

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23034

Docket Number MW-23078

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(**Consolidated** Rail Corporation (formerly The New York,
(New Haven & Hartford Railroad **Company**)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when outside forces **were** used to cut brush and install track ties on the West Hanover Secondary Track between North **Abington** and West **Hanover**, Massachusetts (System Docket **NH-7** Northeastern Region - New England Division).

(2) As a consequence of the aforesaid violation, **Trackmen T. Pawlak, C. Medeiros, M. M. Medeiros, Jr., A. Almeida, E. Camara, J. Almeida and G. Farrell** each be allowed sixty-six (**66**) hours of **pay** at their respective straight-time rate and twenty-two and one-quarter (**22 $\frac{1}{4}$**) hours of pay at their respective time and one-half rates."

OPINION OF BOARD: Between October **31, 1977** and November **7, 1977**, an outside contractor performed Maintenance of Way work on the West Hanover **Secondary** track running between North Abington and West Hanover, Massachusetts. This short piece of track (**3.6** miles) was not part of the Conrail System, but was still under the control of the trustee of the Penn Central. The State of **Massachusetts** desired that **train** service be continued on this line and it obtained control of the right of way from the Penn Central trustee. The **state thereupon entered** into an agreement **with** Conrail to operate trains over the road and to **perform** certain maintenance work for which Conrail would be compensated by the Commonwealth of Massachusetts as the subsidizer.

Carrier also entered in to an agreement with the **Commonwealth** to obtain by subcontract certain accelerated maintenance of the **3.6 miles** of track in question. Carrier notified the **Organization** that it intended to obtain a subcontractor to do the accelerated **maintenance** work. It then obtained a subcontractor and the work was **completed. The Organi-** nation filed a grievance alleging that furloughed Maintenance of Way employes should have been used to do the work, not an outside subcontractor. **The Organization** relied ou Rule **53**, classification, to buttress Its claim.

Carrier denied the claim, arguing that:

- (1) it did not own or control the track in question,
- (2) the work performed was not instigated by it, was not done for its benefit, and was not paid for by Carrier, and
- (3) the agreement between Conrail and the Commonwealth of Massachusetts specifically states that accelerated maintenance will be done by subcontract. Carrier was not in control of the situation when this agreement was made and was directed by the Commonwealth to subcontract the work.

It is clear from the record that claimants were furloughed employees who normally would have performed maintenance work on the section of track involved. It is also clear that the work done by the contractor was work belonging to Maintenance of Way employees.

This Board has carefully reviewed the record of this case and can find no basis on which to justify Carrier's position. We have carefully studied the Third Division awards cited by Carrier in its submission, Awards 20639 and 20644, and we do not find them on point. This Board, however, has been guided by a recent award involving Carrier and the Organization and an identical issue, though on another part of the railroad (Public Law Board No. 2203, Award 21, Harold M. Weston, Chairman).

The facts of Award 21 closely parallel those in the instant case and this Board agrees fully with that award;

- (1) Claimants cited are proper claimants.
- (2) The action was consistent with the terms of the agreement between carrier and the Commonwealth of Massachusetts.
- (3) The action, however, violated Rule 53 of the agreement.
- (4) This Board is not in accord with Carrier's view that it bears no responsibility in this matter.

We believe that **Carrier knew** that it had **commitments** under collective bargaining agreements when it entered into operating contracts with the **Commonwealth**. These collective bargaining commitments were not eliminated by these operating agreements.

Based on the record of the case and the rationale expressed in Award No. 21 (with which we fully agree), this **Board** must issue a sustaining award. **As to the damages to be paid to** claimants, after considerable discussion we have concluded that a total of 88.25 hours at the **pro rata rate shall** be divided equally among the **named** claimants.

In arriving at this **award**, this Board is confined to the undisputed **facts** of this record. We **may not**, no matter how reasonable it may appear to be, speculate on the existence of facts not cited in the record. The only fact agreed upon or cited in this record concerning the subcontract was the number of hours it took to complete **(88.25)**. No mention was made of the total labor cost, number of men working, hourly rates paid, etc.

This Board, therefore, has been confined to basing **this** award on the total hours cited in the record.

FINDINGS: The **Third** Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

But the **Carrier and the Employees** involved in **this** dispute are respectively Carrier and **Employees** within the **meaning** of the Railway **Labor Act**, as approved June 21, 1934;

That this Division of the Adjustment **Board** has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third Division**

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at **Chicago, Illinois**, this 28th day of October 1980.