

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45048
Docket No. MW-46660
23-3-NRAB-00003-210676**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman Corporation) to perform Engineering and Mechanical Department work (installing rail), on September 11 through 16, 2019, beginning at Mile Post 41.2 working northward.**
- (2) The Agreement was further violated when the Carrier failed to provide adequate notice and to make a good faith attempt to reach an understanding concerning said contracting as required by Article 3.**
- (3) As a consequence of the violation referred to in Part (1) above, Claimants D. Emery, R. Principato, D. Conner, D. Richardson, J. Waltman, J. Blanchard, K. Kendrick, W. Perro, P. Jackson, B. Miles, A. Bussell, M. Garner, G. Holt, R. Randall, R. Parker, A. Lawrence, Jr., S. Glasgow, R. Strout, R. Hawkins, Jr., Z. Burgess, J. Fanjoy, R. Gilliland, III, S. Tracy, S. Taylor, L. Miles, G. Coons, M. Nelson, S. Pelletier, J. Wing, R. Parsons, C. Begin, and T. McLellan shall now each be compensated in accordance with the initial claim.”**

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.

In a letter dated August 9, 2019, the Carrier informed the Organization in writing of its intention to use outside forces to install/replace rail at various locations on the Carrier's system, commencing sometime in early September 2019. The letter read in pertinent part as follows:

Please allow this to serve as notice of the Carrier's intent to have a contractor perform the replacement/installation of rail (and tasks incidental thereto) at the following general locations on the Carrier's system...

It is anticipated that the work may begin sometime near the beginning of September. As is typical, a Carrier Foreman would be designated to work with the contracted forces. The reasons for needing to contract out this work are various in nature and are summed up herein as follows....

As you can see, the Carrier could not and would not delay any of the aforementioned projects to later dates. Funding could disappear and forestalling these capital improvements would negatively affect the Carrier's customers and ultimately the Carrier itself. Moreover, the set of circumstances ... are such that these projects be undertaken at this time....

It is relevant and significant to add here that all Carrier forces are currently active and there are no involuntary furloughs. Based on the amount of work scheduled for the Carrier's workforce, the Carrier anticipates that no maintenance of way employees will be involuntarily furloughed when the work outlined herein takes place. In other words, the Carrier's maintenance of way employees will not be detrimentally affected by the presence of contacted forces on the property. In fact, all Carrier employees will benefit from these capital improvements.

...[T]he Carrier issues this notice and invites the Organization to discuss the matter further, in the event that the Organization wishes to do so.

The Organization sent a letter protesting the Carrier's Article 3 Notice on August 15, 2019. In that letter it emphasized the fact that the work at issue was reserved to BMW employees and referred to its continuing concern that the Carrier has failed to maintain sufficient BMW forces to complete all work covered by the ST/BMW Scope Rule. Despite its concerns, the Organization expressed its willingness to "discuss this project in good faith." The Parties held a conference call on August 21, 2019, but failed to reach a mutually acceptable agreement regarding the contracting out.

In a letter dated September 5, 2019, the Organization confirmed that discussion and outlined the Organization's position in connection with the Carrier's Article 3 notice. On October 15, 2019, the Organization presented a claim to Carrier, alleging that it had violated the Parties' Agreement when it assigned outside forces to perform Engineering and Mechanical Department work. (Substance of this claim is reproduced in the above "Statement of Claim".) In a letter dated December 17, 2019, the Carrier denied the claim. The matter was then progressed in accordance with the Parties' Agreement, including conference on the property on December 4, 2020, after which it remains in dispute. It is properly before the Board for resolution.

At the heart of this claim are Articles 1 (Scope) and 3 (Contracting Out) of the Parties' Agreement. Those provisions read in pertinent part as follows:

Article 1. Scope

- 1.1 The rules contained herein shall govern the hours of service, working conditions, and rates of pay of Engineering and Mechanical Department employees represented by the Brotherhood of Maintenance of Way Employes (BMW) who are working on Track, Bridges and Buildings, Work Equipment Maintenance, or Welding Plant.**
- 1.2 These rules do not apply to supervisory forces above the rank of foreman, nor do they apply to employees covered by other agreements.**

Article 3. Contracting Out

3.1 In the event the Company plans to contract out work within the scope of the Agreement, except in emergencies, the Company will notify the General Chairman 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.

3.2 If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization representatives will make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith....

At the outset, the Organization notes that the work at issue in this case is clearly reserved to BMW employees. Moreover, it points out that the Carrier has not refuted that fact. It also insists that the Carrier has experienced a considerable reduction in force, beginning in 2014, and yet has not made efforts to replace those employees. Thus, although the Carrier has complained of a shortfall of qualified employees, the Organization asserts that it has made no efforts whatsoever to correct that shortfall. It notes as well that the issue here was previously argued in cases precipitating Awards 44002-44008 in 2019, in which the claims were denied by Referee Greenberg, but the Carrier has made no attempt to acquire additional employees in the interim. The Organization insists that this circumstance is, *per se*, an indication of the Carrier's complete lack of "good faith," regarding compliance with Article 3 of the Agreement. In light of the Carrier's continued failure to maintain an adequate workforce, and despite the Carrier's argument that no employees were furloughed at the time, the Organization urges that the instant claim be sustained.

For its part, the Carrier maintains that Third Division Awards 44002, and those following it, have established the precedent by which the present case should be decided. It notes that it followed the letter and the spirit of Article 3 of the Agreement. The Carrier also points out that no BMW employees were in any way disadvantaged by the instant contracting out of work, since no employees were involuntarily furloughed and the employees listed in the above claim were all fully employed during the period in which the contracted-out work was performed. Thus, the Carrier asserts, absent any proven damages to employees or failure of compliance with the clear language of Article 3, the instant claim should be denied. While this Board is not constrained to follow precedent,

we find that those well-reasoned decisions are directly on point with the circumstances in this case.

The Board has reviewed the instant claim in great detail. We do not find, as the Organization has suggested that the Carrier's need to contract out certain work on occasion is an indication of lack of good faith on the Carrier's part as set out in Article 3 of the Parties' Agreement. There is no evidence on this record to suggest that the Carrier's decision to do so was motivated, as the Organization protests, by a "bad faith" attempt to circumvent its obligations under the Scope Rule of the Agreement or to negatively impact the Organization. Article 3 does not give the Carrier an unfettered right to contract out BMW work, but, as Referee Greenberg pointed out in his Awards, "once work is found to be within the scope of the Organization's recognized work jurisdiction, there exist implied limitations on the right of the Carrier to contract out that work."

In this case, as in the prior cases decided by Referee Greenberg, no employees were furloughed as a result of the work contracted out. Furthermore, the Board finds that the Carrier has sufficiently shown that the work at issue was time sensitive and could not have been completed in a timely fashion using its current workforce. The Board therefore determines that nothing in the Carrier's action was violative of either Article 1 or Article 3 of the Parties' Agreement. Accordingly, the instant claim is denied.

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 7th day of September 2023.