

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23422  
Docket Number MW-23316

John B. LaRocco, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**  
(  
(Consolidated Rail **Corporation** (NY, NH&H)

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

(1) The Carrier violated the Agreement when, without notification to the General Chairman and without a conference having been held between the Chief Engineer and the General Chairman as required by Paragraph (a) of the February 24, 1954 Memorandum of **Agreement**, it assigned outside forces to install track ties and **rail** on the Dorchester Branch from South Bay Junction to **Fairmont**, Massachusetts beginning May 10, 1978 (System Docket **NH-14**).

(2) As a consequence of the aforesaid violation, the following named **employees** shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in the performance of the work referred to in Part (1) hereof.

TRACK FOREMEN

Generoso **Molinario**  
Willie Brown  
William F. Reagan  
Antonio Fortes  
Stefano **Grintchenko**

MAINTENANCE HELPERS

Robert J. **Muirhead**  
Michael Pawlak

DISTRICT POWER  
MACHINE OPERATORS

Albert J. Spencer  
**James C. Ricci**

DIVISION POWER  
MACHINE OPERATORS

**Carmino A. Bianco**  
John R. **Harrington**

TRACKMEN

Jeffrey C. **Pitts**  
Paul C. **Pomurleau**  
Carl G. **Weltman**  
Kenneth A. Topalian  
John J. Bottary  
Patrick **Coughlin**  
Ronald R. Wallace  
Anthony J. Montaquila  
Gerard Babineau  
Charles E. **Desmond**  
David P. Deyab  
John Garde  
Paul E. McCarthy  
Kenneth R. Pearce  
Charles A. King  
Brian D. **Colpitts**  
Michael E. Cotter  
Allen F. **Jenner**  
Ronald L. Roof  
Harold D. Smith  
**Raymond** Meehan  
**Waverely** Carter  
William Delfino  
Anthony Rose"

OPINION OF BOARD: Between May, 1978 and November, 1978, an outside contractor performed an extensive track improvement project including the installation of track ties and welded ribbon rail on the Dorchester Branch ("Branch") right of way which is owned by the Massachusetts Bay Transportation Authority ("MBTA"). The Carrier was never an owner of the Branch. In 1976, the trustee of the Penn Central conveyed the Branch to the MBTA. The MBTA granted the Carrier a license to operate trains on the Branch and the Carrier performed ordinary maintenance work. The outside contractor was engaged by the MBTA. Prior to performance of work by the outside contractor, the Carrier did not give notice or hold a conference with the Organization. The Organization has brought this claim on behalf of thirty-five Maintenance of Way employees who are claiming wages for an equal share of the total number of hours worked by the outside forces. by the outside forces.

Both the Organization and the Carrier have charged each other with the failure to timely raise certain subjects on the property. After reviewing the record, we find no merit in either party's procedural objections. Thus, we will consider the Organization's contention that the Carrier violated Paragraph (a) of the February 24, 1954 Memorandum of Agreement as well as the Deed and Contract attached to the Carrier's submission as Exhibits A and B respectively. Contract attached to the Carrier's submission.

The Organization contends the work performed by the outside contractor is covered by the Scope Rule. According to Paragraph (a) of the February 24, 1954 Agreement, the Carrier is prohibited from contracting out work reserved to Maintenance of Way employees unless it first gives notice to the Organization, holds a conference with a representative of the Organization and endeavors to reach a mutually satisfactory agreement concerning the disputed work. Since the Carrier did not satisfy any of the Paragraph (a) prerequisites, the Organization asserts the claimants are presumptively entitled to receive the requested monetary relief. The Organization argues that the Carrier had sufficient control over the disputed work since it operated trains over the Branch, was in charge of routine track maintenance and engaged in all the normal functions of a common carrier. The Organization relies on two recent Third Division Awards involving these same parties and similar claims. Third Division Awards No. 23036 (Dennis); No. 23036 (Dennis); See also Award No. 21 of Public Law Board No. 2203 (Weston) No. 23036 (Dennis); No. 2203 (Weston).

The Carrier raises three defenses:

The Carrier raises three defenses:

1.) The work performed by the outside contractor was beyond the Carrier's dominion and control (citing Third Division Awards No. 20644 (Eischen) and No. 20639 (Twomey); and No. 20639 (Twomey);

2.) The work was performed at the MBTA's expense and solely for its benefit; 2.) The work was performed at the MBTA's expense and solely for its benefit;

3.) The Carrier was neither a principal nor an agent in the transaction between the MBTA and the outside contractor.

between the MBTA and the outside contractor.

The issue **is** whether the Scope clause contained in the applicable collective bargaining agreement between the **Organization** and the **Carrier** specifically covers the work performed by the contractor. Generally, we have adhered to the **proposition** that where the disputed **work is not performed** at the Carrier's instigation, not under its control, not performed at its expense and not exclusively for its benefit, the work may be contracted out **without** a violation of the scope rule. Third **Division** Awards No. 20644 (Eischen); No. 20280 (Liebe-); No. 201% (**Lieberman**) and No. 19957 (**Hays**).

Recently, **we** have refined the general rule. In Third Division Awards No. 23034 and No. 23036, we correctly ruled that the Carrier retains **sufficient** control over the disputed work if the **Carrier** participates in **the** contracting out process when **it** knows the work is covered by an applicable collective **bargaining** agreement. In those cases, we were concerned with the Carrier's attempt to evade its collective bargaining obligations merely by inserting a clause in the Carrier's operating **agreement** with the state **government** authority which stated that an outside contractor would perform track rehabilitation work. In Award Nos. 23034 and 23036, the Carrier assisted the state **in** obtaining an outside contractor and then sought to **evade** its labor agreement **obligations** by relying on the state operating agreement.

The facts in this case are very different. The **Carrier** did not have any control over **MBTA's** determination of who should perform the **work**. The **MBTA** contracted directly with the outside contractor. The **Carrier** played no role (either as a principal or an agent) in selecting the outside contractor. **Unlike** the situation in Awards No. 23034 and 23036, the contracting out of the **work** was not instigated by the **Carrier** because there was no operating agreement between the state and the Carrier which covered this project. Here, the **MBTA** alone controlled when and how the work was to be **performed**. Since the Carrier had no control over the **MBTA's** actions, the Carrier was not evading any of its responsibilities under the applicable labor agreement. Since we have **found** that the Carrier had no control over the disputed work, the Carrier had no duty to notify and confer with representatives of the Organization.

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;

That 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 not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

*A. W. Paulsen*

Executive Secretary

Dated at Chicago, Illinois, this 3rd day Of November 1981.

