

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 29627  
Docket No. MW-28330  
93-3-87-3-882

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance  
(of Way Employees  
(Burlington Northern Railroad  
(Company (formerly the Colorado and  
(Southern Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned or otherwise allowed outside forces to perform track work (construction of a 'shoo-fly') in connection with a grade separation project on the Golden Branch at Kipling Avenue in Arvada, Colorado (System File BN-86-17/DMWD 86-10-10).

(2) As a consequence of the aforesaid violation, the furloughed trackmen listed below\* shall each receive pay at their respective straight time and overtime rates for an equal proportionate share of the total number of man-hours expended by outside forces in the performance of the work referred to above beginning sixty (60) days retroactive from August 11, 1986 and continuing until the violation is corrected.

\*The Claimants are:

|                 |                 |
|-----------------|-----------------|
| M. Sias         | P. A. Sabella   |
| A. R. Mitchell  | C. M. Martinez  |
| J. J. Gallegos  | J. R. Montoya   |
| R. L. Snook     | J. Rivera, Jr.  |
| R. J. Jaramillo | M. L. Bergheger |
| E. L. Johnson   | R. J. Pate      |
| M. Ezell        | K. S. Schriener |
| J. L. Griego    | C. M. Montoya   |
| C. J. Young     | R. G. Stahl     |
| S. W. Logan     | B. K. Wade      |
| P. M. Nisky     | J. B. Mulhern   |
| D. A. Hunsaker  | J. F. Shafer    |
| T. P. McDonald  | R. W. Conner    |
| J. S. Fonseca   | P. R. Knebl     |

|                    |                  |
|--------------------|------------------|
| D. L. Breidert     | W. H. Glover     |
| P. J. Davenport    | R. Miller        |
| P. A. Morgando     | M. S. Gallegos   |
| H. Patrick         | R. D. Garcia     |
| M. Fonseca, Jr.    | L. E. Sease      |
| C. T. Garcia       | B. D. Hahn       |
| A. P. Sanchez      | B. Brock         |
| W. L. Jackson      | T. Estroga       |
| W. F. Harston, Jr. | M. L. Williams   |
| R. L. Cox          | T. C. Slater     |
| S. L. Hammer       | D. R. Padilla    |
| R. D. Merritt      | S. B. Hart       |
| T. R. Million      | M. D. Roggenbuck |
| G. D. Mitchell     | C. L. Smith, 3rd |
| M. L. Peterman     | T. H. Sweeney    |
| C. Williams, Jr.   | K. M. Wagner     |
| J. L. Maston       | R. E. Jackson    |
| T. G. Andres       | O. T. Marshall   |
| D. J. Bohling      | A. Martinez, Jr. |
| P. J. Dunne        | E. Torrez        |
| A. E. Martinez     | C. W. Morris     |
| M. R. Smith        | E. L. Arasmith   |
| R. Nanney          | S. G. Gayman     |
| F. L. Alicea       | D. E. Kahl       |
| G. A. Garcia       | J. B. Mulhern    |
| G. K. Kirchmer     | M. M. Waida      |
| P. Mecado, Jr.     | K. J. Benaglio   |
|                    | A. Smalls, Jr."  |

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

On April 10, 1986, the Carrier sent the following notice to the General Chairman:

"The City of Arvada plans to construct a grade separation where Kipling Ave. crosses Burlington Northern's Golden Branch Line at M.P. 9.25. I'm attaching a print, BR-2, showing the proposed construction. You will note the project also includes a temporary shoofly track around the bridge site.

The City of Arvada is funding all work on the project and they will contract construction of Bridge 9.25 and the shoofly including the track and crossings thereon. Burlington Northern forces will remove the existing crossing and track, construct track on the new bridge, place and remove a 45 Ft. crossing where the west detour crosses our existing track, and make connections to the temporary and permanent tracks. BN signal forces will perform all crossing signal work on the project."

Subsequently, a conference was held pursuant to a request by the Organization. The following letter of Agreement was the result of the conference:

"This will confirm the conference with Mr. Gulliford of May 22, 1986 concerning construction of the grade separation of Burlington Northern's Golden Branch over Kipling Ave. in Arvada, Colorado.

It was agreed that the City of Arvada will contract construction of Bridge 9.25 and the temporary shoo-fly grade. Burlington Northern forces will remove the existing grade crossing and track, construct track on the new bridge, install and remove temporary crossing where the west detour crosses our existing track, make connections to temporary and permanent tracks, and provide flagmen for protection of trains as required.

We were unable to agree on the construction of the shoo-fly track by contract. This work does not have Organization approval.

If this is your understanding, please sign one copy of this letter in the space provided and return it to me."

Significantly, the Parties did not arrive at an understanding concerning the construction of the "shoo-fly" track. As a result of the Organization's belief that the work was covered by the scope clause of the Agreement, the instant claim was filed.

The Board has many times been faced with similar, and occasionally identical, circumstances. Generally, the Board has held that performance by outside contractors of work of the kind involved here does not violate the scope clause if it is not performed at the instigation, is not performed for the benefit, is not done at the expense and is not under the control of the Carrier. See Third Division Awards 24078 and 23422. There are Awards which do not subscribe to this approach, but they are in the minority.

In this case, the project was clearly at the instigation and completely for the benefit and at the expense of the City. If the City had not wanted a bridge constructed to avoid train traffic blockage there would have been no need for the shoo-fly track. The last criteria is control. It is obvious that the Carrier had input, as is natural, into the project. However, its input was far from control and its participation was not designed to avoid its obligations under the Agreement.

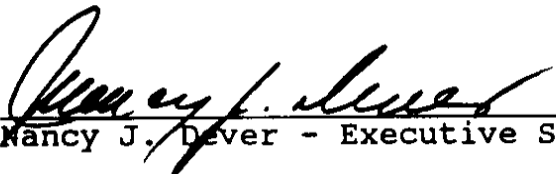
In view of the foregoing, the claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of April 1993.