Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41387
Docket No. SG-41316
12-3-NRAB-00003-100223

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of R. Castillo, L. R. Chavez, Jr., J. R. Cooper, J. P. Granger, J. M. Johrendt and L. E. Riley, for all straight-time and overtime worked by the outside forces beginning October 22, 2006 and continuing until this dispute is resolved, account Carrier violated the current Signalmen's Agreement, particularly Rules 1, 2, and 8, when it contracted with the State of New Mexico Department of Transportation (NMDOT) to upgrade motion devices at existing crossing warning devices at Iselta, New Mexico from Mile Post 914.4 to Mile Post 915 from October 22, 2006 through November 5, 2006 and the installation of Centralized Traffic Control Signal System with Color Light Signals and Electro-code on the El Paso Subdivision from Mile Post 915 to Mile Post 924 from November 6, 2006 through December 6, 2006, causing a loss of work opportunity for the Claimants. Carrier's File No. 35-07-0006. General Chairman's File No. 06-048-BNSF-161-NM. BRS File Case No. 13936-BNSF."

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.

This is the second of two claims, Docket Nos. SG-41315 (Third Division Award 41386) and SG-41316, arising out of the Carrier's sale in late 2005 of an existing freight rail line to the New Mexico Department of Transportation (NMDOT) for use as a commuter rail line (New Mexico Rail Runner Express) in and around Albuquerque, New Mexico. The two claims were originally filed separately but were combined for presentation to the Board, following protracted litigation in the federal courts, which ultimately deferred the claims to arbitration. Both cases arise from the same transaction in which the Carrier sold rail lines, buildings, equipment and fixtures to the State of New Mexico for it to use for a commuter rail service, while retaining an easement to continue its freight operations over the same lines. The issue before the Board is the same in both claims: whether the Carrier breached its obligations under the parties' Agreement when it transferred the responsibility for signal maintenance to New Mexico as part of the transaction.

In Third Division Award 41386, the Board fully addressed the arguments of the parties and laid out its analysis of the issues presented. The issues are exactly the same in this claim. While the two claims differ in their factual particulars – different Claimants, dates, and work locations – as noted above, they were presented and argued to the Board as a single case, without differentiation. The different facts do not warrant a different outcome. Accordingly, the Board's holding in the two claims must be the same. The Board incorporates herein by reference Award 41386. The Board's

analysis and its conclusions in that case apply equally to this claim, which is also denied.

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 25th day of July 2012.

Labor Member's Dissent
to
Third Division Awards 41386 and 41387

Referee Andria S. Knapp

The undersigned respectfully objects to and dissents from the Board's Award No. 41386 and 41387, dated July 25, 2012.

I dissent, for, in ruling that as a result of the sale BNSF no longer had "legal or actual control" over the signals on its reserved right-of-way (Decision at 20), the Board has exceeded its jurisdiction by transforming the BNSF's sale transaction with the State of New Mexico into one the parties never made and the Surface Transportation Board (STB) never approved. The majority recognizes as it must that under the transaction as actually devised by BNSF and New Mexico, BNSF retained the common carrier obligation under the Interstate Commerce Act (ICA) to maintain the right-of-way it reserved for itself in the Rail Corridor it was transferring to New Mexico. But, the majority then ignores the control over who performs the maintenance that necessarily flows from the ICA-imposed obligation to maintain the signals on the reserved right-of-way. The fact that New Mexico obtained a possessory ownership interest in the Rail Corridor, did not give it the right to perform BNSF's maintenance of BNSF's reserved right-of-way. Rather, New Mexico's right to maintain BNSF's right-of-way flows from the contractual undertaking in the Joint Use Agreement (JUA) by which BNSF agreed to have New Mexico's contractor, rather than its own employees, perform the signal work on its retained right-of-way. The fact that the JUA was negotiated and entered into as an integral part of the sale does not change the fact that BNSF never transferred its ICA common carrier rights and obligations to New Mexico, for the STB's ruling that it had no jurisdiction over the transaction meant that it agreed with New Mexico that the transaction transferred no ICA rights or obligations to New Mexico. To rule otherwise, as the majority has done, transforms the transaction into one the ICA never approved. Properly viewed, the JUA is nothing more than BNSF's contracting with a third party to perform work that it has previously agreed with its signalmen would be performed by them. That is contracting-out, which breaches BNSF's agreement with its signalmen.

Contrary to the majority's reasoning, New Mexico's property interest in the signals on the Rail Corridor does not remove BNSF's reserved right-of-way from the scope of BNSF's agreement with its signalmen, for despite New Mexico's ownership of the land, tracks and signals that make up the Rail Corridor, New Mexico never obtained complete ownership of those rail assets, nor complete control over their maintenance. Rather, the Quit Claim Deed for each of the property transfers provides that BNSF "reserves for itself and its successors and assigns an exclusive easement for freight railroad purposes, including, but not limited to, the construction, maintenance, repair, replacement and operation of freight rail and associated facilities, subject to the provisions of the" JUA. Quit Claim Deed at ¶ 1. "Freight rail and associated facilities" has a clearly defined meaning under the ICA, which unquestionably includes signals. It refers to "the road used by a rail carrier and owned by it or operated under an agreement" (ICA § 10102(6)(B), 49 U.S.C. § 10102(6)(B)) and to the "property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership

or an agreement concerning use . . . ." ICA § 10102(9)(A), 49 U.S.C. § 10102(9)(A). Thus, contrary to the majority's belief (Decision at 18-19), BNSF never transferred to New Mexico complete ownership of the rail and "associated facilities" that make up BNSF's retained right-of-way. More to the point, the parties structured their transaction so that BNSF retained all of the ICA common carrier obligations associated with that retained property interest–including what the majority acknowledges is a non-delegable duty to maintain that right-of-way. Decision at 19.

BNSF and New Mexico deliberately structured their transaction to fall under the Interstate Commerce Commission's (ICC), and now the Surface Transportation Board's (STB), State of Maine doctrine in order to avoid placing the transaction and New Mexico under the STB's jurisdiction. As the ICC explained in State of Maine Department of Transportation–Acquisition Exemption, 8 I.C.C.2d 835, (1991): "Under [49 U.S.C.] § 10901, we have jurisdiction over the acquisition of a railroad line by a non-carrier (including a State) where the common carrier rights and obligations are also to be transferred, in whole or in part." 8 I.C.C.2d at 836-37. But, where no such rights or obligations are transferred, the agency maintains that it does not have jurisdiction over either the transaction or the state entity acquiring the rail line. 8 I.C.C.2d at 837; see also, NMDOT–Acquisition Exemption, STB Finance Docket No. 34793 at 2, served February 6, 2006 ("Board authorization is not required . . . when the common carrier rights and obligations that attach to the lines will not be transferred"). As the ICC has explained (Southern Pacific Transportation Co.–Abandonment, 8 I.C.C.2d 495, 506-07 (1992) (emphasis added)):

The underlying rationale [as to whether a transaction falls within the agency's jurisdiction] is that a carrier's obligations to serve can only be extinguished by Commission authority to sell or abandon. The two elements of common carriage, the willingness and the ability to provide service, may not be separated without our authority.

BNSF and New Mexico could have structured their transaction as BNSF's predecessor, the Atchison, Topeka & Santa Fe Railway, did in its sale of rail lines to transit authorities in the Orange County, California area (see, Orange County Transportation Authority–Acquisition Exemption, 10 I.C.C.2d 78, 86-87 (1994)), which is one of the sales referred to in footnote 10 of the majority's decision. In that sale, the Santa Fe transferred control over the maintenance to the acquiring state entity. If BNSF and New Mexico had structured their transaction in that way, they would have separated the willingness from the ability to serve and that would have had two relevant consequences here: First, that transfer of control over the ICA maintenance obligation to the state entity would have placed the transaction and the acquiring entity within the STB's jurisdiction; and second, it would have meant that, since the maintenance was no longer within the control of the selling carrier, it was no longer within the scope of its collective-bargaining agreements. But BNSF and New Mexico for reasons of their own did not want to place either the transaction or New Mexico under the STB's jurisdiction, so they chose the State of Maine route.

They were successful, for the STB found that (NMDOT–Acquisition Exemption, STB Finance Docket No. 34793 at 2-3; emphasis added):

The record shows that BNSF would not be transferring common carrier rights or obligations and that NMDOT would not hold itself out as a common carrier performing rail freight service. The

agreements between NMDOT and BNSF show that NMDOT would acquire only the physical assets but not the contractual rights necessary to conduct, control or interfere with common carrier freight operations on the line. BNSF would continue to provide its freight service over the line. Under these circumstances, we find that NMDOT would not become a rail carrier subject to the Board's jurisdiction as a result of the transaction.

Structuring the transaction so that BNSF retained all of the ICA common carrier rights and obligations has a consequence BNSF refuses to acknowledge: BNSF retains the obligation imposed by ICA § 11101(a), 49 U.S.C. § 11101(a), to maintain its retained right-of-way, and, thus, it has control over who performs that maintenance. The majority recognizes that BNSF retained this obligation, for it states: "As the common carrier under the ICA, BNSF also retained a statutory duty to maintain the line, including the signals." Decision at 14. That obligation can be transferred to New Mexico only with the STB's approval–but BNSF and NMDOT deliberately chose not to seek that approval. Thus, the answer to the threshold question posed by the Tenth Circuit–i.e., "whether BNSF actually transferred the maintenance obligation to New Mexico when it sold the physical assets of the rail line" (BMWED v. BNSF, 596 F.3d 1217, 1227 (10th Cir.), cert. denied, 131 S.Ct. 151 (2010))–is clear: No such obligation was transferred. Since BNSF continues to have that obligation, it had control over who performed the maintenance at the time it entered into the JUA and, consequently, the JUA represents nothing more than BNSF contracting with an independent contractor to perform its maintenance. Indeed, that is exactly what the parties to the JUA intended, for Article IV of the JUA provides that: "The relationship of the Parties as respects all activities hereunder will be that of independent contractors, and nothing in this Joint Use Agreement will be construed as inconsistent with that status."

To excuse BNSF from the consequences of its actions, the majority seeks to rewrite the transaction as presented to the STB by concluding that "once BNSF sold the signal equipment, it no longer had legal or actual control over it." Decision at 20. It reaches that erroneous conclusion by observing that even though BNSF retained the non-delegable duty to maintain its right-of-way, the "ICA permits a common carrier to have someone else do the work." Id. at 19. And here, it notes, the STB was presented with transaction documents that provided for New Mexico to have a contractor perform that maintenance. Id. at 20. Thus, it surmises: "New Mexico's maintaining the equipment appears to have been a non-issue with the very agency charged with determining who is a common carrier. As far as the STB was concerned, BNSF could be the common carrier even if NMDOT did the actual maintenance." Id.

That is correct, for the STB's jurisdiction over the transaction does not depend on who performs the maintenance. As far as the ICA is concerned, it could be BNSF itself (with its signalmen) or it could be a contractor BNSF hires. The STB has no jurisdiction over the entirely separate issue of whether the route BNSF takes to perform its maintenance obligation violates the Railway Labor Act. What concerns the STB in deciding whether it has jurisdiction over the transaction is whether the ICA obligation to perform that maintenance–either the obligation itself or the ability to comply with that obligation–is being transferred in whole or in part. State of Maine, 8 I.C.C.2d at 836-37; Southern Pacific Transportation Co.–Abandonment, 8 I.C.C.2d at 506-07. Here, the STB was never asked to, and never authorized the separation of the ICA obligation to maintain the BNSF's reserved right-of-way from the BNSF's ability to comply with that obligation. This necessarily means that BNSF retains control over how that obligation will be

performed, and its agreement in the JUA to have NMDOT perform the maintenance is simply a contract to have New Mexico, rather than its signalmen, perform that work. New Mexico's common interest in maintaining the signals on BNSF's reserved right-of-way does not relieve BNSF of its–i.e., BNSF's–obligation to maintain those signals; BNSF's reserved right-of-way remains BNSF's "field" within the meaning of Rule 1.

The majority's decision to reform the sale transaction into one that transfers an integral element of the obligation to maintain the BNSF's right-of-way may be politic, but it is not one within this Board's jurisdiction. This Board has to accept the transaction as devised by the BNSF and New Mexico and as presented to the STB. It has no authority to rewrite it so as to transfer the "legal and actual control" over BNSF's reserved right-of-way, including the signals, to New Mexico. That transfer can be accomplished only if authorized by the STB, which BNSF and New Mexico never requested and this Board cannot pretend occurred.

For these reasons, the Organization dissents.

John Bragg

John Bragg
NRAB Labor Member
Vice President
Brotherhood of Railroad Signalmen

CARRIER MEMBERS' RESPONSE TO THE ORGANIZATION'S DISSENT
and
CONCURRING OPINION

to

Third Division Awards 41386 and 41387
Docket Nos. SG-41315 and SG-41316
Case Nos. 12-3-NRAB-00003-100222 and 3-100223

(Referee Andria S. Knapp)

It is significant that the Labor Member's Dissent fails to cite, let alone discuss *Bhd. of Railroad Signalmen v. Surface Transportation Board*, 564 F.3rd 462 (DC Cir., 2011). Counsel for the Signalmen did hand out that case at the Referee Hearing. And it was appropriate that he did so, because he was obligated, by professional responsibility codes, to disclose directly adverse (and very recent) legal authority on the very point at issue in these Awards.

In retrospect, it can be seen that the Brotherhood of Railroad Signalmen had a problem with the sale of rail lines and their signal systems to commuter entities. Instead of seeking to continue to perform the signal maintenance for the new owner, or seeking to represent the employees of the commuter agencies' contractors, BRS began what became a two-pronged campaign to undercut the very structure on which most new urban commuter operations have been based. Represented by Richard Edelman and Michael Wooly, BRS (and others) launched a major effort before the Surface Transportation Board and then in the District of Columbia Circuit Court of Appeals to overturn, as wrongly decided, the decision in *Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad Co.*, 8 I.C.C. 2nd 835 (I.C.C. 1991) (*State of Maine*). That effort foundered in the decision cited above. Meanwhile, represented by John O'B. Clarke, BRS pursued these labor claims on the property, before the federal district court, before the Tenth Circuit and, eventually, before the Third Division. And in these Awards, this effort likewise foundered, because it was based on the exact same fallacious theory.

In both settings, the Organization insists there can be nothing but <u>complete</u> transfers of <u>all</u> aspects of ownership and use (and thereby saddling the commuter

agency with freight common carrier obligations and operations). Anything short of that is not a complete transfer, in the Organization's view, and so the signal maintenance remains entirely with the freight railroad. Accordingly, in the Organization's view, the commuter agency cannot take over maintenance responsibility - not even if it wants to maintain and needs to improve the signal system that it now owns. In both settings, the Organization relies, indeed over-relies on the Interstate Commerce Act's Section 10102 definitions. And in both settings, the same end is sought: to overturn reasonable public policy and to frustrate the desires of the public agency providing commuter service, all based not on the Labor Agreement, but rather on a reading of the Interstate Commerce Act so stringent that not even the agency with responsibility for enforcing that Act is willing to adopt it.

The state of Maine, as well as MassDOT in the recent DC Circuit decision, structured their transactions in the exact same way as NMDOT did in the instant case. In each instance, a rail segment, including all physical assets (among which is the signal system) was purchased (here, in fee simple absolute) by the commuter entity. That public agency assumed the primary maintenance responsibility. The selling carrier retained a permanent easement to continue to conduct its common carrier freight operations and concomitantly retained oversight rights as to the performance of the maintenance function. In *State of Maine* and its progeny (including MassDOT and this transaction) the Surface Transportation Board (and its predecessor, the Interstate Commerce Commission) determined that, because the freight carrier seller reserved the freight rights to the acquired property permanently and exclusively, the commuter agency purchaser did not acquire the "rail line" so that its acquisition of railroad assets by themselves was not subject to the Interstate Commerce Act's authorization requirement in the first instance and, therefore, did not need to be exempted from it. The DC Circuit went on to observe:

> **"...but over time '(the Surface Transportation Board) determined that reasonable restrictions on freight operations are acceptable if necessary to permit commuter operations and the freight carrier has sufficient access to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.' With regard to maintenance and dispatching in particular, the Board**

> explained that 'the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any . . . defects.' We find the Board's policy a reasonable one as it provides the responsible jurisdictional carrier . . . has the opportunity to ensure the tracks are being adequately maintained and available for interstate freight transportation." (Citations omitted, interlineation and emphasis added)

Two observations must be made: first, the agency charged with enforcing the Interstate Commerce Act as well as the Court of Appeals that most commonly oversees administrative agency action are, here, expressly approving both such (not "complete" to the BRS) transfers and the commuter agency taking over primary maintenance responsibility as not being in conflict with the freight common carrier's maintenance obligation. Second, there have been a *lot* of these: as the Court of Appeals noted:

> "The combination of some 60 decisions and no challenge thereto in 20 years, however, suggests that potential opponents deemed such a challenge fruitless, perhaps in recognition that the Board's interpretation of section 10901(a)(4) is reasonable. In any event, that the Board has repeatedly interpreted the statute the same way for 20 years does indeed warrant deference."

That is what the Organization is swimming against, and what it was seeking to have the Third Division overturn. Its main complaint with the Awards, at the end of the day, is that the Referee did not join them. Instead, she reached a more sensible result, one that coheres, rather than conflicts, with the recent review of this situation by the agency with responsibility for enforcement of the Interstate Commerce Act and with the just-months-old Court of Appeals decision upholding the agency's - and not the Brotherhood of Railroad Signalmen's - view.

Because the Organization's Dissent is based on the same faulty propositions as the Organization's briefs before the Surface Transportation Board and the Tenth

Circuit, as well as its Submission[1] in these dockets, it is subject to the same criticisms. First and foremost, it assumes the issue, being based on the proposition that the maintenance obligation within the common carrier obligation can only be satisfied in a single way and triumphs *uber alles*. Second, it totally ignores all of the Railway Labor Act Awards about indicia of ownership and control and the analytical framework, set forth in those precedents, that led this Referee – properly - to this result. Third, it repeatedly insists - without any supporting authority - that there would have to have been a transfer of complete ownership and control, without any gradations, any consideration of relative interests, any recognition of permissible alternatives to its preferred and only solution. Fourth, it treats this situation as unique, ignoring the important fact that this is a *very* well-trodden path: thousands of miles of urban freight railroads have been conveyed, since *State of Maine*, to public authorities who then undertook the construction and maintenance of their own track and signals. Fifth, the BRS's Counsel for these claims continues to center his case not on the Labor Agreement (which, peculiarly for a Scope Rule case, is barely mentioned) but on his conception of the ICA, and then urges that conception on every forum other than the STB. Last, the Dissent ignores the control over who performs the maintenance that necessarily flows from the sale transaction as approved by the administrative agency with jurisdiction[2], an approval that two federal courts have subsequently considered without noting any irregularity and a point that these Awards, the Dissent to the contrary notwithstanding, correctly recognized.

It does not take a rocket scientist to perceive that the author of the Dissent is setting up to take an appeal - somewhere. Asserting, in the second sentence, that the Division "has exceeded its jurisdiction" is, just maybe, a clue. But problems loom. The Division, in these Awards, did no more - and no less - than the task that it was quite explicitly given in Judge Tymkovich's Opinion. The Dissent provides no proof that the Referee improperly went afield, acting outside the instructions that had been laid down for the Division by the Tenth Circuit; rather, once again, the Organization's quarrel is with her result. Instead of exceeding her jurisdiction, Referee Knapp carefully referenced the controlling holding and then went about the

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[1] Compare the Dissent to the Referee's description of the Organization's arguments at Pages 7-9 of Award 41386.
[2] Does anyone seriously think that, if BNSF had simply abnegated or abdicated its ICA common carrier maintenance obligation, the STB was incapable of noticing and then taking appropriate remedial action?

assigned task meticulously, analyzing yard-high dockets with notable care, adhering to precedents, and applying established arbitral standards. And, ultimately, holding rightly, rendering Awards that are in accord with the Surface Transportation Board's recent revisitation of this matter and with Judge Tymkovich's manifest skepticism about Mr. Clarke's argument for the Brotherhoods.

One would think that, with these thorough, careful Awards, these claims will have, finally and at long last, been brought to a conclusion. One would note that the claims have now been adjudicated, at a high level, three times. One would like to believe that the third time is a charm, a definitive resolution based on a careful consideration of the whole record. One would hope that there will be a cessation of these efforts to overturn what had, long and oft, been settled, approved and publicly important arrangements.

Michelle McBride *Michael C. Lesnik*

July 30, 2012