

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45382
Docket No. MW-47884
25-3-NRAB-00003-221144**

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

**(Brotherhood of Maintenance of Way Employees 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 January 29 and February 5, 12 and 15, 2021 when it assigned or otherwise allowed outside forces (Atlas Outdoor Fencing Co.) to perform Maintenance of Way work (fencing work, including installation but excluding gates, fence posts or guard rails) at Mile Posts 174.3 to 179.2 (System File BMWE-160201-TC AMT).**
- (2) The Agreement was further violated when the Carrier failed to gain the General Chairman’s concurrence in connection with the Carrier’s intent to contract out the subject work.**
- (3) The Agreement was further violated when the Carrier eliminated the succeeding officer review requirement of Rule 64 and instead had the Division Engineer’s first level review processed under the care of the Labor Relations Department, creating a situation whereby all subsequent levels of appeal will be reviewed by the same individuals that denied the first level claim.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, Claimants D. Thibaudeau and P. Poirier shall now receive an ‘*** equal and proportionate share for all straight time and overtime hours spent by the outside forces performing the claimed work. ***’**

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 argues that on January 29 and February 5, 12 and 15, 2021, the Carrier assigned or otherwise allowed outside forces (Atlas Outdoor Fencing Co.) to perform Maintenance of Way work (fencing work, including installation but excluding gates, fence posts or guard rails) at Mile Posts 174.3 to 179.2. According to the Organization, the express provisions of the November 4, 2010 Fencing Agreement stipulate that unless otherwise agreed, all work associated with new fence installation, except installing fence posts, gates and, where necessary, guard rails, work not claimed here, will be performed by BMWED forces. Further, the Organization asserts that the Carrier failed to notify the General Chairman in advance of its intent to contract out this Scope-covered work and failed to exert good-faith efforts to reach an understanding with the Organization in subsequent conference.

According to the Carrier, the Organization did not meet its burden of proving that the Carrier violated the agreement when the outside contractor performed the work in question. The rule does not require the Organization's concurrence to contract out when it is a bridge and building major construction project, which this was because it was a railroad-wide, \$50 million project at 425 locations for the purpose of putting up security fencing across the system in preparation for the Carrier's new Acela trains. In addition, concurrence is not required because the time of completion for the work could not be met because of lack of available skilled manpower or lack of essential equipment. According to the Carrier, the work was FRA-mandated to be completed by September of 2023. Further, the Carrier was (and is) understaffed and had been trying to hire as many Maintenance of Way employees as possible as quickly as possible. It would not have been able to complete the work in a timely manner. Finally, the work that has historically been done by the BMWED employees was only a part of the project. It also involved installing security card readers and power poles. The Carrier is not required to piecemeal the project.

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 this case rests on the interaction between the Scope Rule and the Fencing Rule. According to the Organization, the Fencing Agreement essentially supplanted the Scope Rule for fencing projects. Therefore, the major construction project exception does not apply to fencing work. The Carrier argues that the two rules have to be read together, particularly as there is language in the Fencing Agreement that ties back to the Scope Rule.

The two rules read as follows:

SCOPE RULE

These rules, subject to the exceptions herein, shall constitute the agreement between National Railroad Passenger Corporation, hereinafter referred to as "AMTRAK", and its respective employees of the classifications herein set forth, represented by the Brotherhood of Maintenance of Way Employees, hereinafter referred to as Brotherhood, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repairs and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, including catenary system, third rail, substations and transmission in connection with electric train operation, and work which as of June 1, 1945, was being performed by these employees, such as station lighting, power lines, floodlights, on elevators and drawbridges, and shall govern the rates of pay, rules and working conditions of such employees.

Nothing in this Agreement shall be construed to require the transfer of work now being performed by AMTRAK employees not covered by this Agreement to employees covered by this Agreement. In the event AMTRAK plans to contract out work within the scope of the schedule agreement, the Director-Labor Relations shall 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. If the General Chairman requests a meeting to discuss matters relating to the said contracting transaction, the Director-Labor Relations or his representative shall promptly meet with him for that purpose. The Director-Labor Relations or his representative and the General Chairman or his representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no

understanding is reached, the Director-Labor Relations may nevertheless proceed with said contracting, and the General Chairman may file and progress claims in connection therewith.

1. EXCEPTIONS

A. Effective March 2, 1987, the following work may not be contracted out without the written concurrence, except in case of emergency, of the appropriate General Chairman.

(1) Track inspection, maintenance, construction or repair from four (4) inches below the base of the tie up, and undercutting.

(2) Inspection, maintenance, construction or repair of third rail systems and the electric traction catenary wire system including transmission wires, poles and appurtenances, which are not integrally associated with overhead bridges or similar structures. Routine substation maintenance of the type being performed under the scope of this Agreement on January 1, 1987. Specifically excluded from this provision are new substation installation or construction and the construction or conversion of major power systems.

(3) *Bridge and Building inspection, maintenance, construction or repair of the type being performed by Amtrak forces under the scope of this Agreement on January 1, 1987, specifically excluding major construction projects and non-railroad projects.*

B. It is understood that the written concurrence of the General Chairman for the contracting of work in Paragraph 1.a. above will not be required where the time of completion for the work, as determined prior to the start of construction of projects contracted in accordance with Paragraph 1.a., cannot be met for the following reasons:

(1) Lack of available skilled manpower, However, the Carrier shall make a reasonable effort to hire additional employees and train current employees to perform the work in question if such does not add unreasonable cost to the project and if the project is not a "one time" job that will require furlough of most of such employees, who cannot be used in connection with other projects, following completion. Further, the work referenced in 1.a. (1), (2), and (3) will not be contracted out if sufficient employees to perform the project are furloughed within the sub department.

(2) Lack of essential equipment.

C. Should a significant change in the time of completion referenced in Paragraph b. occur after the start of construction, the Carrier shall schedule a conference and discuss the circumstances for such change as soon as possible.

D. Any question with regard to contracting out work in accordance with the scope of this Agreement may be referred by either party to a Special Board of Adjustment created specifically and solely to hear and render decisions upon such questions. The Special Board of Adjustment shall operate in accordance with the Agreement appended hereto as Attachment "A".

Emphasis Added.

FENCING AGREEMENT

1. In the application of the Scope Rule of the Northeast Corridor BMWED Agreement, Amtrak 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. . .

This appears to be a case of first impression. Neither party has presented any evidence of any prior major fencing project. We find that the introductory language of the Fencing Agreement--*"In the application of the Scope Rule of the Northeast Corridor BMWED Agreement, Amtrak 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” --means that the Fencing Agreement applies to work that under the Scope Rule could not otherwise be contracted out without concurrence. The Fencing Agreement “represents the concurrence of the BMWED that Amtrak may contract out fencing work as outlined below.”

The operation and application of the Scope Rule must be analyzed in stages. First, the Scope Rule states that before a Carrier is going to contract out work that is historically BMWED work, it must give notice to the Organization and upon request, meet and confer. Concurrence is not required. Here notice was given and a conference held, but no agreement was reached and no concurrence given by the Organization.

Then the Scope Rule states that there are three exceptions to the “no concurrence needed” provision, i.e. three instances in which concurrence is required. The third exception and thus work that does require concurrence before contracting out is “Bridge and Building inspection, maintenance, construction or repair of the type being performed by Amtrak forces under the scope of this Agreement on January 1, 1987.”

Assuming *arguendo* that the fencing work here is encompassed within that language, there is an exception to this exception for emergencies, major construction projects, and non-railroad projects. Further exceptions follow, including where the time of completion for the work cannot be met because of lack of available skilled manpower or lack of essential equipment, exceptions the Carrier argues are also applicable here.

We find that the Carrier has persuasively demonstrated that the project is a major construction project. The Acela 21 Gate program would erect specialized high security fencing along the Acela Right of Way. It has an estimated cost of 50 million dollars and is projected to take place at 425 different locations to connect all fencing along the Northeast Corridor (NEC) and is all being done to protect the railroad as the new Acelas become operational. Accordingly, this substantial amount of work is considered to be a “Major Construction” project within the meaning of the Scope Rule.

Because we find that the project is a major construction project, we do not need to determine whether the other exceptions urged by the Carrier are also applicable.

Thus, for this work, analyzed under the Scope Rule, first concurrence would not be required, then because it is within the 1(A)(3) exception, concurrence would be required, and then, finally, because it is within the exception to the exception, concurrence is not required.

The purpose of the Fencing Agreement is to provide needed concurrence in limited situations. However, as demonstrated above, the project at issue here is not work that needs concurrence because it is excepted from the concurrence requirement because it is a major construction project. Because concurrence was not required under the Scope Rule, it is not necessary to get to the Fencing Agreement, prefaced by the words “[i]n the application of the Scope Rule.” A different conclusion would mean that even if the Carrier could prove, for example, that contracting out was necessary because an emergency existed or because the time of completion for the work could not be met because of lack of available skilled manpower or lack of essential equipment, it would still be precluded from contracting out the work. This is not a conclusion that makes sense. That is why, presumably, the parties prefaced the Fencing Agreement with a reference to the Scope Rule.

We also note that the Organization in its argument recognizes that the Scope Rule is applicable at least in part. For example, it argues that there can be “no doubt but that the Carrier failed to notify and participate in good-faith discussions to reach an understanding surrounding the subject work as otherwise required by the Scope Rule of the Agreement.” There is no obligation under the Fencing Agreement to meet and confer, only to notify. Here the Carrier and the Organization met on at least two separate occasions to discuss the proposed contracting out.

Upon review of the entire record, we find that the Organization has not met its burden of proving that its concurrence was necessary for the Carrier to be able to contract out the claimed work.

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 19th day of December 2024.