

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45390
Docket No. MW-47501
25-3-NRAB-00003-220681**

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña when award was rendered.

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

PARTIES TO DISPUTE: (

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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 (including, but not limited to, removing old glue plugs and reinstalling and welding in new glue plug rails) at multiple locations on the West Route Main Line on multiple dates beginning on January 9, 2021 and continuing (System File S-2124-K-242/BMWE 23/2021 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 plan 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 (2) above, Claimants J. Clark, J. Falardeau, C. Clark, A. Welch, T. Davidson, C. Scott, P. Smith, D. Enes, A Secchiaroli, D. O’Connell, D. Secchiaroli and J. Silva must now be compensated ‘... all hours worked by contractor employees, to be divided equally and proportionately amongst all Claimants as their respective claimed rates of pay, as well as all credits for vacation and all other benefits for their lost work opportunity. This Claim (sic) is also ongoing and inclusive of all hours worked by the contractor on the**

“aforementioned routes until the contractors are removed from the property, or until this work ceases to exist, whichever comes first.”

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

Claimants J. Clark, J. Falardeau, C. Clark, A. Welch, T. Davidson, C. Scott, P. Smith, D. Enes, A. Secchiaroli, D. O’Connell, D. Secchiaroli and J. Silva have seniority in the Carrier’s Maintenance of Way and Structures Department, and on the relevant dates pertaining to this claim, were assigned and working their respective positions.

On July 1, 2014, the Carrier contracted with Massachusetts Bay Transportation Authority (“MBTA”), a separate entity from Carrier, to operate and maintain commuter rail service. The MBTA owns the commuter rail property, infrastructure, rolling stock and other equipment the Carrier uses to operate the commuter rail service. MBTA retains the right, as owner, to perform work and bid out work on its property in the same locations where the Carrier functions.

If the MBTA requests the Carrier to perform any work on its property, it does so under the terms of Schedule 9, Part 1 of the Operating Agreement between the Carrier and MBTA which states:

The [Carrier] 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 (Supplemental Work) and to designate the work to be done as Supplemental Work.

MBTA contracted with Hitachi to perform contract work on its property. Hitachi then contracted with Herzog to perform the work. On January 9, 2021 and continuing, employees of Herzog, were observed performing Maintenance of Way Department work, removing old glue plugs and reinstalling and welding in new glue plugs at multiple locations on the West Rute Main Line and Freight Main Line. Hitachi and Herzog are separate entities not affiliated with the Carrier.

Position of Organization

In its Position Statement, the Organization claims that the Carrier retained Herzog to perform the work at issue. The Organization maintains that the Carrier's retention of Herzog as contractor violates Rules, 1, 5, 7, 11 and particularly 24 of the Parties' Agreement. Rule 24 requires that the Carrier notify the General Chairman fifteen (15) days prior to the date of retaining a contractor. The Organization asserts that at no time did the Carrier notify the Organization of its intention to contract out this work and seeks contractual remedies for the Carrier's failure to comply with the Rules cited above.

Carrier's Position

The Carrier denies that it violated Rules 1, 5, 7, 11 or 24. The Carrier maintains that MBTA, as owner of the rail property, retained Hitachi, who then retained Herzog, to perform the work at issue.

Analysis

This is a rules case. For that reason, the Organization has the burden of proving its case by a preponderance of the evidence. Generally, in rules cases, the Board will examine the facts brought forward by the Organization and compare and analyze those facts against the relevant agreement provisions at issue.

The burden was on the Organization to prove that the work performed by Herzog was under the Carrier's scope and authority. There is no evidence that the Carrier was under contract with MBTA to perform the work at issue. The Operating Agreement between the Carrier and the MBTA requires that any supplemental work to be performed by the Carrier on MTBA property must be agreed to by MBTA in writing. The Organization did not produce any documentation authorizing the Carrier

to either perform the work in question or retain either Hitachi or Herzog to perform the work in question.

The Board thoroughly reviewed all the evidence submitted by the Organization and finds no evidence to support its claims.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimants not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of December 2024.