

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40778
Docket No. MW-40279
10-3-NRAB-00003-080022**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (
Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(BNSF 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 utilized outside forces (Marta Track Construction) to perform Maintenance of Way and Structures Department work (build new lead track and related work) at the Bel Ayre mine lead beginning on September 12 and continuing through October 10, 2005 [System File C-06-C100-40/10-06-0063(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants B. Prickett, R. Lauer, H. Wetzel, M. Straight, C. Martinek, D. Johnson, R. Shacklett, J. Deeth, M. Rodriguez, G. Prosenick, J. Stover, R. Rainbolt, N. Bell and R. Ariaz shall now each be compensated for one hundred sixty-eight (168) hours at their respective straight time rates of pay.”**

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.

On November 4, 2005, the Organization filed a claim alleging that "Rules 1, 2, 5, 55 and Appendix Y but not limited thereto were violated . . . when the carrier used . . . a contractor to perform maintenance of way work." Specifically, Marta Track Construction built a new lead on the Bel Ayre mine lead.

On December 28, 2005, the Carrier denied the claim stating the Claimants were not available for service on the dates in the claim and that the "work claimed was on track leased to Industry. BNSF did not pay for the work, nor was the work for the operation of the Carrier in the performance of common carrier service."

On February 21, 2006, the Organization filed an appeal reiterating its position as set forth in the claim and noting there was no proof of a lease.

On April 17, 2006, the Carrier denied the appeal stating that "this claim is invalid because the Carrier did not contract to build a new lead on the Bel Ayre mine lead. The industry of Foundation Coal West, Inc., leased the land and built the track" and "the Carrier had no responsibility in the construction and repairs to the track."

By letter dated May 1, 2007, the Organization confirmed the conference held on March 19, 2007. Aside from the arguments reiterated in the claim and appeal and denials, the Organization stated the lease "appears to be open ended and one cannot distinguish when this lease went into effect and for how long" and it contains "confusing and ambiguous statements that lead one to believe that the land was temporarily leased to the industry to have the track built and that after the work had been done the Carrier may again become responsible for the track." The lease "is a sham" that circumvents the Agreement.

In another letter (August 2, 2007) the Organization asked the Carrier for an updated lease because the one provided “was of a temporary nature” because it stated “exact terms of an agreement are still being negotiated by the parties and will not be completed prior to the execution of this lease.” The only date on the lease is July 5, 2005; the claimed work began on September 12, 2005; there is no indication that the lease continued more than one month or beyond August 5, 2005.

The contracted work (building a new lead track) is the kind of track construction work customarily and historically performed by BMW-employees. According to the Organization, “this case turns on one (1) issue and one (1) issue only, i.e., did the ‘evidence’ provided by the Carrier during the on-property handling of this case show that the ordinary track building work at issue was performed during the term of a lease[?]”

A review of the lease shows that it was signed by representatives for the Carrier and the industry. The effective date of the lease was July 5, 2005. The lease states, under TERM, that “unless terminated as hereinafter provided, this Lease shall be in force for the term of One Month from its date and shall automatically continue thereafter until terminated by either party giving to the other thirty (30) days written notice of its desire to terminate the same.” The lease has a term with an effective date and a method spelled out in sufficient detail to terminate or end the lease. This is an evergreen lease that perpetually renews absent action by a party to terminate it.

The “Industry has agreed to maintain the Track and Constructed Track during the term of this Lease” and the “Industry will continue to maintain the Track and Constructed Track after the term of this Lease” although the exact terms of an agreement “after the term of this Lease” were not determined when the lease was executed. There is no evidence showing that the lease was terminated by either party prior to the track construction or even shortly thereafter.

The Carrier was not required to issue notice to the Organization of work performed because this trackage was leased to a third party. As stated in Third Division Award 32308, “[t]here 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.”

Based on the foregoing, this claim is 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 15th day of December 2010.