

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45410
Docket No. MW-47713
25-3-NRAB-00003-230018**

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 (Folan Waterproofing and Daniel O’Connell and Sons) to perform Maintenance of Way and Structures Department work (including, but not limited to, power washing and cleaning the walls of debris, dirt, soot, etc. and also performing cleaning work at the stations after the washing to the walls) along with Worcester Mainline from 7:00 A.M. until 3:00 P.M. on a Monday through Friday schedule from August 16, 2021 through September 1, 2021 (System File S-2124K-2415/BMWE 87/2021 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/or (2) above, Claimants T. D’Arcy, S. Epstein and B. Hunter must now be compensated for all hours worked by contractor employees, to be divided equally and proportionately amongst all Claimants at their Claimed (sic) rate of pay for the Carrier’s violations, 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

Claimants T. D'Arcy, S. Epstein and B. Hunter have seniority in the Carrier's Maintenance of Way and Structures Department, and on the relevant dates pertaining to this claim, were working their respective assigned 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.

Between August 16 and September 1, 2021, Folan Waterproofing (“Folan”) and Daniel O’Connell and Sons (“O’Connell”) employees were observed performing Maintenance of Way Department work, power washing and cleaning station walls along the Worcester Mainline. Folan and O’Connell are separate entities not affiliated with the Carrier.

Position of Organization

The Organization believes the Carrier retained Folan and O’Connell to perform the work at issue. The Organization maintains that the Carrier’s retention of Folan and O’Connell as contractors 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. The Organization contends that the work performed by Folan and O’Connell was ordinarily and traditionally performed by the Carrier’s Maintenance of Way forces.

Carrier’s Position

The Carrier denies that it violated Rules 1, 5, 7, 11 or 24. The Carrier maintains that MBTA retained Folan and O’Connell 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 Folan or O’Connell 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 a contractor – either Folan or O’Connell—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.