Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45064
Docket No. MW-46644
24-3-NRAB-00003-210634

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

(Brotherhood of Maintenance of Way Employes 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 (Herzog) to perform Maintenance of Way and Structures Department work (included, but is not limited to remove and replace switch timbers, track ties, guard rails, tie plates and gage rods) on the East Route near Mile Post 2.95 in the town of Everett, Massachusetts on multiple dates including, but not limited to, April 25, 27 and 28, 2020 (System File S-2024K-243/BMWE 12/2020 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 C. Darcy, E. McKinnon, D. Gordon, B. Hogan, M. MacInnis, D. Enes, C. Marelli, T. Davidson and C. Breedy must now each 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."

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.

Position of Organization:

The Organization asserts the Carrier contracted out to Herzog work that was traditionally and historically performed by the Organization's members. It further maintains the Carrier failed to give the Organization the required notice under the Agreement. The Organization maintains Claimants were ready and available to perform the subject work, and would have performed this work had the Carrier afforded them the opportunity to do so.

Rule 24 of the parties' Agreement addresses Contracting Out, and provides as follows in pertinent part:

> **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. * * ***

Position of Carrier:

The Carrier defended that it had no control or choice over the contracting at issue. It explained that it is under contract with MBTA to provide operations for the railroad, and has no authority to prevent or control MBTA contracting decisions. It pointed out that Keolis CS is limited in its ability to perform work by the parameters established by its Operating Agreement with the MBTA. If the MBTA decides to direct Keolis CS to do any work, it does so through Schedule 9, Part 1 of the Operating Agreement between Keolis CS and the MBTA, which states:

> **1. GENERAL**
>
> **The Operator shall perform any Services not otherwise required in this Agreement, when and as directed in writing by the MBTA, subject to the provisions of Section 4 (Emergency Supplemental Work) of this Schedule 9 (Supplemental Work), such written direction to contain particular reference to this Schedule 9 (Supplement Work) and to designate the work to be done as Supplemental Work. In addition, this Schedule 9 (Supplemental Work) governs the process for payment for construction support services as described in Schedule 3.11 (Construction Support Including PTC). The MBTA shall determine, in its sole discretion, reasonably exercised, the amount and value of Supplemental Work in accordance with the provisions of this Schedule 9 (Supplemental Work).**

The Carrier notes that the MBTA did not use this provision to assign Keolis CS to perform the claimed work. As a result, the Carrier could not assign the work to the Organization, or to anyone else. The Carrier notes that prior on-property awards addressing nearly identical circumstances are directly on point for the proposition that the Carrier cannot be held responsible for work being performed by the MBTA on its own property when the MBTA has not ordered or authorized the Carrier to perform that work. Because the work was entirely outside of the control of the

Carrier, the Carrier contends it fell outside the scope of the collective bargaining agreement.

Analysis:

The Carrier must prevail in this case. There is no evidence that it had the authority or discretion to decide whether or not the work at issue would be contracted out. It was only responsible for work delegated to it under the Agreement with MBTA. Because the work at issue was not assigned to Keolis CS, it was powerless to make any determination about how it would be performed. By offering a statement from a knowledgeable Carrier official, the Carrier has shown this Board that the MBTA and not the Carrier was the contracting entity.

This is not a case of first impression: Arbitrator A. Kenis decided the issue on June 20, 2017, following precedent "which recognized that the disputed work was exclusively an MBTA project that did not involve the MBCR and therefore the Organization had no claim to the work." PLB 7777, Award 5, pp. 4. The precedent on this point is clear and unequivocal, and we choose to follow it here.

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.