Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44055
Docket No. MW-44120
20-3-NRAB-00003-170230

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 Carrier violated the Agreement when it assigned outside forces (Cranemasters) to perform Maintenance of Way work (remove and install diamond track panel) at Mile Post BI 213.8 on the Garrett Subdivision, B&OCT Seniority District, Chicago Division on November 26 and 27, 2014 (System File H42417314/2015-180602 CSX).

(2) As a consequence of the violation referred to in Part (1) above, Claimants T. Pniewski, A. Barilla, J. Laizure, T. Stone, W. Whitehurst, R. Ely, P. Griffin, M. Smith, D. Webber and C. Albertson shall now '... be compensated for eighty (80) hours of straight time, and one hundred, thirty (130) hours of overtime at each of their respective rates 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 and maintain seniority in various classifications on the Carrier's Chicago Division. The Claimants were trained and qualified to perform track construction work such as removing and installing diamond track panels and they customarily and traditionally performed such work.

On October 31, 2014, the Carrier provided the Organization notice of its intent to contract for specific work in conjunction with the replacement of a diamond at milepost BI 213.8, on the Garrett Subdivision of the Chicago Division, in Wellsboro, Indiana.

On November 26 and 27, 2014, the Carrier assigned outside forces (Cranemasters) to perform Maintenance of Way work removing and installing a diamond track panel at Mile Post BI 213.8 on the Garrett Subdivision, B&OCT Seniority District, Chicago Division. The contractors provided a 100-ton and 70-ton capacity crane, lifted a 125-ton track diamond, and placed a new 125-ton track diamond in the same location. The Carrier's maintenance of way forces performed all work relating to cutting the track, removing fouled ballast, connecting the new diamond to existing rail, and grading tamping. Ten employees from the outside forces used various hand tools and equipment and expended eighty straight time and one hundred thirty overtime hours in the performance of this work.

The Organization filed a claim on December 29, 2014, asserting that the Carrier's failure to assign the Claimants to this work was a violation of the Agreement. The Carrier denied the claim, asserting that it provided notice to the Organization that it did not have a crane large enough to safely handle a diamond of this size. 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 Scope Rule expressly reserved the work of removing and installing diamond track panels to BMWE-represented employes. The

Organization contends that the work is reserved because BMWE members have customarily or traditionally performed this work using the Carrier's tools and equipment. The Organization further contends that the Claimants were willing, qualified, and available to perform this work and would have done so if the Carrier had assigned it to them.

The Organization rejects the Carrier's contention that the work required specialized equipment and operators, as this work has been performed by its members. Further, the lack of specialized equipment does not excuse a violation of the Agreement. The Organization contends that the Carrier was obligated to make a good faith effort to rent or lease the necessary equipment.

The Carrier concedes that the Scope Rule reserves to BMWE-represented employees the work of installation of switches, track repair, and machine operation. The Carrier contends, however, that it may subcontract out work under paragraph 4 of the Agreement, so long as proper notice is provided.

The Carrier contends that it gave proper notice of its intent to use outside forces. The Carrier contends that it made a sound business judgment because this 125-ton diamond track panel required 100-ton and 75-ton cranes to install, which the Carrier does not own. In addition, the Carrier contends that specialized training is required to operate this equipment, which is not possessed by its forces.

The Board finds that there was no violation of the parties' Agreement. While the work at issue was Scope-covered, the Agreement provides 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.**
>
> **If the General Chairmen, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and Organization Representatives shall make a good faith attempt to reach an understanding concerning said contracting, but,**

if no understanding is reached, the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith."

There is no dispute that the Carrier provided notice of its intention to use outside forces to install this unique diamond track panel. Further, the Carrier has justified its actions by way of explaining that a diamond track panel of this size required specialized equipment that the Carrier did not own and that its forces were not trained to operate. There was no violation of the Agreement.

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.

LABOR MEMBER'S DISSENT TO
AWARD 44054, DOCKET MW-44119; AND
AWARD 44055, DOCKET MW-44120

(Referee Kathryn Van Dagens)

The Majority erred in its findings that the Carrier was justified in contracting out the work of diamond installation. Within its submissions, the Carrier argued:

> "Without question, the Scope rule reserves numerous activities to the BMWE including installation of switches, track repair, and machine operation. However, the Carrier is permitted to subcontract out work under paragraph four provided all notice requirements are met. Arbitrators have held consistently that subcontracting is permitted under the scope rule where the Carrier provides a 'highly compelling' reason to justify the work. See NRAB, Third Division, Award 37831 (Wallin). **(Carrier's Exhibit H)**. The Carrier provides several highly compelling reasons."

The Carrier relied on Award 37831, which holds in pertinent part:

> "*** When work is reserved to an Organization, it will be performed by the members of the Organization unless truly compelling circumstances, that can pass strict scrutiny in arbitration, exist to the contrary. This effectively means that the Carrier must use due diligence to inspect its property to detect the need for project work covered by the new Scope Rule and, where the need for such work is or should have been identified through the exercise of due diligence, the Carrier will plan for performing the work with its own employees represented by the Organization. Such planning should include any necessary hiring, training, equipping, and scheduling of such forces. Full employment and/or lack of furloughed employees does not suffice as a defense to a compensation remedy if a violation of the Agreement is determined. However, where circumstances arise that provide the Carrier with truly compelling reasons to use a contractor to perform the work, the Carrier should be able to do so. If the justification is disputed by the General Chairman and cannot be resolved by the parties, whether compelling reasons were demonstrated by the Carrier is a question of fact to be decided in arbitration after due consideration of all relevant circumstances shown by the parties' Submissions."

Based on the language of Award 37831, which both parties acknowledge as the authoritative analysis for a contracting case, the Carrier cannot establish a compelling justification for contracting out the claimed work that can pass a strict scrutiny review laid out within the award.

For these reasons, I must dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member