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

Award No. 45385
Docket No. MW-48021
25-3-NRAB-00003-221133

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 when it allowed outside forces (Reese) to perform Maintenance of Way work (tree cutting and brush cutting along the right of way) at Bowie State Passenger Station (Bowie, Maryland) on March 29, 30 and 31, 2021 (System File BMWE-161404-TC AMT).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, of its intention to use outside forces to perform the subject work and/or failed to obtain the written concurrence of the General Chairman before contracting out the work.

(3) The claim appeal as presented by Vice Chairman L. Owens, on September 29, 2021, to Labor Relations Specialist D. Johnson shall now be allowed as presented because said claim appeal was not disallowed by Labor Relations Specialist Johnson in accordance with Rule 64.

(4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, the Claimants (BMWED employes who were assigned to Gangs C039 and C040 headquartered in Zone 1) shall now '… receive an equal proportionate share of all hours (one hundred and fifty-two (152) total) expended by the contractors on each date identified in this claim payable at the Claimant's

> **respective straight time and overtime rate of pay. *** Also, all lost credits and benefits normally due must be included with the Carrier's settlement to make up for the lost work opportunity ***' and the Claimants must '*** be made whole in every way for any loss resulting from Management's violations.' (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.

On March 29, 30 and 31, 2021, the Carrier assigned to outside forces brush cutting, tree clearing, and removing obstructions in association with the installation of a new fence. On January 22, 2021, the Carrier had notified the Organization of its intent to contract out the work.

The Organization argues that the work that the Carrier assigned to outside forces--brush cutting, tree clearing, removing obstructions—has historically been 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. The Organization maintains that the alleged "notice" from the Carrier to the General Chairman was specifically restricted to new fencing installation and not for the disputed brush cutting work. Additionally, the Organization contends that the Carrier failed to participate in good-faith discussions to reach an understanding about the subject work,

prior to its initiation on the cited claim dates. Therefore, the Carrier failed to comply with the advance notification and conference provisions outlined in the Scope Rule.

According to the Carrier, the Organization did not meet its burden of proving that the Carrier violated the agreement when the outside contractor completed the work in question. The Carrier notified the General Chairman, in writing, of its intention to use outside forces more than 15 days in advance of the start of the work. Secondly, the work being claimed was not maintenance of way work, but rather the removal of obstructions for a new security fence to be installed by the contractor. It has long been Amtrak's interpretation of the rule that the contracting out of the installation of a new fence does not violate the 2010 fencing agreement. The Scope Rule is clear that such work does not fall under the scope of the agreement. Finally, the Notice provided to the Organization stated that "[t]he contractor workforce will perform all work related to the installation of fence posts and gates. The contractor will also be responsible to furnish all materials and remove all obstructions within the proposed fence line as located by Amtrak."

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, 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. . . .**
>
> **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. As this Board held in Award No. 45023, "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. …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. It provided such notice. The reference to "remov[ing] all obstructions within the proposed fence line" is sufficient to put the Organization on notice that removing brush and trees in preparation for the fence installation would be performed by the contractor.

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.