Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36091
Docket No. MW-34849
02-3-98-3-535

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Denver and
(Rio Grande Western 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 (Commercial Services and Construction, Inc.) to perform Maintenance of Way work (repair track) at Spin Nos. 6047, 6048, and 6049 between 4th and 6th South at Salt Lake City, Utah on March 5 though 29, 1996 (System File D-96-08/BMW 96-188 DRG).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, the foreman and all laborers assigned to the Roper Section during the period involved here shall be compensated at their respective rates of pay for an equal proportionate share of the total number of straight time and overtime man-hours expended by the outside forces on March 5 though 29, 1996."

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.

Claimant D. L. Mata established and holds seniority as a Section Gang Foreman in the Track Sub-Department. The other four Claimants have established and hold seniority as Section Laborers in the Track Sub-Department. The Claimants were assigned to their respective positions and were working on the section gang at Roper Yard during the instant claim period.

The facts of the instant matter do not appear to be in dispute. In February 1996, the Carrier leased some property to an industry, Jack B. Kelly, Inc. The industry in turn contracted with Commercial Services and Construction, Inc. to perform work consisting of the repair of the Dick tracks (Spin Numbers 6047, 6048 and 6049) at Salt Lake City, Utah. This work took place beginning on March 5 and continued though March 29, 1996. Said outside concern used one Foreman and five Laborers to operate one backhoe while replacing ties and rail on spur tracks.

The Organization takes the position that the Carrier demonstrated bad faith, as well as violated the Agreement in this case, when it improperly assigned the relevant work to an outside contractor. The Organization contends that the work in question traditionally is performed by members of the Organization, and that Organization members should have been assigned to complete this work. Further, the Organization claims that the Carrier did not provide proper notice of the work to its General Chairman. Finally, the Organization argues that the Carrier did not engage in good faith discussions regarding the contracting out of the work. The Organization asks that the Claimants be made whole for all time lost.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that it leased the relevant property to an outside firm, and that this outside concern and not the Carrier requested that the relevant work be done. According to the Carrier, when this work was performed, it was within the purview of the Lessee, not the Carrier. Therefore, the Carrier is not responsible for any work that was requested by the Lessee. Finally, according to the Carrier,

controlling precedent has upheld the Carrier's position. Thus, the Carrier asks that the claims be denied in their entirety.

First, we reviewed the lease between the Carrier and Jack B. Kelly, Inc. Specifically, paragraph 5 of the lease states:

> "Industry agrees that if, in the judgment of the Railroad, operations of Railroad make it necessary or desirable that an independent spur or side track be installed to serve the plant of Industry, such spur or side track shall be constructed and maintained and the cost of such construction and maintenance shall be assumed by Industry, or divided between the parties in accordance with the general practice of the Railroad in effect at the time. Railroad and Industry shall enter into an agreement setting forth the basis of construction, maintenance, and operation of said independent spur or side track, and upon execution of said agreement this Agreement shall terminate."

The issue that is raised is whether this paragraph deobligates the Carrier from its contractual requirements to the Organization during the term of the lease. We note that the lease was entered into on February 23, 1996. The work which the Organization claims it was entitled to took place in March 1996, after the lease went into effect.

The Board dealt with a similar issue with the same parties when a Lessee contracted out the improvement of a depot. In Third Division Award 28778, the Board held that the Carrier was not obligated to the Organization when an improvement completed by an outside contractor was subject to the terms of a lease and the contractor had completed the work pursuant to instructions from the Lessee:

> "A lease did exist which permitted Amtrak to utilize and improve the Granby depot. The contract with Rawhide Construction Company was entered into by Amtrak and not by the Carrier. There is no direct evidence that the Carrier had any advance knowledge of contracting out. There is no language in the Lease that provides the Carrier with control, only approval of "style and type of construction." While improvements remain with the Carrier, the work was not shown to be initiated or under the control of the Carrier. Nor does the record demonstrate how, and in what manner, if any, the Carrier would have received any direct or indirect benefits from the improvements."

We remind the parties that the burden of proof in this matter falls to the Organization. After a review of said evidence, we cannot find that there has been sufficient evidence presented to prove that the Carrier was responsible for the work that was contracted by out by the Lessee. Like Third Division Award 28778 cited above, it appears that the work was done at the direction of the Lessee who initiated and completed the work. While the ultimate benefit of the construction went to the Carrier, the lease provided that the Lessee was ultimately the responsible party. Further, there is no evidence in the record that the Carrier was aware of the work, as it was completed during the legitimate term of the lease. Finally, there is no provision in the lease that imposes the terms of the Labor Agreement upon the Lessee. Thus, the Organization has been unable to prove that the work done by the contractor belonged to the Organization's members.

Thus, having determined that Jack B. Kelly, Inc. and not the Carrier was responsible for the work, we find that the Organization has not met its burden of proof and the claim is therefore 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 22nd day of July 2002.