Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41386
Docket No. SG-41315
12-3-NRAB-00003-100222

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 D. J. Cantrell, J. C. Fulcher and M. Huerta, for all straight-time and overtime worked by the outside forces beginning October 1, 2006 and continuing on a monthly basis 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 perform required federal tests and inspections in accordance with Rules, Standards and Instructions for Railroad Signal System in particular CFR 234 — Grade Crossing Signal System Safety and CFR 236 — Rules, Standards and Instructions Governing the Installation, Inspection, Maintenance, and Repair of Signal and Train Control Systems, Devices, and Appliances on the line of railroad between Mile Post 883.49 and 932.48 on the Glorieta and El Paso Subdivisions causing a continuing loss of work opportunity for the Claimants. Carrier's File No. 35-07-0004. General Chairman's File No. 06-045-BNSF-161-NM. BRS File Case No. 13935-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.

Background

This is the first of two claims, Docket Nos. SG-41315 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 transaction was structured so that the Carrier retained an exclusive easement to provide freight rail service on the line.[1] Although the State of New Mexico now owned the Rail Corridor (as the real property together with buildings, fixtures and equipment was described in the transaction documents) BNSF remained the "common carrier" under the Interstate Commerce Act (ICA) which regulates interstate freight rail traffic. The record establishes that this form of transaction has been common for several decades, as metropolitan areas have developed commuter rail systems on existing freight rail lines. Because they do not carry freight and the traffic is relatively local in its scope, local and regional commuter rail providers do not want to take on the burden of federal regulation associated with providing interstate freight transport. Here, BNSF and NMDOT entered into a Purchase and Sale (P&S) Agreement that transferred BNSF's property interest in the rail lines and associated buildings and equipment to NMDOT, subject to an easement for the Carrier to continue to run freight trains on the lines.[2] A few days later, the Carrier and NMDOT executed a Joint Use Agreement (JUA) the terms of which established

[1] The Carrier also retained its property interest in a portion of the rail yard in downtown Albuquerque known as "The Coachyard," but that is immaterial to the dispute at hand.

[2] There were actually four P&S Agreements and four JUAs, relating to four separate pieces of property and totaling 297 miles of track – the rail lines from Belen to Bernalillo, from Bernalillo to Lamy, and from Lamy to Trinidad, Colorado, and the Coachyard. The four transactions were structured similarly. The events giving rise to both claims occurred on the Belen to Bernalillo line, so it is to that P&S Agreement and that JUA that the Board addresses this Award.

NMDOT as an independent contractor with the Carrier, providing, among other things, signal maintenance services for the subject rail lines.

As a result of the transfer of the Rail Corridor via the P&S Agreement and the JUA,[3] NMDOT took over maintenance of the signal equipment, using an outside contractor that it had selected through a competitive bid process, to perform work that had previously been done by Carrier forces. The affected employees filed these grievances as continuing claims, alleging that the Carrier violated the parties' Collective Bargaining Agreement when it entered into a Joint Use Agreement that assigned signal maintenance obligations to NMDOT, despite the fact that BNSF retained its status as the common carrier, with the ultimate obligation under the ICA for proper maintenance of the signals.

This claim, along with that in Docket No. 41316 (Third Division Award 41387) arrives before the Board after protracted litigation in the federal courts, including a decision by the United States Tenth Circuit Court of Appeals.[4] The claims were deferred to arbitration before the Board as "minor disputes" under the Railway Labor Act.[5]

The Organization contends that the act of transferring maintenance responsibilities from the Carrier to NMDOT in the JUA violated Rules 1, 2 and 8 of the Agreement between the Carrier and the Organization. Rule 1 of the Collective Bargaining Agreement (Scope) provides: "This agreement governs the rates of pay, hours of service and working conditions of all employees engaged in the construction, reconstruction, reconditioning, installation, reclaiming, maintenance, repair, inspection and tests, either in the signal shop, or in the field . . ." of the signal work specified. There is no dispute that the work that is the subject of the two claims before the Board falls

---

[3] At the time of the Referee Hearing before the Board, one of the four transactions, relating to the rail line from Lamy to Trinidad, Colorado, had yet to close, and counsel for the parties indicated informally that it might never close. Geographically this is the longest line in the original deal, at about 170 miles. Presumably the Carrier is still operating and maintaining that stretch of track, along with its signals; the Board is unaware of any claim before it for work related to the line involved in that transaction and this Award does not address that portion of the transaction.

[4] See, Brotherhood of Maintenance of Way Employes and Brotherhood of Railroad Signalmen v. Burlington Northern Santa Fe Railway Company and Secretary, New Mexico Department of Transportation, 596 F.3d 1217 (10th Cir., March 2, 2010).

[5] A "minor dispute" is one that relates to interpretation of an existing collective bargaining agreement, in contrast to a "major dispute," which relates to formation of the agreement.

within the types of work set forth in Rule 1.[6] Rule 2 (Classification) sets out various job classifications (Signal Electronic Technician, Signal Inspector, Maintenance Foreman, and so on) covered by the parties' Agreement. Rule 8 (Basic Day and Starting Time) establishes shifts and starting times for employees covered by the Agreement. Moreover, there is no dispute that the work at issue in these claims was previously performed exclusively by BRS-represented forces.

The Organization acknowledges that the Carrier has the right to sell lines and equipment. The problem here, from its perspective, is that BNSF did not sell all of its property interest in the disputed lines and, in addition, retained its obligations under the ICA for their maintenance to federal standards.[7]

The Purchase and Sale Agreement for the Belen-Bernalillo transaction, dated November 28, 2005, sets forth in the introductory recital the rationalization for the transaction: the Carrier owned property that the State of New Mexico was prepared to take by exercise of eminent domain to use for its commuter rail service. In lieu of such a taking, the Carrier agreed to sell the property to the State, as long as it could have a "permanent and unconditional" easement to continue its freight transport operations on the lines. The introduction continued:

> "D. Conveyance of the property interests and facilities subject to the retained railroad easement by BNSF under the terms of this Agreement and operation of the retained easement under the terms of the Joint Use Agreement will leave BNSF with sufficient property rights to exercise common carrier rights and obligations under 49 USC §11101 and with sufficient rights of access to maintain, operate and renew the railroad line.
>
> E. NMDOT has no intention or ability to assume such common carrier obligation."

The actual undertakings in the P&S Agreement defined the "Property" to include not only the real property (the land) being transferred, but also the buildings, fixtures and

---

[6] The claim set forth in this case relates to required federal testing and inspection of existing signals. The claim set forth in Docket SG-41316 (Award 41387) relates to the installation of replacement equipment in the field.

[7] See, e.g., 49 C.F.R §§ 234 and 236 on testing requirements for signals.

equipment on it: "All of BNSF's right, title and interest in any tangible personal property and fixtures of any kind owned by BNSF and attached to or used exclusively in connection with the ownership, maintenance or operation of the Land or Buildings, if any (the "Personalty", and excluding, among other things, all locomotives and rolling stock of any kind); . . ." (See, P&S Agreement, Section 1.) So along with the actual land on which the rail lines sat, the State of New Mexico also bought the associated equipment, including all signals.

Section 1 of the P&S Agreement defined the "Retained Railroad Easement" as "That permanent and unconditional common carrier rail easement reserved by BNSF in the Deed." A Quit Claim Deed was attached to the P&S Agreement. It described the easement as ". . . 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 Joint Use Agreement (defined below) . . . ." The Quit Claim Deed also incorporated the terms of the JUA "as restrictions encumbering the Property as if fully set forth in this instrument." The Quit Claim Deed also required New Mexico to operate its commuter passenger trains "in a manner that . . . complies with the requirements of 49 C.F.R. Part 238, as such requirements may be amended or waived by the Federal Railroad Administration or any successor agencies. . . ."

The Joint Use Agreement, dated December 5, 2005, defined the "Retained Freight Easement" to mean "the perpetual, exclusive, assignable easement along, over, and through the Rail Corridor to be retained by BNSF from all conveyances described in the Purchase and Sale Agreements to provide BNSF the perpetual, exclusive right and obligation to provide rail freight services and supporting activities." The "Rail Corridor" was defined as "(i) all of the property interests to be conveyed by BNSF under the Purchase and Sale Agreements, as and when each respective property interest is conveyed and (ii) all track, signals, structures, and other rail-related facilities conveyed along with these property interests and affixed to or used in conjunction with these property interests in connection with the provision of Commuter Service or Amtrak Service. . . ." (Emphasis added.)

Section 2.1.A. of the JUA set forth the basic transfer of responsibility from the Carrier to NMDOT:

> "All recitals in this Joint Use Agreement are incorporated as part of the Parties' Agreement. Pursuant to the Purchase and Sale

> Agreements, as the closings occur under each of these agreements, BNSF will convey to NMDOT certain property interests making up the Rail Corridor to enable NMDOT to provide Commuter Service, . . . and BNSF will retain and reserve from the conveyances, among other things, the Retained Freight Easement."

Section 2.1.C. specifically addressed maintenance:

> "From and after the Coachyard Closing, NMDOT will be responsible for management and maintenance of the Rail Corridor, subject to BNSF's Retained Freight Easement . . . ."

Section 2.2 set forth further undertakings with respect to maintenance. Paragraph E obligates BNSF to pay its proportionate share of the maintenance costs for portions of the Rail Corridor used by both parties. Section 2.5 of the JUA obligates NMDOT to use a "private party operator" to operate the Commuter Service, including performance of all maintenance activities. NMDOT retained Herzog Transit Services as "the initial Operator to operate and maintain the Rail Corridor." BNSF reserved the right to approve the Operator and "all contractors performing maintenance of the Rail Corridor."

Article IV of the JUA defined the parties' relationship as Independent Contractors. Finally, in Section 4.1.A., the Carrier undertook to "comply with all the terms and conditions of all applicable agreements with any labor organization representing BNSF's employees concerning wages, benefits, and terms and conditions of employment."

NMDOT filed a notice of exemption under 49 CFR 1150.31 with the Surface Transportation Board (STB) and a simultaneous motion to dismiss the notice because NMDOT would not become a common carrier as a result of the transaction. In a decision dated February 3, 2006, the STB granted the motion to dismiss. In its decision, the STB noted that under the JUA, "NMDOT would take over responsibility for track maintenance." The Board concluded: "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."

The Organization's Arguments

The work at issue falls within the scope of the BRS/BNSF Agreement; that fact has never been disputed. The burden now shifts to BNSF to prove its affirmative defense that it no longer controls the signal maintenance work. Because the Carrier never sold its right-of-way or transferred to NMDOT its ICA obligations to maintain the right-of-way it retained, signal work on the right-of-way remains within the scope of the Parties' Agreement, and the Carrier violated its prior contractual obligation to BRS-represented employees when it allowed NMDOT contractors to perform their work. BNSF did not divest itself of all interests in the rail lines it sold to NMDOT. It retained, and continues to own, a significant interest in the form of an exclusive easement to provide freight rail service and all of the property rights to construct, maintain, repair, replace, and operate that freight rail service. An easement is a property interest that conveys a right to undisturbed use and a concomitant obligation to maintain that property. The easement holder's duty is the same as that owed by a landowner. Certain of those duties are non-delegable. BNSF and NMDOT intentionally structured their transactions so that BNSF did not transfer to NMDOT rights or obligations as a common carrier, and the STB held that NMDOT had not become a common carrier by virtue of the transaction. BNSF retained the ICA obligation to maintain its right-of-way and the JUA's assignment to NMDOT of the responsibility to maintain the line did not transfer BNSF's common carrier obligation to maintain that line. That is, it did not relieve BNSF of its continuing ICA duty to maintain its right-of-way.

Maintaining and repairing rights-of-way is an essential obligation imposed on common carriers by the ICA. If an asset-transfer agreement transfers the obligation to maintain the tracks with the transfer of the assets, the maintenance work no longer belongs to the selling carrier or its employees. The STB has made it clear that while parties may structure their transaction so as to divide common carrier obligations amongst themselves, they may not do so without specific agency authorization. Who has the maintenance obligation is important because ICA § 11101(a) requires the

common carrier to "provide transportation or service on reasonable request." This includes the duty to maintain the line.[8]

As the common carrier, BNSF retained the ultimate responsibility to maintain its right-of-way; the JUA with NMDOT did not relieve BNSF of that obligation. Moreover, the STB never approved that separation of obligations. Thus the JUA is clearly an agreement between BNSF and NMDOT to have NMDOT's contractors perform BNSF's maintenance obligations. As far as the ICA is concerned, railroads may contract with third parties to have those parties perform the railroad's ICA obligation. But it is the railroad that retains the obligation to maintain the lines. Through the JUA, BNSF contracted with NMDOT for the latter to perform BNSF's obligation to maintain the tracks on its right-of-way. This is subcontracting in violation of BNSF's pre-existing contractual obligation to have signal work performed by BRS-represented employees.

The work at issue belongs to BNSF as the common carrier that bears the burden of maintaining its right-of-way. Prior Awards have established that rail carriers may not use contracts like BNSF's with NMDOT to relieve themselves of pre-existing contractual obligations to their employees. Moreover, even though BNSF contracted with NMDOT to perform the maintenance, the Carrier never divested itself of its interests in that maintenance: it agreed to pay its share of the maintenance expense, with billing on a monthly basis. BNSF retained control over dispatching and over the selection of contractors by NMDOT, and it retains significant control over how, when and by whom the maintenance work will be done. When these contractual entanglements are coupled with the ICA maintenance obligation and the property rights BNSF retained, it is clear that BNSF never divested itself of control over its signal maintenance work. Consequently, its actions in entering into the JUA and allowing NMDOT's contractors to perform its signal work breached its agreement with BRS.[9]

---

[8] See, ICC v. Maine Central R.R., 505 F.2d 590 at 593 (2d Cir. 1974): "A railroad has a duty under both the Interstate Commerce Act and under its state franchises to maintain and repair its line and provide service thereon."

[9] Originally, BNSF had objected to the claims as not timely filed. It did not argue that position at the Referee Hearing. From that, the Board concludes that timeliness is no longer an issue and it will not address the matter.

By way of remedy, the Board should direct the Carrier to restore the work to its signal employees and establish a fund into which BNSF will deposit the hourly rates of pay it would have paid to its signal employees if it had not violated the Agreement, continuing until such time as the work is restored to its signal employees. The Board should remand these cases to the property for the parties to confer in an effort to agree upon the amount of hours improperly performed. The Board should also retain jurisdiction over implementation of any remedy that may be ordered.

The Carrier's Arguments

The incident complained of in the Statement of Claim before the Board occurred after the First Closing, when, pursuant to the JUA, NMDOT had assumed responsibility ". . . for management and maintenance of the Rail Corridor . . . ." Moreover, the challenged work occurred on trackage conveyed to NMDOT by the First Closing. Thus, NMDOT was doing maintenance and construction on its own property with its own forces. BNSF had sold the property and the lines were no longer "in the field" as required for coverage under Rule 1 (Scope) of the Agreement. Numerous prior Awards have held that where the Carrier no longer owns the track or facilities on which the work is claimed or has little or no control, the work is no longer covered by the collective bargaining agreement. Here, BNSF did not lease the lines to NMDOT; the Carrier sold them in fee simple, and NMDOT owns the property permanently. Nor was there any subterfuge here. NMDOT let its contract to perform the maintenance work by competitive bidding. NMDOT's improvements will not inure to BNSF's benefit. BNSF did not "order, seek, request or perform" the challenged work. In at least three reasonably recent similar examples where BNSF sold a line to a public entity and continued to run freight trains over the track that was sold,[10] the Organization did not oppose the transactions, nor did it contend that the parties' Scope Rule had continued application after the finalization of the transaction.

The Organization's case rests on a single sentence in the freight easement found in the Quit Claim Deed, that the Carrier reserves for itself ". . . an exclusive easement for freight railroad purposes, including, but not limited to, the construction, maintenance, repair, replacement and operation of freight rail and associated

[10] The sale of the former BN Oklahoma City-Tulsa route to the State of Oklahoma, the sale of the trackage from Tacoma to Lakewood to Sound Transit in Washington State, and the sale of a series of Santa Fe lines in Southern California to a variety of public agencies including the Southern California Regional Rail Authority.

facilities . . . ," subject to the provisions of the JUA. While the words "construction, maintenance and repair" are in the easement, the easement itself was explicitly made subject to the provisions of the JUA – and that document unequivocally placed the responsibility for all maintenance with NMDOT. The negotiation history submitted by BNSF and NMDOT stressed the pivotal importance of the JUA, which intentionally placed maintenance responsibility on NMDOT. There is nothing in the easement that obliges BNSF to maintain the right-of-way it has reserved to itself. The Carrier can enter the territory for the purpose of conducting freight railroad operations, but nothing obliges it to do so. At this point in time, it is operating no freight trains on the lines at all. BNSF may enter to make a repair if, under the JUA, NMDOT fails to do so after notice and an opportunity to correct the problem, but there is nothing in the transaction documents that requires it to do so. An easement is an entitlement, not a requirement, and a privilege, not a duty. Absent any duty or obligation, the Organization cannot show that the territory and the signal facilities covered by the First Closing were still "in the field" within the meaning of the Scope Rule.

The Organization's argument that BNSF has an inescapable maintenance obligation as a common carrier under the ICA is outside the jurisdiction of the Board to determine. There is a wealth of precedent for the proposition that RLA arbitrators should not engage in statutory interpretation. The Board's job is to determine whether there was a violation of the parties' Collective Bargaining Agreement. If BRS wanted to raise this issue, it should have done so before the STB or in federal court. The duty to provide common carriage over a line can exist separately from the duty to maintain the line. Railroads frequently divide these duties through various forms of joint or partial ownership of rail lines, such as trackage rights agreements and leases.

New Mexico wanted to maintain its own property under the arrangements it made, and there is nothing wrong with that. There is no basis in the BNSF/BRS Agreement for ordering the unwanted involvement of BNSF's signal forces. The sale of the lines was anything but subterfuge: BNSF is already off the lines, and the Board should not put BNSF forces back where they are neither wanted nor required to be. The claims should be denied.

The Opinion of the Board

This Award addresses the first of two claims, Docket No. SG-41315, that were originally filed separately, but were combined for presentation to the Board. 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 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.

The Board's function is to interpret and apply the parties' mutual undertakings as expressed in their Collective Bargaining Agreement, which is a private contract. The Board sits neither as a public court of law, charged with interpreting both common and statutory law, nor as a government agency that is tasked with applying regulatory standards to the entities within its jurisdiction. That being said, determining and interpreting both the facts of any individual claim and the terms of a Collective Bargaining Agreement sometimes require an arbitration panel to look beyond the four corners of the parties' Agreement. In remanding this case to the Board for arbitration, Judge Tymkovich of the United States Circuit Court of Appeals for the 10th Circuit addressed that issue. In urging the Court to classify the matter as a "major dispute" to be resolved in federal court rather than a "minor dispute" subject to determination by the NRAB, the Organization argued that the Board has neither the jurisdiction nor the expertise to examine and evaluate such matters as the transaction documents, the STB's decision regarding the transaction, or BNSF's obligations under the ICA – all of which are necessary to any determination that BNSF transferred the maintenance obligations to New Mexico when it sold the physical assets of the line. The 10th Circuit disagreed:

> ". . . [T]he workers are correct that the Adjustment Board must determine whether BNSF actually transferred the maintenance obligations to New Mexico when BNSF transferred the physical rail line. The rail workers will be entitled to show that BNSF retained control over maintenance obligations on the freight easement. To resolve that question, the Adjustment Board will have to consider several issues, including an interpretation of the line-transfer documents and the JUA, as well as the rail workers' contention that BNSF retained all the rights and obligations of a freight common carrier under the ICA.

* * *

> [T]he rail workers argue that the Adjustment Board does not have jurisdiction to review the ICA, the STB's decision, or the sales documents in answering the threshold question, and that even if it did, it is not equipped to do so.
>
> The rail workers' arguments fail because they cannot rebut the undisputed fact that the only source of their right to work is the CBA. They have no claims independent of it. That the Adjustment Board will have to consider these issues related both to the interpretation of the CBA and its application does not change this fact. Naturally, the Adjustment Board will look to documents, cases, statutes, and past practices outside the four corners of the document to do that. In the end, the Adjustment Board must still determine whether BNSF violated the CBA. And the Adjustment Board is perfectly capable of reviewing whether BNSF actually divested itself of maintenance obligations, or whether the line-sale transaction was a subterfuge to evade the requirements of the CBA." (Slip Opinion, Pages 17—19, citations omitted.)

The Tenth Circuit merely articulated a commonplace reality in industrial relations. Employers and unions do not negotiate their agreements in a vacuum, any more than the employer's business and the employees' work take place in a vacuum. Boards and arbitrators are routinely required to evaluate contract claims in the context of external events, including other contracts, statutes, and regulatory authority. In this case, the Organization is not claiming that the Carrier breached the ICA, and the Board is not charged with determining whether the Carrier violated the ICA or any other federal statute. The Board's charge – as it is in any arbitration – is solely to determine if there has been a violation of the parties' Collective Bargaining Agreement.

Under Rule 1, the Collective Bargaining Agreement ". . . governs the rates of pay, hours of service and working conditions of all employees engaged in the construction, reconstruction, reconditioning, installation, reclaiming, maintenance, repair, inspection and tests, either in the signal shop or in the field . . ." of signals and signal-related work. Prior to the sale of the rail lines (or the "Rail Corridor" as it is referred to in the transaction documents) BRS-represented employees performed all signal work on the lines that were sold. Thus, there is no dispute that the work at issue was originally scope-covered work under the parties' Agreement and that Carrier

forces had the right to be assigned to perform it. Had BNSF contracted out the work directly, it would have been in violation of the Agreement.

But this claim arose after BNSF had sold the Rail Corridor, including all of the signal equipment, to the State of New Mexico. The Organization does not dispute the Carrier's right to sell lines and equipment. In the ordinary course of things, there would be no question that once BNSF sold the signal equipment, it would no longer be covered by the Collective Bargaining Agreement or subject to its requirements. If the Carrier no longer owned the equipment, it would have no obligation to maintain it. That obligation would fall to the new owner, i.e., the State of New Mexico. Here, however, the Carrier sold the underlying property while retaining a property interest in the form of an exclusive freight easement that permitted it to continue its freight rail operations as it had before, uninterrupted. As the common carrier under the ICA, BNSF also retained a statutory duty to maintain the line, including the signals.

The threshold issue for the Board to determine is whether the signal work in question was still covered by the parties' Scope Rule even after the Carrier sold the equipment to the State of New Mexico. If it was not, the Agreement no longer applies to it and there was no violation of the Agreement when New Mexico's contractor performed the signal work. The thrust of the Organization's argument is that the Carrier's reserved rights and obligations in the Rail Corridor are so substantial that it has retained effective control of the property sufficient to conclude that the work remains ". . . . in the signal shop or in the field . . ." as required under the Scope Rule. The Carrier breached its pre-existing obligation under the Agreement to assign the signal work to its forces when it transferred the responsibility for maintenance to the State of New Mexico in the JUA. The Carrier's position is that once it sold the Rail Corridor, it no longer had either ownership or control of the property or the signal equipment, and the work was no longer its to assign to anyone.

It must be noted that the mere fact of the sales transaction does not release BNSF from its obligations under the Collective Bargaining Agreement. Section 4.1.A. of the JUA requires BNSF to ". . . comply with the terms and conditions of all applicable agreements with any labor organization representing BNSF's employees concerning wages, benefits, and terms and conditions of employment . . . ."

The Board must examine the transaction to determine whether transferring the maintenance work was an integral part of the deal, so that the Carrier, in the words of the Tenth Circuit, ". . . actually divested itself of the maintenance obligation . . ." when

it sold the rail lines. If it did, the signal maintenance work is no longer "in the field" within the meaning of the parties' Agreement because the Carrier no longer owned it. None of the many Awards cited by the parties is entirely on point, but they do indicate what criteria the Board has looked at in the past in determining whether work remains within the scope of the parties' existing collective bargaining agreement in similar situations. As summarized in Third Division Award 23422:

> "Generally, we have adhered to the proposition that where the disputed work is not performed at the Carrier's instigation, not under its control, nor performed at its expense and not exclusively for its benefit, the work may be contracted out without a violation of the Scope Rule."

(See also, Third Division Awards 28778 and 32274.) The common analytical thread in these cases is the extent to which the Carrier retains control over the work in dispute.

The problem here arose in part because even though ownership of the Rail Corridor had changed, the Carrier continued to run its freight operations over the same lines much as it had before the sale. It is easy to understand why the Claimants filed the complaint in this case: same tracks, same trains, same signals, same work – but all of a sudden they are told that the work is no longer theirs to perform. It may have appeared to employees out in the field that nothing had changed, but in reality there was a significant change: BNSF no longer owned the property. And an equally big change was on the horizon. A critical element in this case is the transformation of the Rail Corridor from a primarily freight rail line with effectively one user[11] to a primarily commuter rail line with multiple users. Prior to the sale, freight traffic had been the primary use of the rail line. After the sale, the primary use would (eventually) be the New Mexico Rail Runner Express commuter service. What had once been BNSF's near-exclusive freight line was now subject to joint use with the new owner for its commuter rail service.

In addition, this is not a case where two parties share joint ownership of property and thus have equal rights of control. BNSF previously owned the actual track, buildings, fixtures and equipment located on the Rail Corridor. Now, even though it is operating in exactly the same geographic location, it runs its freight trains

---

[11] The record indicates that there is Amtrak service on the line as well, but the Board's focus is on the impact of the New Mexico Rail Runner Express commuter rail service on the Carrier's freight operations.

on someone else's property, by virtue of an easement that permits it to do so. The easement is not a traditional type of easement that forecloses use by the landowner in favor of the holder of the easement. The "exclusive" easement retained by the Carrier is exclusive only as to freight rail operations. It is not the same as the exclusive right to use the Rail Corridor (other than the fact that two trains cannot occupy the same track at the same time). With New Mexico as the owner of the Rail Corridor, its rights and interests take precedence over those of the Carrier. BNSF may be contractually committed to having its employees perform its signal work, but NMDOT wants its employees (or contractors) to perform its signal work – and they are, for the most part, the same signals. More importantly, they are owned by the State of New Mexico, not the Carrier. If BNSF had continued to retain exclusive use of the Rail Corridor after the sale, the argument in favor of having signal maintenance, testing and installation done by its forces, as it was in the past, would be much stronger. Instead, the exclusivity here is limited to freight service that has to share the Rail Corridor with NMDOT's commuter rail service. With two different uses of the Rail Corridor came two different sets of maintenance responsibilities, one for freight rail, and one for commuter rail.

With the sale, the Rail Corridor's primary use shifted from freight traffic to commuter rail traffic. Simply purchasing the Rail Corridor was not enough to establish a commuter rail service, however. New Mexico had to engage in extensive renovations and new construction in order to transform the freight lines into commuter lines, with commuter stations and platforms, ticket facilities, parking lots, and so on. Exhibit A to the JUA listed the "Commuter Improvements" that were necessary: all five of the "committed projects" involved "signalization." During the negotiations the Carrier and NMDOT made provisions for the State of New Mexico to undertake the construction and renovations it needed for its purposes, and to take the lead on all maintenance work, including the signals. Of necessity, the Carrier's maintenance needs took a back seat. As the common carrier, BNSF had to ensure that the rail line was maintained to a certain standard. Equally, the State of New Mexico had its own minimum maintenance standards to meet for commuter rail service. The JUA preserved BNSF's ability to ensure that the Rail Corridor would be maintained to federal standards under the ICA, but with NMDOT (through its contractor) in charge of the work.

It is against the backdrop of the switch from exclusive use to shared use of the Rail Corridor that the Board now turns to consider the transaction and the nature of the interests that were conveyed by the Carrier to the State of New Mexico. In October 2009, NMDOT issued a Project Development History of the Rail Runner project. The

document recaps the State's development of the project, including the negotiations with BNSF. It describes what was required to turn a freight and long-distance passenger rail line into a combined freight, long-distance passenger and commuter rail line. The commuter rail operation required track and signal improvements to expand capacity for all users, as well as construction to add new commuter-specific services. Coordinating all three uses was a major consideration, involving the construction of new sidings to minimize disruption of service for any of the three users (BNSF, Rail Runner, and Amtrak). Most importantly, New Mexico's perspective, at least as expressed in the History, supports BNSF's position that the Carrier transferred responsibility for signal maintenance as an integral part of the entire transaction. The History states:

> "The Joint Use Agreement defines the ongoing relationship between New Mexico and BNSF for use of the rail line purchased by New Mexico. A key concept of the agreement is that New Mexico owns the corridor and BNSF becomes a tenant of New Mexico. As owner of the corridor New Mexico controls its own destiny." [At Page 44]

One of the "important rights" identified by the State in the History is ". . . capital improvements are determined by New Mexico, not mandated by BNSF." It is clear that the State of New Mexico was sensitive about, and committed to, retaining sovereignty as the new owner of the Rail Corridor.

Transferring the responsibility for maintenance of the Rail Corridor to the State of Mexico was not an afterthought. It was a natural consequence of the State of New Mexico's purchase of the real and physical property, especially in light of the work needed to develop the Rail Runner Express line, and an integral part of the transaction from the beginning of the negotiations between the Carrier and NMDOT. Because both entities would be using the Rail Corridor, negotiating how they would use it jointly was as important as negotiating the actual transfer of the real property rights. New Mexico wanted complete control over the Rail Corridor it was buying, including control over its maintenance. The fact that the P&S Agreement and the JUA were not executed on the same day is immaterial. By incorporating the JUA into the Deed, the Quit Claim Deed makes it very clear that the P&S Agreement and the JUA were two halves of a unitary transaction. As such, it is impossible for the Board to conclude that the maintenance responsibility was separable from the rest of the transfer of assets. When the Carrier sold its interests in the Rail Corridor to the State of New Mexico, the responsibility for maintaining the Rail Corridor was part of the sale. As the common

carrier, BNSF had to negotiate minimum maintenance standards into the JUA in order to ensure that its responsibilities as the common carrier would be met, but those standards did not change the fact that BNSF no longer owned or controlled the signal equipment or its maintenance. There is no evidence that the Carrier was trying to circumvent the terms of the parties' Collective Bargaining Agreement when it agreed to transfer responsibility for maintenance of the property to New Mexico in the JUA, and every indication that New Mexico wanted and indeed required the responsibility, given the size of the Rail Runner project.

The Organization contends that even after the transfer of assets to New Mexico, the Carrier retained sufficient control to warrant a finding that it had retained control of its maintenance obligation, bringing it within the scope of the Agreement. After reviewing the facts in light of the criteria set forth in Third Division Award 23442, the Board disagrees. The signal equipment was sold outright. The JUA includes a number of provisions through which the Carrier maintains its obligations as a common carrier, but they do not result in the Carrier having significant control of the maintenance work on the signals it sold. Having knowledge of the contracting out is not the same as having control over it. BNSF must approve any new contractor that New Mexico wants to use. That is an important power, but not nearly at the same level as deciding to change contractors or what maintenance to undertake and where, when and how. The fact that BNSF pays a proportionate share of the maintenance costs does not establish that it has control over maintenance; one would expect users of a jointly shared facility to have to pay for their share of the costs. The fact that BNSF receives a benefit from the maintenance, as it surely does, is not enough to establish its control: the criterion used in earlier decisions by the Board was exclusive benefit to BNSF of the work. As it is, New Mexico and the Carrier both benefit from the maintenance work done by New Mexico. Even the level of maintenance required is not subject to control by BNSF: under the JUA maintenance must be done to federal standards – which are outside BNSF's control.

Moreover, the ultimate legal obligation to maintain the rails, tracks, signals and other appurtenances remains with the common carrier, or BNSF. It is, in that sense, a non-delegable duty. But that does not mean that the common carrier is required actually to perform the maintenance work itself. The ICA permits a common carrier to have someone else perform the work. Crucial to this case, the STB had to evaluate whether the State of New Mexico had become a common carrier as a result of the purchase of the Rail Corridor. The STB explicitly acknowledged that the State would be doing the maintenance work and still found that it had not become a common

carrier. New Mexico's maintainance of 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. BNSF has the ultimate obligation to ensure that the signals are maintained to standards set by the federal government – which explains many of the undertakings and caveats in the JUA. Should New Mexico fail in its responsibilities, BNSF could, after proper notice, go in to correct the problem.

When all is said and done, the record establishes that once BNSF sold the signal equipment, it no longer had legal or actual control over it. The case is complicated by the fact that the equipment has not gone anywhere; it remains "in the field" – literally – but the field no longer belongs to BNSF. BNSF has the ultimate obligation to ensure that federal standards for freight rail traffic are met on the lines, but that does not give it the right to manage how the new owner meets those standards, much less require the new owner to use BNSF forces to perform the signal work. Should New Mexico fail to maintain the lines and signals to ICA standards – a "Worst Case Scenario" – BNSF would be required as the common carrier (and the JUA permits this) to step in and ensure that those standards were met. In that event, under its Collective Bargaining Agreement with the Organization, the Carrier would be required to use its forces to perform any maintenance work on signal equipment, as set forth in Section 1 of the Agreement. For now, however, the signal maintenance work at issue in this claim is no longer subject to Rule 1 (Scope) of the parties' Agreement and/or its terms. The 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 25th day of July 2012.