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

**Award No. 45082**
**Docket No. MW-47038**
**24-3-NRAB-00003-220086**

**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 not limited to, removing old glue plugs and reinstalling and welding in new glue plug rails) at multiple locations on the ERML and Gloucester Branch beginning on September 26, 2020 and continuing (System File S-2024K-2411/ BMWE 06/2021 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 E. McKinnon, C. Darcy, D. Gordon, R. Downes, M. MacInnis, P. Smith, C. Breedy, D. Enes, C. Merelli, A. Secchiaroli, D. O'Connell, D. Secchiaroli and J. Silva 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.**

***Factual Background:***

**The Organization asserts that beginning on September 26, 2020 and continuing, the Carrier improperly assigned outside forces (Herzog) to perform Maintenance of Way Department work (including, but not limited to, removing old glue plugs and reinstalling and welding in new glue plug rails) at multiple locations on the ERML and Gloucester Branch. In its view, this work belonged to Claimants. The resulting claim was fully processed through the grievance procedure to consideration by this Board.**

**Rule 24 regarding 'Contracting Out' governs the situation. That provision states 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 Organization:***

**The unrebutted record reveals that the work performed by the outside forces was ordinarily and traditionally performed by the Carrier's Maintenance of Way forces and that 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. Claimants were readily available to perform the subject work and would have performed this work had the Carrier afforded them the opportunity to do so.**

**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. Yet, the Carrier openly admits it did not give notice or afford the Organization any opportunity to meet and discuss the subject work. Inasmuch as the subject work was proven to be of a sort ordinarily and traditionally performed by Maintenance of Way employees, there can be no question that the instant work is reserved by clear Agreement language.**

***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).**

**Here, 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.**

**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.**