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. 3
and)
) Award No. 3
UNION PACIFIC RAILROAD COMPANY)
)

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 Maintenance of Way Department flagman duties on Pikes Peak/ Colorado Springs Subdivision at approximately Mile Post 41.6 to Mile Post 42.8 Main Track 2 and any side track within those limits commencing on February 14, 2018 and continuing until February 15, 2018 (System File B-1852U-253/1705301).

2. The Agreement was further violated when the Carrier failed to comply with the advance notification and conferencing provisions in connection with its plans to contract out the work described 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, Claimant J. Mcglasson shall now be compensated for eighteen (18) hours at his respective rate of pay for the hours worked on the dates cited by the outside contracting forces.

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 April 5, 2018, the Organization submitted a claim alleging that on February 14 and 15, 2018, an outside contractor, RailPros was flagging for a special project on

the Pikes Peak/ Colorado Springs Subdivision from Mile Post 41.6 to Mile Post 42.8 Main Track 2 and "any side track within those limits." Carrier responded by letter dated May 21, 2018, that "RailPros provided protection for an independent project adjacent to Carrier tracks which 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 Carrier. Further, the RailPros employee was not employed, directed, or paid by Carrier. This work has nothing to do with BMWED projects or Carrier operations."

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. Particularly relevant to the instant case is Award No. 5 of that Board.

In Award No. 5, Carrier had produced documentation authorizing the third parties at issue to enter Carrier's property. Carrier also produced a statement from Todd Wimmer, Senior Director of Workforce for the Engineering Department, that explained:

> A Right-of-Entry Agreement is arranged by our Real Estate Department before the third party can begin work. . . . Beings how this work is solely for the benefit of the third party and no cost or benefit to Union Pacific, the Right-of-Entry agreement instructs them to arrange for their own flagging protection. The third party is also instructed to contact the respective field management within 48 hours of starting work. It is because of these sporadic property access requests, and short lead time notifications that the third party is advised to provide their own vendor for flagging services.

Although the Organization attacked Carrier's documentation as insufficient, the Board disagreed. The Board wrote, "The Organization's claim alleged, as it had to, that Carrier assigned or caused to be assigned Rail Pro to perform the flagging work. The evidence presented by Carrier on the property rebutted those allegations. The onus then shifted to the Organization to rebut Carrier's evidence." The Board found the Organization's rebuttal evidence insufficient.

In the instant case, Carrier identified the third party, the Colorado Department of Transportation, and the purpose for the third party entering Carrier's property, to conduct geotechnical soil bore drilling related to a highway overpass improvement project. Carrier produced the right of entry agreement, a statement from the Railroad/Utility Program Manager for the Colorado Department of Transportation that CDOT paid Rail Pros directly for all flagging costs. Carrier also produced a statement from the RailPros CEO that its contract was with CDOT and not with Carrier and the same Wimmer statement produced in Award No. 5 of the prior Board.

If there was nothing else in the record, we would analogize to Award No. 5 of the prior Board and deny the claim. The record would show that the third party's entrance onto Carrier's property was of the same nature as the usual entry by a third party described by Mr. Wimmer and,

under the usual arrangement, the third party is responsible for arranging for its flagging protection. 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.

As in Award No. 5, Carrier's evidence raised a reasonable inference that CDOT, rather than Carrier, controlled who performed the flagging work. However, unlike Award No. 5, here the Organization produced detailed and specific evidence rebutting that inference. The Organization produced an email from the CDOT Railroad/Utility Program Manager attesting that "[t]he decision to utilize RailPros flaggers was handed down by the UPRR Manager of Industry and Public Projects." The Organization also produced an email from a Carrier officer to RailPros saying, "Please get with CDOT to provide them flagging for this work," and an email from the RailPros Manager of CIC Operations to the CDOT Railroad/Utility Program Manager stating, "Lance Kippen [from Carrier]has sent this project to us to provide the Flagging for you on. Our office will be touch with you soon to get all of the Information so that we can get everything setup. Should you have any questions, please feel free to call me any time."

The record thus reflects that it was Carrier who decided that RailPros would provide the flagging in the instant case. The instant case differs from the typical case described by Mr. Wimmer where Carrier merely requires that the third party provide flagging protection whenever the third party will be working within 25 feet of Carrier track and leaves it to the Third party to arrange for such protection. Where Carrier controls the work that is to be performed on Carrier's property, the Agreement applies and the claim must be sustained.

Carrier emphasizes Third Division Awards 40327 and 43431 and urges that they require that we deny the claim. We do not agree. Award 40327 concerned Carrier's assignment of flagging duties to a system gang Maintenance of Way employee instead of a Maintenance of Way employee assigned to a gang in the District in which the flagging occurred. The Board denied the claim, reasoning that the district gang did not perform the work exclusively and Carrier had the right to assign it to the system gang. The case did not involve outside contracting at all and does not control the instant case. In Award 43431, Carrier assigned flagging work to an ARASA supervisor instead of a Maintenance of Way employee. The Board held that neither craft exclusively performed the work and denied the claim. This Award also did not involve subcontracting work and does not govern the instant case.

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.

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 Dissent to Follow

Derek E. Hinds
Carrier Member

Robert Shanahan, Jr.
Employee Member

Dated at Chicago, Illinois, October1, 2020