

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44960
Docket No. MW-46764
23-3-NRAB-00003-210739**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (AMTRAK)
(-other than Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it allowed outside forces (RailPros) to perform Maintenance of Way work (flagging work) at or near the ‘Old Post Office’ located at approximately Mile Post 467.59 in Chicago, Illinois beginning January 20, 2020 and continuing (Carrier’s File BMW-158494-TC NRP).**
- (2) The Agreement was further violated when the Carrier failed to comply with advance notification and conference provisions in connection with the Carrier’s intent to contract out the subject work.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Moreno, J. Gleason, K. Green, M. Locicero, T. Judkins, L. Redmond, J. Gardner, J. Crespo, E. Augle, D. Fuentes, J. McNeilly, E. Flores, V. Williams, A. Matyszczyk, S. Lalinsky, A. Negrete and R. Mendoza shall now receive an equal and proportionate share for all hours (straight time and overtime) expended on the project by the outside contractor payable at the Claimants’ respective 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 Claimants maintain seniority within the Carrier's Maintenance of Way Department. For several months prior to the dates involved herein, the Carrier assigned its own Maintenance of Way Department forces to perform flagging work in connection with the Jones Lang LaSalle Americas ("JLL") project involved in this dispute.

On July 26, 2019, the Carrier provided notice to the Organization:

As a courtesy, I am notifying you that Jones Lang LaSalle Americas has advised that it intends to enter into a contract with a qualified contractor to provide flagging protection services as necessary for its activities associated with structural repairs of the Old Post Office, effective August 12, 2019 for approximately one year. The Old Post Office is adjacent to Amtrak property at MP 467.59 in Chicago, IL. The work being completed by Jones Lang currently requires two flaggers five days a week for 8-hour shifts and every other weekend during 55-hour outages. Amtrak forces in Chicago are fully engaged in railroad projects and routine maintenance making it difficult for Amtrak to provide all flagging services for non-railroad projects such as this.

Even though Amtrak is not paying for or benefiting from the contractors discussed in this letter, I am notifying you of a contractor's presence on the property.

The Organization requested a contracting conference and the parties conferenced on August 2, 2019, but reached no agreement. The Union requested a site visit and to discuss the matter further.

On November 1, 2019, the Carrier sent this notice to JLL:

Jones Lang LaSalle has an active Temporary Permit to Enter Upon Property (PTE) at the above listed location. Please be advised that Amtrak will soon cease its flagging services in connection with your PTE. To continue your work, you may make arrangements for flagging with an Amtrak approved flagging service. At this time, RailPros is the only Amtrak-approved flagging service, and can be reached as follows:

Sean Quigley

Please find attached a replacement PTE that accounts for flagging services to be provided by an Amtrak-approved flagging service. Please sign and return to me at the address below. Once you have made arrangements for flagging, please advise me of the start date of those services and Amtrak will sign and return your replacement PTE.

In December 2020, the parties discussed scheduling another contracting conference. Assistant to the General Chairman, Steven Stearn gave this statement,

Sometime during the first full week of January 2020, Ms. Clinton called me with the advisement that the project would now go forward using BMWED employees for the protection portion. Ms. Clinton advised that the contractor working on the Old Post Office was ready to go and the 3rd party contractor protection forces were not. Ms. Clinton said she would send me something advising that Amtrak's notice would be rescinded.

On January 20, 2020, the Carrier removed the flagging work from Maintenance of Way Department forces. From that point forward, RailPros, an outside contractor, performed all aspects of the disputed flagging work at or near the "Old Post Office" located at approximately Mile Post 467.59 in Chicago, Illinois.

In a letter dated February 19, 2020, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated April 13, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that it has presented a *prima facie* claim of the Carrier's violation of the Agreement. The Organization contends that it has presented evidence that the Scope-protected work took place as alleged. The Organization contends that there is no question that providing flagging/track protection is typical Maintenance of Way work. The Organization contends that such work has customarily

and traditionally been assigned to and performed by the Carrier's Maintenance of Way forces and is contractually reserved under the Agreement.

The Organization contends that when the Carrier plans to contract out work within the scope of the Agreement, it must give the General Chairman at least fifteen days' advance written notice of its plans to contract out the work and if requested, meet with the Organization, as required by Rule 24 of the Agreement.

The Organization contends that there is no question that on-track protection (flagging) is Scope-protected work. Third Division Awards 26777, 28180, 34181, 37003, 43919, and Award 8 of Public Law Board 6054. In fact, the Organization points out that the Carrier assigned its own Maintenance of Way Department forces to perform this very work for several months prior to the events that gave rise to this dispute. The Organization contends that while other crafts have provided flagging work, it is in conjunction with its own work.

The Organization contends that the Carrier's refusal to comply with the provision of Rule 24 requires a sustaining award. The Organization contends that the Carrier failed to comply with the advance notification and conference provisions, in good faith, in an attempt to reach an understanding between the parties concerning it.

The Organization contends that the Carrier maintained control over how and by whom the subject work was going to be performed. The Organization contends that the Carrier instigated the work, arranged for the work, received the benefit of the work, and paid for the work, thus the work falls under the Scope of the Agreement. The Organization contends that the Carrier failed to offer any evidence which could allow a reasonable mind to conclude that the Carrier did not control, instigate, benefit or pay for the work. The Organization contends that the Carrier has failed to provide any documentation to support its affirmative defense that JLL, and not the Carrier, has control over the contractors.

The Organization contends that Award 1 of PLB 7705, which involves flagging disputes between the BMWED and the Union Pacific (MOP Agreement), relied on by the Carrier, is distinguishable from the instant matter, because here the Carrier has maintained control over the claimed work. The Carrier trained and required RailPros to provide flagging protection for a third-party project occurring on its property. More recent arbitral authority from the same MOP Agreement found that the Carrier still controlled the work, even when a third party was paying the outside contractor.

The Carrier contends that the Organization has failed to show a violation of the Agreement. The Carrier contends that the Organization is claiming work that does not belong to its members. The Carrier contends that the work is part of JLL's structural repairs at Chicago's Old Post Office, which is adjacent to the Carrier's property. JLL, on behalf of the property owner, contracted out, paid for, controlled, and received the benefit of this work, which is to ultimately maintain the building's structural integrity.

The Carrier contends that the work is not for its benefit and is only involved to ensure that the outside entity coming onto its property is safe. The Carrier contends that it did not contract out this work. Under the third-party doctrine, set forth in Award 1 of PLB 7705, if a carrier does not arrange, control, pay for, and receive the primary benefit from the work, it is not Scope-covered work. Here, the Carrier did none of those as the work was for a JLL project.

Even though it was not required to do so, the Carrier provided notice and an opportunity to discuss when requested as a courtesy, and also met all procedural requirements throughout the handling of this matter. The notice indicated that it would not be feasible to provide flagging services for this non-railroad project.

The Carrier contends that the Organization has failed to prove that the Carrier contracted out Scope-covered work. The Carrier did not contract the work. Nobody was furloughed as a result of this project. Thus, Rule 24 did not apply.

The Carrier contends that JLL, not the Carrier, approached RailPros and arranged the terms of its flagging work at the Old Post Office, decided the project would go forward, told RailPros when to work, and paid RailPros for their work. The Carrier contends that its November 1, 2019 letter does not demonstrate control over the project.

Finally, the Carrier takes issue with the Organization's requested remedy. The Organization has failed to show how any of the Claimants were harmed by the alleged contracting out. Each Claimant was fully engaged in work for the Carrier during the period of the instant claim. No employee was furloughed or suffered a loss of compensation.

The claim before this Board concerns flagging work initially performed by MOW forces and later by RailPros contractors. This is hardly a case of first impression. Because the flagging work was done in conjunction with JLL's project, the parties framed their arguments using the third-party doctrine discussed in Award 1 of Public Law Board 7705. It set forth a set of factors to consider when determining whether

work is related to railroad operations, and therefore, Scope-covered work. The board defined the criteria, as follows:

- (1) Where the work, while perhaps within the control of the Carrier, is totally unrelated to railroad operations.**
- (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operation of others on the Carrier's property and is undertaken at the sole expense of that other party.**
- (3) Where the Carrier has no control over the work for reasons unrelated to having itself contracted out the work.**

In that case, the board applied the factors and found that the carrier did not have control over the claimed work because a third party compensated the contractors for the work and benefited from the work. The Carrier urges this Board to apply this holding to this case, arguing that JLL contracted with and paid RailPros for its own benefit.

Conversely, the Organization asserts that Award 1 has been clarified over the years in subsequent decisions and encourages this Board to follow those decisions, specifically, Awards 1, 2 and 4 of Special Board of Adjustment BMWED-UP Flagging Arbitration Board (Missouri Pacific Agreement) as well as Awards 2, 3 and 4 of Special Board of Adjustment BMWED-UP Flagging Arbitration Board (Union Pacific Agreement and former Chicago and Northwestern Transportation Agreement). According to the Organization, these later awards provide much greater insight into the third-party doctrine than Award 1 of Public Law Board 7705.

In Award 3 of the SBA, the board wrote, "When a third party determines who will provide those services, the identity of the service provider, be it RailPros, Carrier or any other entity, is outside Carrier's control and, even though the services are performed on Carrier's property, the work falls outside the scope of the Agreement." In that case, however, the claim was sustained because the board found that it was the Carrier who decided that RailPros would provide the flagging, writing, "Where Carrier controls the work that is to be performed on Carrier's property, the Agreement applies and the claim must be sustained." It went on,

Carrier did more than simply require the third party to secure flagging services, leaving it to the third party to decide who would provide those services. Carrier did more than suggest sources of those services to the third party. Carrier did more than exercise its reasonable right provided

under the right of entry agreement to approve the third party's selection of the flagging service provider. Carrier dictated who would perform the flagging work on Carrier's property. That the third party directly paid the outside contractor for the work does not change the basic fact that Carrier controlled the work performed on Carrier's property, thereby bringing it under the coverage of the Agreement.

In the case at bar, it is clear that the Carrier similarly told JLL that it could not continue its project on the Carrier's property, unless it used RailPros for flagging. Just as in the cited case, the Carrier left no other choice to JLL, other than to discontinue its work. The Carrier also made clear that it would not issue the PTE until arrangements with RailPros had been made. Finally, the Carrier advised in the PTE that it would provide training to the contractors. Therefore, the Board concludes that the Carrier controlled the work performed by the RailPros contractors on its property.

The Carrier also argues that it complied with the Notice and contracting provisions in Rule 24, by providing a courtesy notice to the Organization and by meeting to discuss the contracting. However, the Organization presented unrefuted evidence that while the parties were still discussing the contracting out, the Carrier rescinded the notice and indicated that JLL would again use MOW forces for flagging at the Old Post office. Thus, the record does not support a finding that the Carrier complied with Rule 24.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of May 2023.