

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45060
Docket No. MW-46649
24-3-NRAB-00003-210294**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (

(Keolis Commuter Services

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Railroad Resources and Recovery) to perform Maintenance of Way and Structures Department work (cutting old rail into sections, loading the old rail to be relocated and hauling and removing rail) on the Carrier’s property on multiple dates beginning November 4, 2019 and continuing (System File S-1924K244/BMWE 06/2020 KLS).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier’s plans to contract out the work referred to in Part (1) above and when it failed to assert good-faith efforts to reach an understanding concerning said contracting out as required by Rule 24 of the Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Saulnier, J. Rowe and P. Sledziewski must now be compensated ‘... all hours worked by contractor employees to be divided equally and proportionately at their respective claimed rates of pay, as well as all credits for vacation and all other benefits for their lost work opportunity. This Claim is also continuous and inclusive of all hours worked by the contractor employees until this work is finished or until the violation ceases to exist.”

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.

Factual Background:

When the Carrier had work involving the removal of scrap rail ties, it offered this work to the BMWED; it alleges only one employee was willing to do the work. The Carrier then notified the Organization that it desired to contract out the work. It is disputed whether the parties had a conference within the meaning of Rule 24. The work was ultimately contracted out, and the Organization contests this decision as a contract violation.

Position of Organization:

The Organization maintains there was no conference between the parties as required by Rule 24. Assistant Chief Operations Engineer J. Ferraro was asked whether he was in receipt of the Organization's letter and he replied that he was and gave a brief account of the Carrier's position. In the Organization's view, this does not constitute a conference within the meaning of Rule 24. It asserts the Carrier has not made any good faith attempt to reach an understanding about the contracting at issue.

It notes the equipment involved was a log truck, equipment long operated by unit members on a very frequent basis. It argues the Carrier's claimed refusal on the part of employees is wholly unsupported by evidence. In its view, the Carrier has not shown that this work could not be performed by unit employees with rescheduling or overtime.

Position of Carrier:

The work at issue in this claim is removal of scrap rail ties. The Carrier asserts this work was directly offered to the Organization, and the Organization's employees declined the work, citing the alleged danger of removing such ties using a hy-rail cart. Because bargaining unit employees opted out of performing the work in question, the Carrier needed to contract it out.

Applicable provisions of the parties' Agreement provide as follows in pertinent part:

Rule 24-CONTRACTING OUT

1. In the event the Carrier plans to contract out work within the scope of the schedule agreement, the Chief Engineer shall notify the General chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
2. If the General Chairman requests a meeting to discuss matters relating to the said contracting transaction, the Chief Engineer or his representative shall promptly meet with him for that purpose. The Chief Engineer or his representative and the General Chairman or his representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Chief Engineer may nevertheless proceed with said contracting, and the General Chairman may file and progress claims in connection therewith.
3. Nothing in this Rule shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman to discuss and if possible reach an understanding in connection therewith. the employees who refused to perform the work wanted to be compensated for not being given the opportunity to perform the work.

Analysis:

We do not find any breach of contract in the manner of conferencing which took place in this case. As a result, there was no cognizable procedural violation.

On the merits, a statement from Ferraro was provided, quoted below in pertinent part:

As we discussed, I did have a conversation with the crew regarding the picking up of scrap rail in August 2019. At that time, out of the entire crew, only one of the employees stated he would perform the work. There was not enough employees to complete a crew to perform the work. The employees stated safety concerns regarding the need to hi-rail with the log truck equipment and the cart behind it. Additionally, I have asked employees to do this work in the past, and they have repeatedly refused to load a 25 foot push cart behind the logging truck with rail due to 'safety concerns' that it is overweight.

Due to the reasons above, I sent notice to the Organization that we would be contracting out this work on August 2, 2020. I did explain these issues and the need to contract out the work while having a separate discussion with Mr. Swain and we contracted out the work in August 2019.

Over thirty employees, including at least two Claimants (unclear due to legibility problems), signed an obviously pre-fabricated group statement providing:

To whom It may concern,

During the fall and winter of 2018 the Framingham maintenance crew pulled many half strings of old rail from the live tracks to a staging area. There they were cut into 40' pieces and stacked to be removed. During this past Fall and Winter Keolis management asked that the old rail be cut into 50' Pieces next to the live track and be picked up by the log truck. At no time were we asked to use a cart and we would have never refused to use a cart with the log truck. As a matter of fact, there was an area in which we could not use the log truck because of the close proximity to the Mass Pike highway. We worked with the mechanic to fabricate a hitch to the front of the speed swing in order to put a cart in front of it so we could remove the rails without fear of a rail getting too close to the mass pike. We have normally removed scrap rail using multiple methods in the past including using machines with a cart on many occasions.

We find the Carrier did not abuse its discretion in crediting Ferraro's statement that he requested Claimants to perform the work, and did not receive enough affirmative answers to form a crew. He had no reason to fabricate a story, and did not stand to

benefit from the subcontracting. His description of the reason given for the refusal was specific and credible.

By contrast, the Organization's statement was prefabricated for the employees who chose to sign, and who stood to benefit if the statement was credited. The Carrier was within its rights to credit the facts as described by Ferraro over those corralled in the particular group statement which the Organization provided.

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 31st day of October 2023.