

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42346
Docket No. MW-41758
16-3-NRAB-00003-110379**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Brotherhood of Maintenance of Way Employes -
(Division IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former St. Louis-San
(Francisco Railway 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 Maintenance of Way work (build section building) in Jonesboro, Arkansas, on the Springfield Division, beginning on October 27, 2008 and continuing through December 18, 2008 (System File B-2814-17/12-09-0027 SLF).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 99 and the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Fry, B. Sills, K. Johnson, Jr., H. Moore, J. Burrow, L. Rogers, S. Mitchell, J. Blackburn, D. Henderson, R. Smith, G. Boylan and J. Cline, Jr. shall now each be compensated for seven hundred and twenty (720) 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.

The essential facts of this case are not in dispute. At the time of the incident leading to the claim, the Claimants were assigned to their regular positions in the Carrier's Structures Department. During the period of October 27 through December 18, 2008, the Carrier executed a build to suit agreement for the construction of a 2,500 square foot Section Building for the Track Department in Jonesboro, Arkansas, which is located on the Springfield Division. The builder purchased property located and approved by Carrier Officials for the construction of the building.

By letter dated December 23, 2008, the Organization notified the Carrier that the Claimants' seniority was not respected when the Carrier contracted out Maintenance of Way Employees' work. Specifically, the Claimants stated that to their knowledge, all buildings on the Thayer South Subdivision have been built and maintained by B&B gangs and not by contractors. The Organization alleged that the Carrier violated Rules 2, 3, 4, 31, 32, 33, 42, and 99 of the August 1, 1975 Agreement. The claim was denied by the Carrier by letter dated February 24, 2009.

The Organization further appealed the claim, which continued to be denied by the Carrier. The claim was subsequently appealed, up to and including conferences on the property on November 18, 2010 and January 18, 2011, after which it remained in dispute.

It is the position of the Carrier that it did not own the disputed property until January 2009 - outside the Organization's claim period. Specifically, it points to the Warranty Deed, executed on January 15, 2009. Moreover, the Carrier references its

Build-to-Suit Purchase Contract with Stonebridge Construction, LLC, and argues that it did not serve to bring the property or work under the scope of the Parties' Agreement. It contends this contract provided specifications and that the Carrier had the right to refuse purchase until the final product was completed to its satisfaction. The Carrier insists there are numerous Awards in support of its right to purchase equipment, material, and buildings without violating the Agreement.

Notwithstanding the specifics of its property purchase, the Carrier contends there is no evidence to support the Organization's claim and alleged damages. It notes that the Claimants were fully employed, or voluntarily absent during the claim period. Further, it points out that the Claimants worked overtime and double time in addition to their regular assignments during the claim period. Accordingly, the Carrier urges the denial of the claim was justified.

At the outset, the Organization argues that the Carrier contracted out construction of the Maintenance of Way Office Building without providing proper notice, and therefore violated the Agreement. It maintains that this type of construction work has been performed by BMW-represented employees, who are able, skilled, and available to perform the work. In support of its position, it points to statements provided by Claimants Cline and Fry.

The Organization asserts that the Carrier retained full control over the property, and that the construction company did not maintain any control, except to construct the building to the Carrier's specifications. It draws attention to the Carrier's Build-to-Suit Purchase Contract, "Agreement of Rights Under Contract," and Warranty Deed.

Lastly, the Organization insists the new construction constitutes an "agreement" which falls under the scope of "Notice" required under the Parties' Agreement. It suggests the Carrier's property transaction was executed to work around the Agreement, and thereby was an attempt by indirection. For these reasons, the Organization urges the claim be sustained.

The Board carefully reviewed all the evidence. We find the Carrier was within its rights when it chose not to utilize BMW-represented employees to perform work on the property in question. Specifically, Section 7 in the Build-to-Suit Purchase Contract indicates the Carrier did not own the building until after the Closing, which was evident through the Warranty Deed. As a result, the Carrier's responsibility to

provide an advance notice of intent to the Organization is irrelevant because the Agreement's Scope Rule covers only property owned by the Carrier.

Accordingly, the claim must 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 28th day of July 2016.