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

Award No. 45023
Docket No. MW-47049
23-3-NRAB-00003-220009

The Third Division consisted of the regular members and in addition Referee Barbara C. Deinhardt when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement on April 14, 2020 and continuing when it assigned or otherwise allowed:

(a) outside forces (Hurricane Fence Company) to perform Maintenance of Way work (brush cutting, removing obstructions, right of way cleanup, grading, removing fence posts and path clearing in association with the installation of fencing) at Mile Post 101.6 (Filberts Siding) and Mile Posts 113.8 to 115.9 (Odenton, Maryland);

(b) outside forces (Reese) to perform Maintenance of Way work (tree cutting/clearing) at Mile Posts 113.8 to 115.9 (Odenton, Maryland) (System File BMWE-158933-TC AMT).

(2) The Agreement was further violated when the Carrier failed to comply with advance notification and conference provisions in connection with the Carrier's intent to contract out the subject work.

(3) As a consequence of the violations referred to in Parts (1)(a) and/or (1)(b) and/or (2) above, the Claimants (as listed in our initial claim) shall now '… receive an equal proportionate share of all hours (one thousand six hundred eighty (1,680) total) expended by the contractors on each date identified in Attachment "1" and Attachment "2" of this claim payable at the Claimant's (sic) respective straight time rates. This claim is herein presented as defined in Rule 64 (e) on a

> **"continuing" basis, and in addition to the 1,680 hours listed, all additional hours accumulated by the contractor so, therefore please forward any contracts, invoices, and billing statements for the contractors. Also, all lost credits and benefits normally due must be included with the Carrier's settlement to make up for the lost work opportunity that the Organization has made prima facie case, therefore. …' (Emphasis in original) and '… the Carrier shall immediately return the work of brush cutting, obstruction removal, tree cutting/clearing, right of way clean-up, grading, fence post removal and path clearing to BMWED represented forces.' as requested within our initial claim letter dated June 8, 2020."**

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.

On 21 dates from April 14, 2020 to May 20, 2020, the Carrier assigned to outside forces brush cutting, tree clearing, removing obstructions, right of way clean up, grading, removing fence posts and path clearing in association with the installation of new fencing. On April 6, received by the Organization on April 7, the Carrier notified the Organization of its intent to contract out the work. The Organization immediately advised the Carrier that it had objections to the notice and requested a conference. No conference was held.

The Organization argues that the work that the Carrier assigned to outside forces--brush cutting, tree clearing, removing obstructions, right of way clean up, grading, removing fence posts and path clearing in association with the installation of new fencing—was Maintenance of Way work covered by the Scope Rule and the 2010 Fencing Agreement. While the Carrier may contract out installation of new fencing, the work here, i.e. the site preparation work for replacement of old fencing, is not

covered. Therefore, the Fencing Agreement did not constitute concurrence and notice must be given under the Scope Rule. The Carrier violated the Agreement because it did not provide timely informational notice and there was no good faith effort to reach an agreement. In addition, the Carrier failed to prove that the work was not on Carrier property.

According to the Carrier, the work that was done is permitted by the Fencing Agreement to be contracted out because it involves the installation of new fencing. Both the removal of the old fencing and the site preparation work for the new fencing are incidental to the installation of the new fencing and thus not exempted from the Fencing Agreement. This interpretation is consistent with past practice. Because the Fencing Agreement permits this work to be contracted out, there is no violation. The only obligation is for the Carrier to notify the Organization of its intent at least 15 days in advance. Here, it did provide informational notification to the Organization on April 6, 2020 of its intent to assign work to outside forces under the 2010 Fencing Agreement. There is no violation of the Fencing Agreement in not providing timely notice as to the few days of work that took place within the 15-day period because that work is beyond the scope of the Agreement because it was not performed on Carrier property.

Upon a review of the record as a whole, the Board finds that the Organization has not met its burden of proof. The parties agree that the essential issue here is whether the work in question is covered by the Fencing Agreement. That Agreement reads, in pertinent part,

> **Fencing Agreement**
>
> **1. In the application of the Scope Rule of the Northeast Corridor BMWED Agreement, trak and the BMWED recognize that the installation of fencing work is covered by the Scope Rule which cannot be contracted out without the concurrence of the BMWED. This article represents the concurrence of the BMWED that Amtrak may contract out fencing work as outlined below and that the use of outside contractors under this Article shall not constitute a violation of the Agreement or serve as the basis for claims against Amtrak:**
>
> **a. For all new fencing (yard, right of way, security, etc.) contractor forces may be utilized to install fence posts, gates and, where necessary, guard rails. Unless otherwise agreed, all other work associated with new fence installation will be performed by BMWED forces.**

> **Amtrak will provide the BMWED with an informational notice as to the location of the work to be performed and approximate time the contractor is to begin work. Such notice must be provided at least fifteen (15) days in advance of the contractor commencing work, except in emergency situations, in which case the BMWED shall be contacted as soon as practical. . . .**

Thus, the Fencing Agreement makes clear that fencing installation work is work of the BMWED that cannot be contracted out without the concurrence of the Organization, but that the Agreement itself constitutes such concurrence for contracting out "all new fencing (yard, right of way, security, etc.)" for which "contractor forces may be utilized to install fence posts, gates and, where necessary, guard rails. Unless otherwise agreed, all other work associated with new fence installation will be performed by BMWED forces."

The questions are whether the project is "new fencing" and whether the work claimed is work "associated with new fence installation," as argued by the Organization, or is incidental to the fence installation, as argued by the Carrier. We find that the Organization has not met its burden of proving that the language of the Fencing Agreement does not permit the Carrier to subcontract this work. The language of the Agreement can reasonably be read to support either interpretation. If there is any doubt about whether this project was the installation of new fencing, as opposed to the maintenance of old fencing, or about whether site preparation work is "incidental to" the installation of fence posts, as opposed to "associated with" new fence installation, the record evidence establishes that the past practice since the negotiation of the Fencing Agreement has been consistent with the Carrier's position. The Carrier provided five notices from 2017 to 2019 that set forth work to be contracted out, including installation and/or replacement of fencing, removal of old fence posts, and clearing obstructions. In each case, as here, the BMWE forces were assigned to install fencing fabric/pickets/lateral rails/slats after the posts were installed and to RWP provide protection during the project (included in "all other work associated with new fence installation.") This is the first claim filed by the Organization. To support its position that this work has been historically done by Amtrak forces, the Organization here supplied only two vague statements from employees about their recollections of Amtrak employees doing similar work in 2010 or 2011. As the practice as supported by Carrier evidence is consistent with a reasonable interpretation of the language of the Fencing Agreement, we find that the Carrier did not violate the Agreement when it contracted out the work.

The remaining question is whether the Carrier gave proper notice under the Fencing Agreement. Because the work is included in the description of work for which

the Fencing Agreement constitutes concurrence, the Carrier's only obligation was to provide informational notice at least 15 days before starting work. The parties appear to agree that the work started on April 14. It is undisputed that this notice, given on April 6, was late by seven calendar days, five work days. We find that the Carrier's reliance upon the letter from Anne Arundel County as proof of non-ownership to be unpersuasive, based upon the email correspondence between Anne Arundel County Real Estate Manager Stephen Walker and BMWED Representative Lydell Owens (Organization Transcript p. 269). While the Organization claims eight hours for each day worked by contractor forces, the only evidence in the record is from the contractor that its employees generally were working six hours a day.

The Carrier argues that if there were a violation, the remedy is payment for the hours missed, but at the straight time rate, rather than the overtime rate, as claimed by the Organization. We agree. Arbitral precedent on this property has clearly established that straight time or pro rata rate for lost overtime opportunities is the appropriate measure of damages.

We find that under the particular circumstances of this case and based on the record before us, an appropriate calculation of damages would be six hours a day at straight time pay for each Claimant who was available for work on April 14, 15, 16, 20 and/or 21, 2020.

AWARD

Claim sustained in accordance with the Findings.

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 7th day of September 2023.

LABOR MEMBER'S DISSENT AND CONCURRENCE
TO
AWARD 45023, DOCKET MW-47049
(Referee Deinhardt)

I must dissent to the Majority's findings in this case. It is undisputed that the Parties' Fencing Agreement reads as follows:

> "a. For all new fencing (yard, right of way, security, etc.) contractor forces may be utilized to install fence posts, gates and, where necessary, guard rails. Unless otherwise agreed, all other work associated with new fence installation will be performed by BMWED forces."

In this case, the Organization filed a claim for brush cutting, removing obstructions, right of way cleanup, grading, removing fence posts and path clearing in association with the installation of fencing. All of the claimed work was done in connection with contractors installing fence posts, gates and guard rails. Under the clear terms of the Agreement, this was "associated work" and should have been performed by BMWED forces. The Board needlessly created a distinction between incidental and associated work where the Agreement makes no such distinction. No matter how big or little of a part of the project, the claimed work was undisputedly associated with new fence installation.

The Board further erred when it found ambiguity and analyzed an alleged practice. The Carrier referenced five (5) contracting notices provided to the Organization during the duration of the fencing agreement. The notices were provided without any context. They certainly should not have been enough to overcome the language of the agreement. Notwithstanding the Organization provided statements that the claimed work has historically been performed by BMWED forces.

In light of the clear language of the Agreement, the Majority erred when it held that the work was not reserved to the Organization.

Respectfully submitted,

Zachary C. Voegel
Labor Member