

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45195
Docket No. MW-43995
24-3-NRAB-00003-230231**

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: (
(BNSF Railway Corporation

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 and Structures Department work (cut, realign, surface and weld track) between Mile Post 4 and Mile Post 7 on the Front Range Subdivision on May 16 and 17, 2015 and June 6, 7, 13, 14, 22, 23 and 24, 2015 (System File C-15-C100-135/10-15-0339 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairperson, in writing, in advance of its plans to contract out this work and failed to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces or reach an understanding concerning such contracting as required by the Note to Rule 55 and Appendix Y.**
- (3) As a consequence fo the violations referred to in Parts (1) and/or (2) above, Claimants H. Miller, R. Tesh, B. McInnis, D. Balzano, J. Holton, Z. Gehlhaus, S. Haldy, A. Slaughter, D. Gonzales, R. Murphy, A. Carlson and M. Smyth shall each be paid forty-four (44) hours of overtime; Claimants C. Stuerke, T. Wilhelm, T. Tracy, R. Nanney, M. Hilliker, D. Guttierrez and J. Hibler shall each be paid thirty-six (36) hours of overtime; Claimants S. Lyons, N. Anderson and J. James shall each be paid twenty-four (24) hours of straight time and sixty-four (64) hours of overtime and; Claimants E. Johnson and M. Brown shall each**

be paid sixty (60) hours of overtime, each at their appropriate rate 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 have established and hold seniority within various classifications of the Carrier's Maintenance of Way Department, including foreman, truck driver, machine operator, laborer, welder and grinder operator.

The Carrier notified the Organization by letter dated July 19, 2010, of its intention to use outside contractors for “a multi-year, multi-phase project that will consist of reconfiguration of the Denver Union Station (DUS), extensive dirt work, realignment of mainlines and yard tracks, various dirt work, and necessary drainage improvements.” The Notice began, “As information, the State of Colorado plans for improvements to the existing RTD rail corridor system located near the Brush and Front Range Sub-Divisions in Denver, CO,” and continued, “This project is for the benefit of and 100% publicly-funded by the State of Colorado, and but for this request BNSF would not be undertaking this project. BNSF does not possess the necessary specialized equipment for all aspects of this project nor do BNSF forces possess all of the specialized skills required for the dirt work to complete this project.”

On May 16 and 17, 2015 and June 6, 7, 13, 14, 22, 23 and 24, 2015, the Carrier assigned outside forces to cut, realign, surface and weld track between Mile Posts 4 and 7 on the Front Range Subdivision.

In a letter dated July 12, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated August 31, 2015. 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 the cutting, realigning, surfacing and welding track has customarily and historically been performed by the Carrier's Maintenance of Way ("MOW") forces and it is contractually reserved to them under Rules 1, 2, 5, 6, 55 and the Note to Rule 55.

The Organization contends that the Carrier failed to comply with the provisions of the Note to Rule 55 and Appendix Y. The Organization contends that the work performed by the contractor forces neither required special equipment nor any special skills that were not already possessed by the experienced and fully qualified Claimants or any other MOW forces.

The Organization contends that the Carrier has failed to support its affirmative defense that the work in question was not connected to the Carrier and thus did not fall under the scope of the Agreement or the provisions governing contracting out MOW work. The Organization contends that a contractor performed Scope-covered work at the Carrier's direction on Carrier-owned and operated tracks. The Carrier received a tangible and direct benefit from the work performed by the contractors.

The Carrier contends that the Organization has failed to prove that the Carrier violated the parties' Agreement. The Carrier contends that prior precedent established that work done by outside forces will not violate the Agreement where the Carrier does not fund or control the work. The Carrier contends that this work was done at the behest and for the benefit of the citizens of the state of Colorado.

The Carrier contends that the record clearly shows that the claimed work was strictly for the benefit of the State of Colorado and was part of a large capacity expansion project. The Carrier contends that the State of Colorado began a project to provide a commuter rail service throughout the state, and in so doing, needed to move the Carrier's main line. There is no dispute that the State of Colorado, and not the Carrier, funded and controlled the project.

Additionally, the Carrier contends that its forces do not perform construction projects of the magnitude and type found in this capacity expansion project. The Carrier contends that it is under no obligation to piecemeal out small portions of more complex projects simply because its forces may have performed some part of the work.

Here, there is no question that the construction project was initiated by the State of Colorado, but was performed on the Carrier's property, including its main lines. The state funded the project, but the Carrier hired the contractors.

In Award 12 of Public Law Board 4768, an on-property award, the board found that work done by outside contractors will not violate the Agreement in any one of these three circumstances:

- (1) Where the work, while perhaps within the control of 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 operations of others on Carrier's property and is undertaken at the sole expense of that other party.
- (3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

Here, the Carrier contracted out this work, but there is no dispute that but for the State's project, this work would not have been undertaken. The impetus for the project was to create a commuter rail line, not to improve the Carrier's operations. While the Carrier no doubt benefited from the installation of newly improved rail lines, it was not the ultimate beneficiary. As noted, the State of Colorado financed the project.

We find that the circumstances here fit the second exception and under the on-property precedent established in Awards 12 and 27 of Public Law Board 4768, we find that the Agreement was not violated.

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 February 2024.