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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35190
Docket No. MW-32916
00-3-96-3-283**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak -
(Northeast Corridor)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned or otherwise allowed outside forces (Stuart Dean) to perform B&B Subdepartment work (installed and polished brass pedestrian traffic control poles) at the 30th Street Station, Philadelphia, Pennsylvania on April 3 and 4, 1995 (System File NEC-BMWE-SD-3542 AMT).**
- (2) As a consequence of the aforesaid violation, B&B Mechanics P. Matthews and B. Coleman shall each be allowed twelve (12) hours’ pay at their respective straight time rates.”**

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.

As Third Party in Interest, the Transportation Communications International Union was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

The record reflects that on April 3 and 4, 1995 the Carrier utilized an outside contractor to install and polish brass poles at its 30th Street Station in Philadelphia, Pennsylvania. It did so in despite of an earlier Agreement, dated September 1, 1994, in which the parties agreed that with regard to "Historic Metal Refinishing work" at that location the Carrier could contract out major refinishing for a period not to exceed 90 days during which the Carrier would assign three bargaining unit employees to work with the employees of the contractor. The parties further agreed that after the completion of that period the Carrier could enter into a six-month Maintenance Agreement with the contractor provided however that whenever employees of the contractor were used an equal number of bargaining unit employees would be assigned to work with them. When employees of a contractor were used on the dates in question and bargaining unit employees were not assigned to work with them, the instant claim was filed.

The threshold issue raised herein is whether the Board has jurisdiction to resolve the matter. The Carrier argues that the proper forum for this dispute lies in a Special Board of Adjustment created by the parties. However, our review of the record shows that the Carrier did not raise this issue on the property. Thus, the argument is not before us and we decline to yield the jurisdiction we would otherwise have.

We therefore turn to the merits of the dispute. The parties' Agreement contains Scope and Work Classification Rules upon which the Organization relies in claiming the work in dispute as its own. However, it is our view that the issue is controlled by the September 11, 1994 Agreement between the parties, rather than their collective bargaining Agreement, because that Agreement provides specifically for the assignment of work in question. Accordingly, as a more specific Agreement it prevails over the general provisions of the collective bargaining Agreement. In that specific Agreement the parties provided for the use of contractors and bargaining unit employees to perform maintenance work "regarding Historic Metal Refinishing work." However, there is no dispute that the work in issue involved the installation

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and polishing of brass poles. In our view there can be no question that brass poles installed in April 1995 do not constitute "historic metal" and the Carrier was therefore not obligated to use bargaining unit employees in accordance with the Agreement.

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 20th day of December, 2000.

CARRIER MEMBER'S CONCURRING AND DISSENTING OPINION
TO AWARD NO. 35190, DOCKET MW-32916

The Carrier Member concurs with the findings that Amtrak did not violate the agreement in the assignment of work in this case. However, we must take exception to the majority opinion that the jurisdictional argument raised by Amtrak was not properly before the Board.

The agreement between the parties provides that disputes involving application of the Scope Rule will be progressed to a Special Board of Adjustment established specifically to resolve such matters. In the subject case, the employees progressed their scope dispute to the Third Division of the National Railroad Adjustment Board, contrary to the provisions of the agreement. While it was argued before the Board that the Third Division of the National Railroad Adjustment Board did not have jurisdiction over this dispute, based on the contract language referred to above, the majority improperly rejected that position on the basis that it was not raised in the handling on the property.

Initially, the procedural violation did not occur during the on property handling of this case. Accordingly, an argument that the dispute was not progressed in accordance with the requirements of the agreement could not be made unless and until that violation occurred. More importantly, it has been well recognized that jurisdictional issues can be raised at any time, even at the Board level. For example, in Third Division Award No. 23932, Referee Sirefman ruled:

CONCURRING AND DISSENTING OPINION
TO AWARD NO. 35190, DOCKET MW-32916

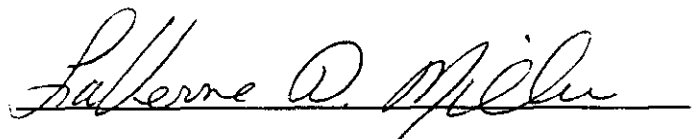
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"A jurisdictional issue can be raised initially at the Board level (See Award 8886 McMahon, 9189 Weston, 10956 Dolnick, 16786 Zumas).

Similarly, In Award No. 20165, Referee Sickles ruled:

"... a question of the Jurisdiction of this Board may be raised at any time during the course of the proceedings. See Awards 17786 (Zumas) and 18322 (Dorsey)."

For this reason, we respectfully dissent to the majority opinion on the jurisdictional argument in this case.

A handwritten signature in cursive script, reading "Laverne D. Miller", written over a horizontal line.