent to use outside forces to perform the work involved here. The Organization contends that there is no exception to contract out Scope-covered work due to a “highly compelling business justification.”

The Carrier contends that the claimed work is not Scope-covered, as there is no mention of building foundations in the Scope Rule. The Carrier contends that if the work is not listed in the Scope Rule, the Organization bears the burden of proving that the work has customarily or traditionally been performed by BMW-represented employees. The Carrier contends that the Organization has failed to fulfil its burden of proving a past practice of this work being done by the Carrier’s forces. The Carrier further contends that if the work was not performed in the past by BMW forces, no notice of the use of outside forces was required.

The Carrier contends a managerial prerogative to contract out the installation of the communications tower because the contractor would not warranty the tower if it did not use its own employees to build the foundation. The Carrier contends that the Organization offered no rebuttal to the Carrier’s assertion that the foundation had to be installed by the contractor for warranty purposes.

The Carrier concedes that the BMW members pour concrete, but insists that this is different work, writing, “The towers in question are 100 foot self-supporting

towers with specialized specifications for the foundation. The scope of work for Communication towers requires that the contractor build the foundation in order to provide a warranty for the tower.” The Organization replied that its members pour concrete every day, including “foundations for buildings, concrete slabs, tower foundations, sidewalks and many integral bridge components, i.e., abutments, piers, etc.” It provided the Claimant’s statement that he had built and formed a “concrete tower” for a satellite tower at the request of the Communications Department.

Although the Carrier characterized the work as “building foundations,” a review of the record demonstrates that the only claimed work, the pouring of concrete, is Scope-covered and thus, was expressly reserved to the BMW-employees. But the parties’ Agreement confirms that the Carrier may contract out Scope-covered work under certain circumstances:

“In the event the carrier plans to contract out work within the scope of this Agreement, except in emergencies, the carrier shall notify the General Chairmen involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. “Emergencies” applies to fires, floods, heavy snow and like circumstances.”

Prior on-property Awards have interpreted this reservation. For instance, in Third Division Award 39138, this Board wrote,

“As past awards concerning this issue have concluded, there is no absolute bar to contracting out scope covered work. The Scope Rule permits an exception for contracting out scope covered work for highly compelling reasons that will satisfy a strict scrutiny standard of review. The Board must determine, on a case-by-case basis, whether the Carrier has demonstrated a highly compelling reason to rebut the very strong presumption that the work covered by paragraph two of the Scope Rule will be performed by BMW members.”

During the on-property correspondence, the Carrier wrote that it would be unable to obtain a warranty on the towers unless the contractor built the foundation. The Carrier made a sound business judgment that a warranty on 100-foot self-

supporting towers with specialized specifications for the foundation was necessary. The Organization's members could not provide the warranty.

However, it is undisputed that the Carrier did not provide notice to the Organization of its intent to contract out this Scope-covered work. There is no assertion that the work was done "as an emergency." As a result, the Carrier was obligated to provide advanced written notice and an opportunity to conference before it contracted out this work, but it failed to do so.

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 18th day of June 2020.