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

Award No. 44757
Docket No. MW-45479
22-3-NRAB-00003-190285

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company
(former MidSouth Rail Corporation)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on October 23, 24, 25, 26 and 27, 2017, the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work (track protection for track maintenance and repair work) between Mile Posts 68.4 and 70.8 on the Meridian Sub [System File 17 10 23 (084)/K0417-7505 MSR].

(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 contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the work referred to in Part (1) above and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by the Letter of Agreement dated February 10, 1986 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 M. Evans, Jr. shall now '... be compensated eight (8) hours at the regular rate of pay, and two (2) hours at the time and one half rate of pay per day for five (5) days which totals $1673.65 for our claimant plus late payment penalties based on a daily periodic rate of .0271% (Annual Percentage

> **Rate of 9.9%) calculated by multiplying the balance of the claim by the daily periodic rate and then by the corresponding number of days over sixty (60) that this claim remains unpaid.' (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.

The Organization asserts that the Carrier improperly subcontracted "track protection for track maintenance and repair work." In its December 5, 2017 claim letter, the Organization specifically describes the violation as "Outsourcing Flagging Meridian Sub."

In Third Division Award 44756 this Board addressed a similar dispute over flagging work:

> **In this claim, the Organization asserts that flagging work was improperly subcontracted. The Organization has not met its burden in this case.**
>
> **Underpinning all of the subcontracting disputes between the parties is the Organization's assertion that it has exclusive rights to perform the disputed work. Flagging work is also done by a number of crafts other than the Organization.**
>
> **The claim must therefore be denied.**

The same result is required in this case.

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 29th day of July 2022.

LABOR MEMBER'S DISSENT
TO
AWARD 44756, DOCKET MW-45284
AWARD 44757, DOCKET MW-44757

(Referee E. Benn)

The Majority erred in its findings in this case. Specifically, the majority ignored previous decisions of this Board contemplating similar disputes and improperly applied the burden of proof in a contracting case. Both of these disputes involved flagging work in connection with track maintenance and repair. In this case, the controlling language between the parties is:

> **Employees included within the Scope of this Agreement shall perform all work in connection with the construction, maintenance, repair, and dismantling of tracks, roadbeds, structures, facilities, and appurtenances related thereto, located on the right-of-way and used in the operation of the carrier in the performance of common carrier service."**

Clearly providing on-track protection (flagging) for track maintenance and repair is work included in the above quoted language, which includes the words "shall perform" thereby reserving the work to the employes governed by the Agreement. Accordingly, the Majority erred when it applied exclusivity as the standard for the burden of proof for these cases. The only exceptions to the mandatory reservation described above are: 1) special skills necessary to perform the work are not possessed by Maintenance of Way Employes; 2) special equipment necessary to perform the work is not owned by the Carrier or is not available to the Carrier for its use and operation thereof by Maintenance of Way Employes; or 3) time requirements exist which present under-takings not contemplated by the Agreement that are beyond the capacity of its Maintenance of Way Employees. In these cases, none of those exceptions existed.

In addition to the previous points, previous decisions of this Board have held this to be the proper analysis for contracting cases under the Agreement.

Award 43831 (Knapp):

> "The Carrier argues that the work claimed by the Organization is not Scope covered work because the Organization cannot establish that it has been performed exclusively in the past by its Maintenance of Way forces. The Board has previously rejected that position in favor of a standard that looks to see if the work has historically, customarily and traditionally been assigned to MoW forces…."

Award 43979 (Helburn):

> "*** The Organization does not have to show that Maintenance of Way forces have exclusively performed that work in the past. If such a showing were the case the contractual attempt to preserve bargaining unit work would be meaningless. Moreover, even if the disputed work is of the mixed practice variety—performed at times by Maintenance of Way employees and at other times by outside forces—the Carrier is not relieved of the obligation to provide appropriate notice of the intent to contract and to justify the contracting as consistent with one or more of the three exceptions set forth in the 1986 SLOA."

In light of the clear language of the Agreement and the precedent on the property, the Majority erred when it held that the Organization must prove the work is exclusively performed by BMWED forces.

Respectfully submitted,

Zachary C. Voegel
Labor Member