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

Award No. 45123
Docket No. MW-46658
24-3-NRAB-00003-210111

The Third Division consisted of the regular members and in addition Referee Jeanne Charles 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 (Kwest, Lee Carolinas and Dellinger Inc.) to perform Maintenance of Way Department work (bridge abutment construction) on and/or near the existing bridge located at Mile Post SE 271.5 on the Raleigh Rocky Mount Seniority District which is part of the Florence Service Lane Work Territory in Laurinburg, South Carolina beginning on June 17, 2019 and continuing (System File FLO807319/19-84578 CSX).

(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 above-referenced contracting transactions as was practicable and in any event not less than fifteen (15) days prior thereto and failed to provide an opportunity for conference.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Harris, A. Bastedo, D. Chisolm, J. Cockrell, J. Harper, B. Ferguson, P. Wise, J. Orban, T. Lawson, J. Neal, J. Wilder, R. Mabe, G. Powell, J. Fields, K. Wilkins, F. Floyd, T. McColl, T. Harris, J. Taylor, C. Daniel, C. Simmons and T. England '... shall now be paid an equal portion of the manhours expended by the Contractor's employees at the proper rate of pay for the required class in overtime and that all time be credited towards vacation and retirement for the Claimants. Please advise

when this claim will be allowed, and as to which pay period such payment will be made.'"

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 above-named claimants have established and held seniority within the Carrier's Maintenance of Way Department. The Claimants were assigned in various classifications within the Maintenance of Way and Structures Department at the time of this dispute.

This claim is based on the proper application of the Scope of Work agreement ("Agreement") between the parties. At issue is whether the Carrier violated the Agreement where an outside contractor performed bridge construction/abutment work during the cited claim period.

The Organization contends that the subject work was improperly contracted out. The Carrier asserts that the work was exempt from the Agreement since the work performed was a public infrastructure project that was initiated by a government agency, at its expense and for its benefit.

By letter dated July 18, 2019, the Organization filed a timely claim on behalf of the Claimants. The claim was properly handled by the Parties at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for final adjudication.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed

herein or not. As the moving party, it was the Organization's responsibility to meet its burden to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). After careful review of the record, the Board finds the Organization has not met its burden.

The Agreement at issue provides an exemption for the assignment of certain work to BMWED-represented employees. Section 6, C. of MOA 1 states in pertinent part:

> **If a government agency contracts for the relocation of the Carrier's tracks and/or bridge and related structures in connection with a public infrastructure project that has been initiated by the government agency, at its expense and for its benefit, such relocation work (dismantling and construction of track, bridges and related structures) shall not be performed by BMWED-represented employees.**

The record reflects the North Carolina Department of Transportation and the Federal Highway Administration initiated an infrastructure project that included dismantling a bridge, the construction of a new bridge, and the demolition and replacement of a bridge. The Carrier did not pay for any of the project. The Federal Highway Administration paid for 80% of the project, and the State of North Carolina paid for the remaining 20% of the project. The project included the work at issue in this claim. Accordingly, we must conclude that the work at issue here falls within the exemption referenced above and does not fall within the Scope provision 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 28th day of November 2023.

LABOR MEMBER'S DISSENT
TO
AWARD 45121, DOCKET MW-46656
AWARD 45122, DOCKET MW-46657
AWARD 45123, DOCKET MW-46658
(Referee J. Charles)

I must dissent to the Majority's findings in these cases. Specifically, the Majority held that the project was covered by Section 6, C. of MOA #1, which reads, in pertinent part:

> "If a government agency contracts for the relocation of the Carrier's tracks and/or bridge and related structures in connection with a public infrastructure project that has been initiated by the government agency, at its expense and for its benefit, such relocation work (dismantling and construction of track, bridges and related structures) shall not be performed by BMWED-represented employees."

Initially, we must highlight that the Carrier provided a notice that the claimed work would be completed under the provisions of MOA #2 not MOA #1. If the work claimed was truly part of a project that fell under the exception of MOA #1, there would be no need for such notice.

It must not be forgotten that the Carrier has an obligation to establish that the elements of Section 6, C of MOA #1 apply to the claimed work. In this case, the claimed work was not part of a project initiated by the state or federal agencies at its expense and for its benefit, as alluded to by the Carrier. It is difficult to understand how this project would be for the exclusive benefit of the state. Obviously the primary beneficiary of this project was the Carrier. These claims were for demolition and construction of a new mainline bridge. This is not a scenario where the government agency built a new arena or park and needed to relocate the tracks, which is what Section 6 contemplates. Rather, the claimed work was nothing more than routine railroad infrastructure improvement. In addition, the Organization provided evidence that the government agency project did not cover the claimed work, and evidence that Carrier contracted out the work and billed the State and Federal agencies for the project.

For these reasons, we must respectfully dissent.

Respectfully Submitted,

Zachary C. Voegel
Labor Member