

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31829
Docket No. MW-31311
96-3-93-3-333**

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Kansas City Southern 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 (Austin Bridge) to perform Bridge and Building Subdepartment work on the bridges at Loggy Bayou, L&A Mile Post 589.6 beginning October 21, 1991 and continuing [Carrier's File 013.31-320 (504)].

(2) As a consequence of the violation referred to in Part (1) above, Messrs. H.H. Hoose, E. Jackson, Jr., C.D. Love, H.J. Mayeaux, J.P. Goodman, M.L. Kelly, R. Woods, M. Smith, A. Woods, C.D. Muse and R.T. Arnold shall each be compensated at their respective straight time and overtime rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of said work beginning October 21, 1991 and continuing until the violation ceases."

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 Organization claims that the Carrier violated the Agreement when it assigned or otherwise permitted outside forces (Austin Bridge) to perform bridge and building subdepartment work on the bridges at Loggy Bayou, L&A Mile Post 589.6, beginning on October 21, 1991 and continuing thereafter. Employees of the outside contractor, who held no seniority under the Agreement, drove pilings, erected headwalls and performed all work related to the construction of concrete bridges. The Organization claims that work of this character had historically, traditionally and customarily been assigned to and performed by the Carrier's B&B employees. The Organization also asserts that the Carrier did not notify the General Chairman, in writing, of its plans to contract out the work as required by Article IV of the May 17, 1968 National Agreement and the interpretations and amendments thereto in the December 11, 1981 Letter of Agreement.

The Organization alleges violations of Rule 1, Scope; Rule 2, Seniority; Rule 22, Overtime; Addendum No. 9, Article VI-Contracting Out, of the May 17, 1968 National Agreement; and the good faith requirements of the December 11, 1981 Hopkins/Berge Letter regarding the contracting out of work.

The Carrier denies that it violated the Agreement. It asserts that it did give notice of its intention to contract the work, although such notice was not required for the type of work claimed in this case. The Carrier further argues that the Scope Rule is merely "general in nature" and the burden of proof is reserved to the Organization to show persuasive evidence of traditional and historical performance of the work claimed. Neither of the Claimants in this case nor any other Maintenance of Way employees have exclusively performed the work claimed. The Organization therefore failed to meet its burden of proof. Finally, the Carrier argues that even if the claim should be sustained on the merits, most of the Claimants were unavailable during the period the work was performed and no monetary award should be made because the Claimants did not suffer any pecuniary loss.

In reviewing the instant dispute, we confined our consideration, as we must, to those matters raised by the parties on the property. Evidence in the record establishes that notice was given by letter dated July 1, 1991 (from A.H. Mentz, Vice President, Human Resources, to L.W. Borden, General Chairman) of the Carrier's "intention to contract with Austin Bridge Company to reconstruct L&A Bridge 589.6 over Loggy Bayou near Nimock, Louisiana." The letter specifically described the project:

"The new bridge will consist of 60' long prestressed concrete spans on the 36" diameter pipe pile foundations and will be built on a new alignment. The piles will be driven off of a barge with special marine construction equipment. The project is expected to take between 6 and 8 months to complete."

The letter further stated that the Carrier's B&B forces did not have the necessary expertise, experienced supervisory personnel or equipment to accomplish the project. The Carrier asserted that its forces had not performed this type of work in the past. Finally, the Carrier asserted that the work was not within the Scope Rule of the current Agreement, and that the Carrier had not furloughed Maintenance of Way employees.

If notice was required, the above notice was adequate.

The parties are in dispute over whether the work was within the Scope of the Agreement and reserved to the Organization. Numerous Awards of the Third Division have established that the Organization has the burden of proof on this issue. In Third Division Award 29331, involving the same parties in the instant dispute, the Board stated:

"[T]he Organization has the burden of proving, by either explicit Agreement language or by persuasive evidence of traditional and historic performance, that the work is reserved to its members. The rules cited by the Organization are general in nature. Its burden, therefore, is to demonstrate traditional and historic performance of the type of work in dispute."

In the instant case, the Organization's initial claim letter recites that the work has "traditionally and historically" been performed by its members. However, the record does not contain any evidence that any such work was actually performed. In denying the claim, the Carrier stated:

“The purchase of a prefab bridge from the source [the Austin Bridge Company] is not any different than purchasing track materials Additionally, this type of work has not be [sic] assigned exclusively to any specific members of your organization, but has historically and traditionally been performed by other Maintenance of Way forces, as well as non-company personnel and equipment.”

In its appeal letter, the Organization stated that, “B&B have worked all up and down this railroad installing bridges....,” but no specific evidence of such work was provided.

In Third Division Award 29332, involving the same parties in the instant dispute, the Board considered a similar claim and found evidence of past performance that established that repair work on concrete bridge substructures as well as a wide variety of unrelated work had been performed by the employees in the past. The evidence also contained references to performance of the same work by contractors. However, the Board concluded:

“The six statements in the record do not, in our view, demonstrate, on a system-wide basis, the requisite regularity, consistency and predominance in the performance of the disputed work necessary to support a finding that the Organization has traditionally and historically performed the work. On this record, therefore, we find the Organization has not established a prima facie case of scope coverage for reservation of work purposes. Accordingly, the first part of the claim must be denied.”

The Organization has not identified clear Agreement language reserving the work to BMWE represented employees and it has not proved with specific evidence that said work was traditionally performed by these forces. Because the Organization has not established a prima facie case of Scope coverage for reservation of work purposes, the claim must be denied.

AWARD

Claim denied.

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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 26th day of December 1996.