

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45075
Docket No. MW-46995
24-3-NRAB-00003-210818**

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 (Manafort) to perform Maintenance of Way and Structures Department work (including but not limited to track surfacing for a culvert replacement) from approximately Mile Post 24 to Mile Post 27 on the Carrier’s Franklin Branch on September 13, 2020 (System File S-2024K-249/BMWE 33/2020 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 T. Cormier, T. McPhee, A. Catino, D. Nickerson and K. Griffith shall 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. *’”**

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:

On September 11, 2020, Manafort, an outside contractor, was seen performing work which the Organization considered to be bargaining unit work. Affected employees filed a claim, which was processed through the grievance procedure to consideration by this Board.

The applicable provision of the parties' Agreement is Rule 24. That provision states 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. * * *

Position of Organization:

On September 13, 2020, outside contractor Manafort performed services which the Organization considered Maintenance of Way Department work. It maintains the contractor employees utilized ordinary Maintenance of Way equipment to accomplish this work. As a result, the Organization has filed a claim alleging that the Carrier denied Claimants their right to work the assignment and earn benefits and compensation in violation of Rules 1 and 24. It insists the work performed by the outside forces was ordinarily and traditionally performed by the Carrier's Maintenance of Way forces and the Carrier did not so much as issue the required contracting out notice in this case, nor did it hold the required good-faith conference with the Organization

Work ordinarily and traditionally performed by the Maintenance of Way employees may only be contracted out after (1) the Carrier has notified the General Chairman, in writing, of its intent to contract out and (2) the Carrier has provided the General Chairman the opportunity to discuss the matters surrounding the contracting out transaction in a good-faith attempt to reach an understanding. The Carrier failed to notify the General Chairman in advance of its intent to contract out this work and when it failed to assert good-faith efforts to reach an understanding with the Organization in subsequent conference. In any event, Claimants were unavailable to perform the work.

Position of Carrier:

On August 17, 2020, in accordance with Rule 24(1), the Carrier sent a contracting out letter to General Chairman, Jason Graham. That letter provided, in relevant part, that the Carrier was planning to contract out "Turnout installation, Grade crossing renewal, Tie and Rail installation, Culvert replacement, Field welding, Track surfacing" on the Franklin Branch. The letter was provided to the Organization twenty-seven (27) days before the work began, well above the fifteen-day requirement contained in the contract.

Unfortunately, through no fault of either party, the two parties were unable to conference the matter until September 18, 2020 -- after the Carrier's contractor had

completed the contracted work. While the parties' schedules did not allow them to meet before the work was performed, that was not the fault of the Carrier, who made every effort to meet with the Organization in advance of the work being performed. Even though that deadline was jointly missed, the Carrier nonetheless engaged in a good faith negotiation with the Organization to address the contracting out and give a clear and un rebutted reason for outsourcing as set forth in the August 17 notice: the surface crew that would ordinarily take the work was unavailable as it was performing another job at overtime rates.

Analysis:

On August 17, 2020, the Carrier notified the Organization of its intent to contract out the contested work. Sheldon Swain responded on behalf of the Organization on August 28, stating he was taking some time off and inquiring about talking on "Monday." On Sept. 7, Program Director John Connors emailed Organization Representative Sheldon Swain asking to speak about it "tomorrow."

This record indicates that the parties were simply unable to conference in a timely fashion; both sides had delayed responses or a failure of response, hence the responsibility for not having a conference is shared. As a result, we cannot find that the Carrier was in violation of its obligation to hold a conference; it cannot very well meet this obligation without the cooperation and availability of the Organization. It follows that there was no contract violation 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.