

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36606
Docket No. MW-34250
03-3-97-3-826

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier assigned outside forces to back slope a hill (bank stabilization) at approximately Mile Post 4.5 to Mile Post 4.7 near Mandan, North Dakota from April 24 through May 8, 1995 (System File B -M-397-H/MWB 95-09-26AC BNR)**
- 2. The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- 3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. M. Erhart, M. E. Sandoval, L. R. Metzger, T. A. Boehm, M. R. Hauck, D. C. Bauer, R. A. Ziegler, D. D. Nelson, J. E. Doll, B. W. Hillius, W. J. Wenger, G. Kuntz, R. L. Hohbein, J. A. Muckle, R. P. Hecker, T. F. Roll, T. B. Rakes, A. M. Schwindt, M. V. Renner, L. R. Aichele and D. E. Van Horn shall each receive pay for one hundred thirty-two and one-half hours (132.5) at their respective straight time rates of pay for the work performed by the outside forces.”**

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 Organization asserts that, without advance notice, the Carrier utilized outside forces to back fill a sloped hill adjacent to a slide fence along the Carrier's right-of-way near Mandan, North Dakota. The Carrier responded on the property that it did not contract out the work, but "[a]ll the work was by, and solely done for the benefit of, the State of North Dakota . . . as part of improvements to I-94 Loop (old Highway 10) . . . [and t]he Carrier had neither ownership nor control of this project . . . this was the State's work, done for the benefit of the State, it was nothing covered under the Labor Agreement . . . [a]nd therefore, the Carrier was not required to notify the Organization." The Carrier further asserted on the property that ". . . [t]he State can use their easement on the Carrier's right-of-way or exercise the State's power of eminent domain, if the landowner does object . . . [and] this was not our project." In reply to the Carrier's position that the State of North Dakota, and not the Carrier had the work performed, the Organization requested production of documentation from the Carrier which would demonstrate the Carrier's asserted lack of control. That documentation was not produced.

The guiding proposition is that the burden in this case is on the Organization to demonstrate a violation of the Agreement. Ultimately, the Organization has not met that burden.

First, the Note to Rule 55 states that covered employees ". . . perform work in connection with the construction and maintenance or repairs of . . . tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service. . . ." The Board has therefore held

that “. . . the Carrier is generally not held liable for the 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.” Third Division Award 35634 and Awards cited therein. The work in question in this case was back filling a sloped hill adjacent to a slide fence along the Carrier’s right-of-way. There is no direct evidence that the Carrier controlled the work or the land on which the work was performed. Quite frankly, from this record we cannot determine if the hill in question was “located on the right of way” under the Note to Rule 55 or merely land adjacent to the Carrier’s right-of-way. The record does reveal that the work was performed as part of a highway improvement project undertaken by the State of North Dakota. However, from what is before us, we cannot say for certain that the work was performed on property which the Carrier owned or controlled. But, the burden is on the Organization to make that showing. From the record alone, that evidence is lacking.

Second, on the property, the Organization correctly recognized the evidentiary hurdle it faced. Essentially, because the Carrier claimed lack of control, the Organization was put in the position of having to prove the Carrier’s control by evidence over which the Organization had no control. To prevent the situation which would allow the Carrier to make an assertion of lack of control and then merely state that the Organization has not met its burden of proof because the Organization could not produce evidence refuting the Carrier’s asserted lack of control, the Board has recognized the doctrine that an adverse inference will be drawn against a Carrier’s assertion of lack of control where a documentation request concerning the lack of control is made but not honored. See, Third Division Award 28430 and Awards cited (where as a defense to a contracting out claim, the carrier asserted that it had no control over certain trackage because the trackage had been leased to a company, but the carrier did not produce a copy of that lease when requested by the Organization, with this Board finding “. . . after the Organization specifically made the request for production of the Lease and after having failed to produce the Lease upon which it relied, the Carrier cannot now rely upon the terms of that Lease as a defense to the Claim”). In this case, the Organization therefore wisely demanded production of documentation from the Carrier to substantiate the Carrier’s asserted lack of control or participation in the assignment of the work. However, the Carrier did not produce that requested documentation.

While it certainly would have made the decision making process easier had either side produced documentation obtained from the State of North Dakota, which would have demonstrated who had control over the contracting of the work and the land in dispute (e.g., statements from officials in charge of the highway project), in this case we cannot find the Carrier's failure to produce the documentation requested by the Organization sufficient for us to draw the adverse inference the Organization seeks.

In Third Division Award 28430, *supra*, the adverse inference was drawn because the track in dispute was at one time owned and/or controlled by the Carrier. Third Division Award 28430 relied upon Third Division Award 28229 where, again, at one time the track in dispute was owned and/or controlled by the Carrier. See also, Third Division Awards 31521 (where the Carrier asserted that it sold rail on an "as is where is" basis to a company, but did not produce a copy of the contract after the Organization made three requests for the document and the Carrier did not supply a copy of the document until it filed its Submission with the Board, with the Board precluding the Carrier from relying upon that late produced contract); 30661 (removal of rail and a switch from track owned by the Carrier with the Carrier asserting that the items were sold on an "as is, where is" basis, but the Carrier did not produce the supporting documentation when requested by the Organization). However, in this case, there is no similar evidence that the Carrier controlled the disputed land on which the work was performed - the hill adjacent to the slide fence. The inference the Organization seeks cannot be given where there is insufficient evidence that the Carrier at some reasonably recent time controlled the land on which the work was performed. All we know from this record is that the land was adjacent to a slide fence on the Carrier's right-of-way.

Third, the other Awards cited by the Organization do not change the result. As just discussed, in those cases the records similarly showed that the Carriers at some time owned and/or controlled the disputed property or there was at least a rational argument that could be made that the particular Carrier did so. See e.g., Third Division Awards 30988 (installation of telephone lines at the carrier's division headquarters); 30971 (removal of the carrier's used crossties); 30683 (removal of the carrier's track); 29059 (dismantling of track in the carrier's yard); 28759 (demolition of tool houses on the Carrier's property); 20895 (where the carrier's forces previously maintained the disputed track for approximately 25 years and then claimed it had leased the property to a customer); 20230 (where the contractor "... constructed a conveyor and storage tank on company property ..." which the Carrier later claimed

was leased to another company); 19623 (which involved work of cleaning a drainage ditch between track owned by the Carrier and a highway).

Here, the bottom line is that there is insufficient evidence that the Carrier controlled the hill on which the work was performed which was adjacent to the slide fence on the Carrier's right-of-way. Without more, we must deny this claim.

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 29th day of July 2003.