

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37048
Docket No. MW-36036
04-3-00-3-143

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
(The Burlington Northern and 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 perform routine Maintenance of Way and Structures Department work (removal and repour of concrete flooring) in the WFE Building at the Dilworth Car Shop at Dilworth, Minnesota beginning on September 26, 1994 and continuing until October 21, 1994. (System File T-D-853-H/MWB 95-03-17AB 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 Appendix Y.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman M. H. Doyle, Assistant Foreman K. S. Porter, Carpenters T. E. Graten, R. D. Romfo, J. L. Groothuis, C. E. Anderson and Group 2 Machine Operators P. C. Waldahl and T. D. Gunst shall now each “... receive an equal proportion of the twelve hundred and eighty (1,280) hours expended by the outside parties in performing the work. Pay is to be at the applicable Group 2 rates of pay for

the Claimant machine operators, at the B&B foreman rate of pay for Claimant Doyle and in the cement finishers rate of pay for the remainder of named Claimants.”

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.

Western Fruit Express (“WFE”) is a wholly owned subsidiary of the Carrier acquired by the Carrier in 1970 and is engaged in the business of inspecting, repairing and fabricating rail cars and refrigeration units. The Brotherhood of Railway Carmen Division, of TCU and TCU have Agreements with WFE. The Organization does not.

During the period of September 16 to October 21, 1994, WFE engaged an outside contractor to remove and pour a new concrete floor at the WFE Building at Dilworth, Minnesota. That building is leased by the Carrier to WFE. In this claim, the Organization asserts that with respect to the contracted floor work, the Carrier violated the contracting out provisions of its Agreement with the Carrier.

In these kinds of contracting out disputes, the issue is the extent of control retained by the Carrier over the leased property. See Third Division Award 32308 (a denial award where repair work was performed by a contractor on a siding owned by the Carrier and leased to a shipper and the lease required the shipper to maintain the track):

"There is no doubt as to the Carrier's right, unfettered by any Agreement Rule cited here, to lease its property. When this occurs, it is equally well established that work on such leased property does not fall under the Agreement terms when performed by and on behalf of the lessee. There is no indication here that the lease was for other than the legitimate purpose of providing a siding to the lessee in order to receive and transport freight by way of the Carrier's track. The lease agreement specifically assigns track maintenance to the lessee. . . ."

See also, Public Law Board No. 4768, Award 15 (a denial award concerning track work where the Carrier leased the facility, land and trackage to a company (Oakway) which maintained and repaired locomotives that it leased to the Carrier):

". . . [I]t is clear that the lessee here has taken control of the facility and its trackage for its own business purposes, which is to lease and service locomotives for the Carrier and for other carriers. As argued by the Organization, the lease arrangement does give the Carrier certain rights as to "knowledge and control" of the work performed on the leased trackage. The business arrangement is not without indirect benefit to the Carrier. Nevertheless, Oakway operates as a separate entity, and the facility is no longer part of the Carrier's operation."

The Organization has not carried its burden of proof.

In its effort to demonstrate the necessary degree of control retained by the Carrier over the leased premises, the Organization focuses upon various portions of the lease between WFE and the Carrier (referred to as "Northern"):

*** * ***

"3. . . . If at any future time during the terms of this Lease and Agreement it shall be determined by WFE necessary and convenient to add additional trackage or to rearrange or remove the trackage or any part thereto or to add other

property or to rearrange or remove the buildings and facilities or any part thereof, the same shall be done, to Northern's specifications, only after Northern's written consent thereto is first obtained. . . .

4. During the term of this Lease Agreement Northern shall maintain and keep in good repair the railroad tracks and shall make all additions and betterments thereto. Any cost incurred by Northern for maintenance of said track shall be shared by the parties hereto in the same ratio as is provided for rental of that facility in Exhibit A.
5. It is understood that WFE has inspected the buildings and facilities leased hereunder and agrees to take same in their present condition and that Northern shall not during the term of this Lease and Agreement, unless otherwise mutually agreed, be obligated to make any repairs or alterations of any kind whatsoever thereto. During the term of this Lease and Agreement WFE shall assume and bear a ratable share of the cost and expense of all repairs and renewals from time to time necessary to keep the buildings and facilities ready and fit for occupancy in the same proportion as its proportionate use as shown in Exhibit A. Any repairs, alterations, additions and betterments shall be done to the specifications and satisfaction of Northern. In the event Northern performs any such work, WFE shall reimburse Northern on Northern's bills for the cost thereof, in the same ratio as is provided for rental of the facility in Exhibit A. Said repairs, additions and betterments automatically shall become the property of Northern."

The record in this case establishes that WFE operates the WFE Building in its capacity as an entity separate from the Carrier; uses that building for its own business purposes; and the contracting of the floor work was at WFE's behest. While there is an element of "control" exercised by the Carrier over the leased premises, that control is not sufficient to rise to the necessary level that the Organization must demonstrate to prevail in this case. WFE is the lessee. It is not

unusual to require in a lease that before performing repairs the lessee must get the approval or consent of the lessor and that any improvements undertaken by the lessee must meet the lessor's specifications and eventually become the property of the lessor. That is what this lease essentially does. But to prevail, the Organization must show much more.

The lease provisions cited by the Organization are not helpful to its position. For example, in paragraph 5 of the lease, WFE and the Carrier agreed that "Northern shall not during the term of this Lease and Agreement, unless otherwise mutually agreed, be obligated to make any repairs or alterations of any kind whatsoever." [Emphasis added]. Rather, the lease provides that "[d]uring the term of this Lease and Agreement WFE shall assume and bear a ratable share of the cost and expense of all repairs and renewals from time to time necessary to keep the buildings and facilities ready and fit for occupancy. . . ." [Emphasis added]. Thus, ability to "make repairs or alterations" to the floor clearly fell to WFE and not the Carrier. Stated differently, WFE had control for making repairs of the type it did in this case. Further, in paragraph 4 of the lease, WFE and the Carrier agreed that "[d]uring the term of this Lease Agreement Northern shall maintain and keep in good repair the railroad tracks and shall make all additions and betterments thereto" [Emphasis added]. While WFE and the Carrier agreed to the Carrier's control over certain tracks, the absence of any reference to facilities such as the floor in dispute further demonstrates that the control for making those repairs fell to WFE and not the Carrier.

The Organization cites us to Third Division Award 32941 (citing Third Division Awards 26212 and 28312). Those sustaining Awards involved lease arrangements which were made for the period of construction of the disputed track work with the track then leased back to the Carrier for 30 years at \$1.00 per year (Award 32941); a lease for preparation of tracks for use by the Carrier (Award 28312); and leasing property for the express purpose of constructing and maintaining track (Award 26212). The key in those cases was that ". . . by leasing the property for the express purpose of construction of the track an attempt is made to do by indirection that which cannot be directly done." Award 26212.

The circumstances in the Awards cited by the Organization are not present here. There was no subterfuge by the Carrier to avoid the terms of the Agreement.

Form 1
Page 6

Award No. 37048
Docket No. MW-36036
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WFE is a separate entity operating the building under a lease that gave it the ability to make repairs as it did.

The Organization has not carried its burden of proof. The claim shall be 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 June 2004.