Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37468
Docket No. MW-36507
05-3-01-3-3

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (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 (Lone Star Railroad Contractors, Inc.) to perform Maintenance of Way work (operate equipment in the building roadbed and track) in connection with a shoofly at the Hebron Siding at Mile Post 692.55 beginning July 27, 1998 and continuing (System File B-2545-3/MWC 98-10-28AJ SLF).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said work or 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 99 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, '. . . Special Equipment Operator G. D. Wakefield be paid at the dozer rate, M. W. Carter at the scraper rate, R. L. Perkins at the packer rate, L. M. McGarry at the truck driver rate, D. L. Rogers at the foreman rate for 280 hours straight time and 70 hours at the time and one half rate each.'"

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.

By letter dated August 26, 1998, the Carrier sent an "informational notice" to the General Chairman, conveying the following information to the Organization, as summarized by the Board, as follows:

* The Carrier was notified that the City of The Colony, Texas, and Billingsley Development Corporation (BDC) required construction of an underpass under Carrier's trackage on Windhaven Parkway in The Colony.

* The project would be funded by The Colony and BDC for motorists who would now be provided a safer route through an underpass.

* To permit opening the right-of-way for the underpass construction, contractor forces will build a shoofly at MP 692.55 on Line Segment 1046 (Hebron Siding).

* Upon completion of the shoofly, Carrier forces will cut into the main line and divert traffic to the shoofly.

* Carrier forces will remove track and ties at the underpass excavation location and the contractor will excavate for and construct the underpass.

* Upon completion of the underpass, Carrier forces will replace the track above and prepare it to handle train traffic; after train traffic is diverted thereto, the contractor will remove the shoofly.

The Carrier's "informational notice" also asserted that the contracting of the above work was consistent with Carrier policy and its "historical practice" of contracting out such work. The Carrier also contended in the notice that the project did not fall under the Agreement's Scope provisions because it was "required and funded by others."

The record properly before the Board furthermore established that by letter dated August 28, 1998, the General Chairman expressed his disagreement with the subcontracting of the work outlined above and requested a conference to discuss the matter. The conference was held on September 2, 1998. However, the parties reached no understanding regarding the matter, the record makes clear.

On September 21, 1998, the Organization submitted a claim on behalf of the above Claimants to the Manager Maintenance Support asserting that, beginning on July 27, 1998, Lone Star Railroad Contractors, Inc., commenced building a roadbed to construct the shoofly. The Organization identified the equipment allegedly utilized by the contractor and asserted that, in April and May of 1998, similar work had been performed by Carrier forces using Carrier equipment just seven miles north of the work currently being performed by the contractor at M.P. 692.55.

The Organization furthermore stressed that the Claimants possessed the skills to perform the work and that the Carrier had the necessary equipment. Thus, it contended that the Carrier violated the May 17, 1968 National Agreement and Rule 99 of the Agreement by assigning contractors, instead of the Claimants, to the roadbed work in connection with the shoofly. The violation includes the fact that the third party contractors had already begun the work at the time the Carrier's contracting notice had been served. Thus, no good faith efforts to assign the scope-covered work to the Organization was ever made in this case, the Organization argued.

In response, the Carrier contended that no notice was necessary because the work was not scope-covered. However, as a courtesy, the General Chairman was given an informational notice. The Carrier additionally asserted that it did not possess the needed equipment and its employees lacked the skills necessary for the timely completion of such a large-scale project. It also said that the Claimants were fully

employed and did not suffer any loss of work opportunity. Finally, the Carrier concluded that the Organization totally failed to prove any violation of the Agreement.

The above captures the essential components of the parties' arguments as advanced during the on-property handling of this claim. In their Submissions to the Board, however, both parties raised other arguments for the first time which we are of course prohibited from considering in our review of this matter. The parties also cited numerous Awards in supposed support of their respective positions that are properly before the Board and we have reviewed these Awards.

For example, we note that the Organization cites Third Division Awards 22783 and 24173, which sustained similar claims for shoofly construction work by contractors on other railroad properties. The Carrier specifically urges the Board to carefully consider Third Division Award 35634, an on-property (former SLSF territory) decision involving the Organization, and a factual situation nearly identical to that involved here. The facts present in that case involved the State of Oklahoma's decision, in 1995, to remove an existing overpass and construct a new one, necessitating the construction of a temporary shoofly by a contractor. In that case before the Board, the Organization similarly argued for a sustaining award on the premise that the work was scope-covered and the Carrier failed to provide the required advance notice and an opportunity for conference. The decision in favor of the Carrier was clear in its *rejection of precisely these contentions, we note.*

Upon our close review of the record, arguments and Awards furnished by both parties to this dispute, we find that several of the Carrier's Awards are directly on point and thus must be afforded the weight of controlling precedent. The Board in Third Division Award 26212 crafted a set of criteria for determining whether contracted work falls within the scope clause under review. Affirmed by the Board in *the above Third Division Award 35634, and reiterated in (Burlington Northern)* Award 12 of Public Law Board No. 4768, the criteria, as set forth by Referee Marx in Award 12, are as follows:

> "(1) Where the work, while perhaps within the control of Carrier, is totally unrelated to railroad operations.
>
> (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on the

Carrier's property and is undertaken at the sole expense of that other party.

(3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work."

As indicated above, the Board in its Award 35634 applied the above criteria to the shoofly construction work at issue in that case, which, again, we view as not unlike the work undertaken by the contractor in this case, and found that the work could be subcontracted.

We hold that Third Division Award 35634 was not palpably erroneous and, as such, directly applies to the present case. Indeed, when the Board applies the above principles to the facts presented by this claim, we independently come to the same conclusion as that which the Board reached in Award 35634. Based on our careful review of record before us, we hold that the contracting work undertaken by The Colony and BDC did not constitute subcontracting within the meaning of the Scope Rule. Specifically, the record shows that, as regards the first criterion, the disputed work was not related to the Carrier's operations, but was performed by the contractor so that the Carrier could continue to operate trains through the construction zone without service disruption, the evidence of record clearly establishes. On that basis, this claim must be denied.

With respect to the second criterion, involving benefit, the record contains no evidence which disputes the contention that the safety benefit associated with use of the underpass inured to the community residents and motorists as opposed to the Carrier.

Third, there is no evidence in the record which refutes the Carrier's assertion that the project was funded by The Colony and BDC, and was not done at the Carrier's expense, or control. From the record as a whole, it is apparent that the construction of the temporary shoofly, built in part by the employees of Lone Star Railroad Contractors, Inc., and by Carrier forces, simply allowed the Carrier to operate trains on its mainline and siding on a continuous basis while the underpass was under construction. Thus, according to the record, the temporary shoofly in and of itself provided no benefit in any material sense to the Carrier, we specifically rule.

Therefore, in light of the factual circumstances and the precedent Awards which the Board has deemed controlling, we conclude that the present claim must be denied in

its entirety. The record makes plain that the work at issue did not fall within the Scope Rule under review. As a result, neither Rule 99 nor the December 11, 1981 Letter of Understanding required the Carrier to provide the Organization any advance written notice or to discuss the matter in conference; but, we note, neither of the Rules prohibited the Carrier from sending the informational notice, nor did the Rules prevent the Carrier from discussing this contracting with the General Chairman. The fact that the notice and these discussions occurred after the work had commenced are not, therefore, evidence of bad faith in this case, we rule.

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 19th day of April 2005.