

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43123  
Docket No. MW-43034  
18-3-NRAB-00003-150248**

**The Third Division consisted of the regular members and in addition Referee Amedeo Greco when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (  
(CSX Transportation, Inc.**

**STATEMENT OF CLAIM:**

- “1. The Agreement was violated when the Carrier assigned outside forces (W. R. Townsend) ‘... to tear down ballast deck bridge and install culverts’ at Mile Post SO 630.2 on the Jacksonville Division on the Jacksonville Tampa Seniority District beginning on August 16, 2013 up to and including August 28, 2013 (System File B169113013/2013-152663 CSX).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimants W. White, S. Reynolds, P. Butler, J. Boyd, T. Boyd and J. Rifenbark shall now be paid ten (10) hours straight time and two (2) hours overtime each, for each day the contractors worked, at their respective rates of pay.”**

**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.

The Carrier hired outside contractor W. R. Townsend which used outside personnel to tear down a rail bridge and install culverts between August 16, 2013 and August 28, 2013.

The Organization states that the September 1, 1999 Agreement, reserves all such work for members except for certain limited exceptions which do not apply here, and that this matter turns on whether the Carrier controls the disputed work under a 1973 lease with the Jacksonville Florida Port Authority which maintains the deep water port.

The Carrier states that the disputed work is covered by the 1973 lease and thus is not within the scope of the Agreement. It also asserts that the claimed work was performed on property that is not owned or controlled by the Carrier because the track is owned by the Jacksonville Port Authority. It further states that the work was performed at the behest of and for the benefit of a third party to the agreement, citing Award 31013, (Referee Newman).

That Award provides in pertinent part:

...

“The determinative issue is whether the disputed work of installing the pipe was contracted out under the Carrier’s control. The Board has consistently held that where work is not performed at the Carrier’s instigation, nor under its control, it is not performed at its expense nor exclusively for its benefit, the Organization cannot claim improper contracting out in violation of the Scope rule. Third Division Awards 23422, 20644, 20280. In reviewing this case, the Board concurs with Carrier that its agreement permitting the County access to dig across its property and its supply of material and labor to aid in the pipe installation effort does not constitute contracting out work as that concept is contemplated within the meaning of the Scope rule. We find no evidence that the Carrier instigated or retained sufficient control over the disputed work performed by County employees, or that it was performed at Carrier’s Expense of exclusively for its benefit. Third Division Award 26082 Moreover, there is no evidence to support the Organization’s claim that this work was done because standing water

**was causing damage to the dump and road bed or that Carrier would have undertaken the project without county initiation. Third Division Award 26816.”**

**...**

**But here, there is no proof that the claimed work was, in fact, not under the Carrier’s control.**

**In addition, there is no proof that the property in question has been leased to a third party.**

**Section 11 of the lease between the Jacksonville Port Authority and a predecessor to the Carrier thus states:**

**“11. The parties hereto agree that existing trackage constructed or to be constructed for exclusive use by private industry and/or tenants on the Authority’s properties will be maintained by other than SCL. Cost of constructing new trackage for exclusive use by private industry and/or tenants on the Authority’s properties will be assumed by other than SCL.”**

**...**

**That was the only lease document presented by the Carrier, and no document has been presented showing that the Carrier has leased out the property.**

**Rather, we only have the Carrier’s assertions at Conference that the work was not under its control; that the work was not performed at its expense; and that it was not performed for the Carrier’s benefit.**

**Those assertions were not backed up by any witness statements expressly describing the work. Absent any clear evidence to that effect, there is no proof supporting the Carrier’s assertions.**

**Accordingly, the Board sustains the Claim.**

**The Carrier therefore shall pay each Claimant ten (10) hours straight time and two hours overtime each, for each day the contractors worked, at their respective rates of pay.**

**This Award is limited to the unique facts of this case and has no effect on future cases.**

**AWARD**

**Claim sustained.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

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

**Dated at Chicago, Illinois, this 30th day of May 2018.**