

SPECIAL BOARD OF ADJUSTMENT
BMWED-UP FLAGGING ARBITRATION BOARD
(Union Pacific Agreement and former Chicago and
Northwestern Transportation Agreement)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT)) Case No. 2
and)) Award No. 2
UNION PACIFIC RAILROAD COMPANY))
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Martin H. Malin, Chairman & Neutral Member
Robert Shanahan Jr., Employee Member
Derek E. Hinds, Carrier Member

Hearing Date: September 16, 2020

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (RailPros.) to perform track protection/flagging work for the Border West Project near El Paso, Texas beginning on March 19, 2017 and continuing to March 26, 2017 (System File B-1752U-252/1687178 UPS).
2. The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the assignment of outside forces to perform the work referred to in Part (1) above and when it failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 National Letter of Agreement.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. DeBartolo and M. Dallolio shall now each be compensated for an equal share of all hours worked by RailPros performing the claimed work.

FINDINGS:

This Special Board of Adjustment upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

By letter dated May 18, 2017, the Organization submitted a claim alleging that commencing on March 19, 2017 through March 26, 2017, two employees of RailPros were flagging for a special project near El Paso, Texas for the Border West Project. Carrier responded

by letter dated June 22, 2017, that “[t]he RailPros employee in this case provided protection for an independent project adjacent to Carrier tracks. This project provides no cost or benefit incurred or gained by Union Pacific Railroad. . . . The claimed services provided by the RailPros employee were done so on an independent project for non-railroad personnel, vehicles and equipment. The service was not performed at the direction of the Carrier and does not benefit the Carrier. Further, the RailPros employee was not employed, directed, or paid by the Carrier. This work has nothing to do with BMWED projects or Carrier operations.”

The denial was accompanied by a statement from Manager of Track Projects Ryan Wirth which read, “This is a no benefit - no cost to UP project dealing with outside organizations and work for them that has nothing to do with UP.”

We do not write on a clean slate. We decide this case against the backdrop of the Awards of SBA Flagging Arbitration Board (Missouri Pacific Agreement) which, although decided under a different Agreement, are highly relevant. The record in the instant case closely resembles the record in Award No. 1 of that Board. In sustaining the claim, that Board observed, “Carrier’s denial contained the naked assertion that the Rail Pro employee ‘provided protection for an independent third party working off track.’ At no time during handling on the property did Carrier even name the purported third party.” Similarly, Manager Wirth’s statement provided on the property was another naked denial that lacked specific details.

Award No. 1 analogized to awards in cases where the carrier maintained it did not control the work at issue because the property had been leased to a third party. The Board wrote (footnotes omitted):

In numerous cases where a carrier maintained that it did not control the work in question because the property had been leased to a third party, boards have sustained claims where the organization requested a copy of the lease and the carrier failed to provide it. *See, e.g.* Third 20895, 28229, 28430, 31619, 37047, 37677, 42996, and 42325. The authority holding that a claim should be sustained where a carrier has denied control over the work at issue but fails to produce documentation supporting that denial even though the organization has requested it are not limited to cases involving leases. For example, Third Division Award No. 28579 concerned the demolition of a building. Carrier claimed that it sold the building on condition that the buyer dismantle it. The organization requested written evidence of the sale but the carrier did not produce it. The Board sustained the claim. Similarly, in First Division Award No. 25973, a train was operated over the carrier’s tracks by another carrier. The carrier maintained that the other carrier’s operation of the train was in accordance with a trackage usage agreement and that it did not control the work. But the carrier failed to provide a copy of the trackage usage agreement when requested by the organization. The Board sustained the claim.

Although during handling on the property, the Organization requested documentation of the relationship between Carrier and the third party, the only documentation that Carrier

produced was a print-out from the Texas Department of Transportation website which generally described its Loop 375 Border Highway West Extension project. Thus, unlike Award No. 1 of the prior Board, during handling on the property in the instant case Carrier did identify the third party.

But the prior Board held that merely identifying the third party was insufficient in responding to an Organization request for documentation. The prior Board wrote in Award No. 4:

We do not find that Carrier's arguably identifying the third party provides a basis for distinguishing Case No. 2, Award No. 1. In all of the awards we cited in Case No. 2, Award No. 1, involving leases, sales and trackage agreements, the carrier identified the party to the lease, sale or trackage usage agreements. It was the carrier's failure to provide copies of the underlying documentation when requested by the organization that required the sustaining awards.

The printout from the Texas Department of Transportation website generally describes the road improvement project but it does not even mention how the project implicates Carrier's tracks, much less detail who has control over the work of flagging when the third party may be fouling Carrier's track. Analogizing to Award Nos. 1 and 4 of the prior Board, we find that the instant claim must be sustained.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Martin H. Malin, Chairman



Derek E. Hinds

Carrier Member



Robert Shanahan, Jr.

Employee Member

Dated at Chicago, Illinois, October 1, 2020