

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26103  
Docket Number MW-25997

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it assigned outside forces (Watts Construction Company) to perform Maintenance of Way work at Rose Lake Yard from August 27 through October 6, 1982 (System Docket No. CR-140).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of the aforesaid violations, Messrs. M. E. Small, D. G. Medsker, J. Petras, G. A. Potts, S. A. Wells, H. Lyon, P. King, B. Ecker, R. G. Hartman, I. Rayphole, H. J. Potts, R. D. Aper, L. W. King, H. B. Haller, B. W. Ruble and R. Jolliff shall each be allowed two hundred thirty-two (232) hours of pay at their respective straight time rates and one hundred thirty-seven (137) hours of pay at their respective time and one-half rates."

OPINION OF BOARD: By letters dated October 25, 1982, Claims were made by sixteen employees alleging that on specific dates commencing August 27, 1982 through October 16, 1982, the contract was violated. Specifically, Petitioners argue that "our work" was contracted at Rose Lake Yards, Saint Louis, Illinois, to Watts Construction Company which unloaded ballast, spread them and removed "rail, plates, ties and scrap in its entirety."

In addition to procedural arguments, the Carrier asserts that the work was not contracted by them. In his declination of December 10, 1982, the Division Engineer stated that "I have a letter signed by their Terminal Manager stating that all of the work done by Watts Excavating was done under their contract and not Conrail's." Further correspondence by the Manager, Labor Relations, dated January 28, 1983, states that "this project was contracted by the Pennsylvania Truck Lines which is independently operated even though it might be a wholly owned subsidiary." The Carrier denies any Agreement violation.

This Board will forego a discussion of the procedural issues and move on merits by noting that there is an absence of proof by the Petitioner to carry its burden in establishing an Agreement violation.

The facts of this case are that a wholly owned subsidiary of the Carrier contracted out work which is not disputed on property as being work that falls within the Scope of the Agreement. This Board has ruled in Third Division Award 23422 and consistent with numerous past Awards (Third Division Awards 20644, 20280, 20156 and 19957) 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."

More recent Awards (Third Division Awards 23034, 23036 and Public Law Board 2203, Award No. 21) have extended the Carrier's liability to include circumstances wherein the Carrier involved itself as principal or agent in the securing of an Agreement with a third party under which the Carrier circumvented its known existing contractual arrangements in relinquishing control to the third party for contracting.

To prevail in the instant case the Petitioner must prove its allegation that the contract was violated in some manner as discussed in the above referenced Awards. There is nothing in the record on property that provides any evidence whatsoever that the Carrier had any knowledge (prior to the Claim) of the contested work. There is no evidence of record that the Carrier participated in the decision to contract out or worked in such close proximity with its wholly owned subsidiary as to be aware of, participated in or have controlled its contract. Contrary to the above, it is not contested that the work was done on property which was under Lease and not under the control of the Carrier. This Board has often held that where the contested work takes place outside the operation and maintenance of the Railroad, it is not work within the Scope of the Agreement (Third Division Awards 10722, 19253, 19639).

In the case at bar (unlike PLB 2203, Award No. 21) there is no showing that the Carrier was involved in the contract or had any knowledge whatsoever of the contract by its subsidiary. Nowhere on property does this Board find any probative evidence to go beyond mere inference that Carrier violated the Scope of the Agreement. This Board finds from the record on property that the Carrier had no control over the work herein contested on leased property of its subsidiary or knowledge thereof, and that such sub-contracting was therefore not within the Scope of the Agreement. As such, there has been no violation of the Agreement.

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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Page 3

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
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Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1986.