

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35634  
Docket No. MW-35156  
01-3-98-3-908**

**The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.**

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Burlington Northern Santa Fe (former St. Louis-  
( San Francisco Railway Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1) The Agreement was violated when the Carrier assigned outside forces (Track Works, Inc.) to perform routine track construction work building a ‘shoo-fly’ track at Oklahoma City, Oklahoma beginning January 7 through 20, 1997 (System Files B-2101-1/MWC 97-04-21AC and B-2654-1/97-04-21AB SLF).**
- 2) The Agreement was further violated when the Carrier failed to furnish the General Chairman proper advance written notice of its intention to contract out the work in question in accordance with Rule 99 and violated the December 11, 1981 Letter of Agreement when it failed to make a good-faith effort to reduce the incidence of contracting.**
- 3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Track Subdepartment employees J. Worthy, P. Schiller, R.D. Wheeler, G. Whitehead, C. Sowers, L. Sumner, E. Honeycutt and M. West shall each ‘ . . . be paid at their respective rates of pay each eighty straight time hours and forty overtime hours.’, and Welding Subdepartment employees R.E. Matheny and G.A. Sumner ‘ . . . each be paid fifty hours at their respected (sic) rates of pay.’”**

**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.

The Carrier and the Department of Transportation of the State of Oklahoma entered into an Agreement dated November 30, 1995 covering the removal of an existing overpass and the construction of a new overpass. Essentially, the State of Oklahoma sought to widen the overpass bridge over the Carrier's tracks from two lanes to four lanes. In order for the State to widen the bridge, a shoo-fly needed to be built to temporarily divert the Carrier's track around the construction area.

The construction and removal of the shoo-fly track was contracted out to Track Works, Inc. The Carrier contended that the State of Oklahoma hired the contractor and that the project was paid by, and solely benefitted, the taxpayers of Oklahoma. The Organization argued that this was scope covered work that has historically been assigned to its employees, and that the Carrier failed to give the required advance notice that it intended to contract out the disputed work. The Organization further maintained that examination of the Agreement between the State of Oklahoma and the Carrier shows that the project was not exclusively for the benefit of the State, as the Carrier claimed, nor was the Carrier completely reimbursed for the expenses incurred in connection with the shoo-fly track. In addition, the Organization asserted that the Carrier had control over the claimed work, and that the Carrier, and not the State, decided to subcontract to a contractor subject to the Carrier's conditions. In support thereof, the Organization referred to the contract between the Carrier and the State.

Both parties raised a variety of arguments in their Submissions to the Board, but these will not be addressed. No citation of authority is necessary for the well-established

**principle that the scope of the Board's review is limited to evidence and argument presented on the property.**

**The Board has recognized in numerous prior Awards that the Carrier is generally not held liable for contracting out where the work is totally unrelated to railroad operations, or where the work is undertaken at the sole expense of the other party and is for the ultimate benefit of others, or where the Carrier has no control over the work for reasons unrelated to having contracted out the work. See Third Division Awards 33936, 32319, 28941 and 26212.**

**Applying those principles to the instant case, the Board concludes that the Agreement with the State does not constitute contracting out work within the meaning of the Scope Rule. The Agreement stipulates that the Carrier was to furnish labor and materials for the construction and removal of the shoo-fly track, but there is no evidence that the Carrier would have undertaken this project absent the State's need to widen the overpass. The overpass project inures to the benefit of the taxpayers, not the Carrier. Moreover, notwithstanding the Organization's assertions to the contrary, we find that the Agreement clearly specifies that "In accordance with the Federal Aid Highway Program . . ." the Carrier "will not be required to participate in the cost of the project." In addition, while the Organization claimed that the Carrier - and not the State - decided to subcontract the claimed work to a contractor, the Organization failed to submit the necessary proof that would have substantiated that assertion.**

**Overall, the evidence shows that this was not work performed at the Carrier's expense or for its benefit and, therefore, the claimed work does not fall within the Scope of the Agreement. It follows, therefore, that the Carrier was not under any obligation to provide the Organization with advance notice.**

### **AWARD**

**Claim denied.**

**Form 1**  
**Page 4**

**Award No. 35634**  
**Docket No. MW-35156**  
**01-3-98-3-908**

**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 28th day of August, 2001.**