

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39946  
Docket No. MW-39796  
09-3-NRAB-00003-060604  
(06-3-604)

**The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
( IBT Rail Conference  
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 outside forces (Middlesex) to perform Maintenance of Way work (grade roadbed for track installation) at Berlin, Connecticut on August 15 through 26, 2005 and continuing (System Files NEC-BMWE-SD-4543, SD-4544, SD-4545, SD-4546 and SD-4547 AMT).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a written advance notice of its plans to contract out said work.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Marenholz, J. Mattie, D. VanderMaelen, J. Nadeau and H. Cousins shall now each be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work.”**

**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 October 3, 2005, the Organization filed claims for each of the Claimants for all time expended by Middlesex grading road bed in Berlin, Connecticut, from August 15 through August 26, 2005. The claims alleged that the Carrier violated the Scope Rule and Overtime Agreement. The Carrier contends that the Board lacks jurisdiction over these claims. The Carrier relies on Paragraph D of the Scope Rule which provides:**

**“Any question with regard to contracting out work in accordance with the scope of this Agreement may be referred by either party to a Special Board of Adjustment created specifically and solely to hear and render decisions upon such questions. The Special Board of Adjustment shall operate in accordance with the Agreement appended hereto as Attachment ‘A’.”**

**The Carrier cites Third Division Awards 31481, 31482, 31484, 31485, 32156, 32157, 32159, 32161, 32220, 32221 and 32222, all of which held that such contracting claims fell within the exclusive primary jurisdiction of Special Board of Adjustment No. 1005. However, all of those Awards were rendered prior to the closing of Special Board of Adjustment No. 1005. Because Special Board of Adjustment No. 1005 is closed, it cannot exercise jurisdiction over this claim. There is no evidence in this record that a successor Special Board of Adjustment was established. We note**

that Paragraph D quoted above provides that contracting out issues “may be referred” to a Special Board of Adjustment. Although during its existence, Special Board of Adjustment No. 1005 had exclusive jurisdiction over such claims, the use of the discretionary word “may” indicates that when no such Special Board of Adjustment is available, the claim may be appealed to the Board. Accordingly, we hold that we have jurisdiction over this matter.

Turning to the merits of the cases, there is no dispute that the Carrier never provided notice of its intent to contract out the work at issue. However, the record reflects that it was the State of Connecticut, rather than the Carrier that contracted the work to Middlesex. The work was part of a state highway project instigated by the State of Connecticut at no cost to Carrier. There is no evidence that the Carrier controlled the assignment of the work in question. Accordingly, since the Organization failed to prove that the Carrier contracted out the work, the claim must fail. See, e.g., Third Division Awards 36176, 33936 and 31013.

**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 30th day of September 2009.**