

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44225
Docket No. MW-45609
20-3-NRAB-00003-190515**

The Third Division consisted of the regular members and in addition Referee Dr. Andrée Y. McKissick 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, on April 2, 3, 4, 5 and 6, 2018, the Carrier assigned outside forces (Blakeslee Excavating) to perform Maintenance of Way Department work (build access road) along the tracks between Mile Posts QI 171.8 to 171.6 near Houston, Ohio on the Indy Line (Carrier’s File 18-70057 CSX).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimants K. Harter and J. Francis shall now each be compensated for sixty (60) hours at the applicable rate 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.

The pertinent provisions governing this dispute is the Scope Rule from Agreement CSX Transportation, Inc. and Maintenance of Way employees, effective June 1, 1999.

On April 6, 2018, the Organization filed this claim, but it was denied by the Carrier on June 7, 2018. It was appealed to the Carrier's Highest Designated Officer (HDO), but again denied on September 13, 2018.

It is the Carrier's position that the construction of an access road is not covered under the Scope Rule nor should this work be considered to be used in the operation of its performance of a common carrier service, as the Organization contends. Instead, the Carrier points to its compelling need to subcontract as the situs was difficult and dangerous. Thus, the Carrier reasons that as such a high level of skill was needed to operate equipment under such conditions.

On the other hand, it is the position of the Organization that the construction of an access road is clearly within the protected work for Brotherhood of Maintenance of Way Employees (BMWED) employees, as it specifically reserved work for its employees. That is, the Organization cites the precise verbiage of "all work in connection with the construction of structures ... used in the operation of the Carrier in the performance of common Carrier service." Thus, the Organization argues that leaves no doubt that this work belongs to BMWED employees.

After a careful analysis of the Scope Rule, as noted, the Board finds that the Organization should prevail for the aforementioned reasons cited in the Organization's reasoning.

This claim is sustained. Claimants K. Harter and J. Francis shall each receive their compensation of sixty (60) hours of applicable pay.

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 30th day of September 2020.

**CARRIER MEMBER'S
DISSENTING OPINION
to
THIRD DIVISION
AWARD-44225, DOCKET MW-45609**

(Referee Andre McKissick)

The Carrier respectfully dissents to the Board's decision. This claim involves the Carrier hiring a subcontractor to build an access road along railroad tracks owned by the Carrier based on an emergency, here destabilization of the track and because of a compelling need, in that the work was highly dangerous and required specialized skill based on the terrain. The Board sustained the claim holding that building an access road was reserved to BMW forces with no analysis of why. The Carrier dissents because BMW forces are not entitled to building access roads in many circumstances under the party's agreement and MOAs, including bona fide emergencies, and instances where there is a compelling need, both of which existed here.

The Carrier can rightfully subcontract work based on an emergency which this Board recognized in NRAB Third Division, Award 44226 (McKissick). Also, the BMW are not entitled to work that is properly subcontracted by the Carrier under the party's 1999 agreement or the MOAs which this Board also held. See NRAB Third Division, Award 44220 (McKissick) (Denying claim and holding the Carrier properly subcontracted work associated with bridge work, including dumping stone, under MOA 2); NRAB Third Division, Award 44219 (McKissick) (Denying claim and holding Carrier rightfully subcontracted mowing and weed eating of ornamental lawns under MOA 1). This would include instances in which the Carrier subcontracts work, including building an access road, based on an emergency or because of a compelling need. See NRAB Third Division, Award 44226 (McKissick) (Denying claim and holding on track work,

including grading and switch work were properly subcontracted based on an emergency derailment).

In instances in which the Carrier is required to provide a notice prior to subcontracting work, the Carrier includes the work that will be performed by the subcontractor which often includes building an access road. In holding that building an access road is scope covered work, the Board is effectively overriding the MOAs and Scope Provision of the Agreement and attempting to rewrite the party's unambiguous and clear contract language which the Board cannot do. See NRAB Third Division, Award 28595 (Goldstein) (Dismissing claim and holding, "It is not within the power of the Board to rewrite Agreement Rules but merely to interpret them as they exist."); NRAB Third Division, Award 20196 (Blackwell) (sustaining claim and holding failure to apply clear contract language that created an exception would effectively rewrite agreement which the Board had no authority to do); NRAB Third Division, Award 22780 (Roukis).

For those reasons, the Carrier emphatically dissents.

Michael Skipper

Michael Skipper

Jeanie L. Arnold

Jeanie L. Arnold

January 6, 2021