

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37961
Docket No. MW-37181
06-3-02-3-184**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Texas Mexican 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 (Lone Star Construction Company) to perform Maintenance of Way and Structures Department work (removing and replacing planking, ties and rail) on S.P.I.D. at Agnes Street crossing between Mile Posts 157 and 158 in Corpus Christi, Texas on April 3, 4, 5 and 6, 2001 (System File MW-01-TM/160).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. H. Serna, Jr., J. A. Garcia, J. Rodriquez and A. Garcia shall now each be compensated for thirty-two (32) hours' pay at their respective straight time rates of pay and for sixteen and one-half (16.5) hours' pay at their respective time and one-half 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.

On April 3, 4, 5 and 6, 2001, the Carrier utilized Lone Star Contractors to remove steel planking, old ties and rail and replace it with new materials at a state road crossing. The crossing at Agnes Street between Mile Posts 157 and 158 at Corpus Christi, Texas, was performed without advance notice to the Organization.

The Organization alleged that the work was scope protected. It maintained that the Carrier failed to provide notice and exert a good-faith effort, as stated in the claim to "increase the use of Maintenance of Way forces," which resulted in a lack of work opportunity for the employees. It is the Organization's position that the Carrier should now compensate the employees for the Agreement violations.

The Board considered this issue in full. The Scope Rule is general, but the grade crossing work performed is work customarily and traditionally performed by BMW-represented forces. This was the employees' work as per the negotiated Agreement. Accordingly, Part 1 of the claim must be sustained because the Carrier contracted out work that belonged to the employees.

Part 2 of the claim asserts lack of a proper notice. There is no issue as to the notice provision of the Agreement. Any work belonging to BMW-represented employees requires the Carrier to provide notice. The Carrier's argument is that it has performed state road crossing work for years without complaint from the Organization. The Carrier argues "Organization acquiescence" on contracting out state road crossing work, stating that "notices have never been served on work performed for state road crossings." And further, "While your Organization did

not deny this fact, it still held that a notice should have been served and Carrier responded by agreeing that notices would be served for State work in the future. . . ." The Carrier's argument was not refuted. As such, while there are no exceptions in the language of the Agreement relating to state road crossing projects, damages are not applicable, and to that degree, Part 2 of the claim has merit.

The Board turns its attention to the other issue of Part 2 of the claim, the failure to exert a good-faith effort to increase the use of Maintenance-of-Way forces. The central argument of which is that the Carrier knowingly failed to hire employees while attrition reduced forces below required needs. The Organization argued that there was a "lack of manpower" and that the Carrier was not engaging in a "good-faith effort to increase the use of Maintenance-of-Way forces and reduce the incidence of employing outside forces . . ."

We are keenly aware that in the review of the "Verified Statement of James L. Riney submitted to the Surface Transportation Board (Finance Docket No. 34342)," the Organization argues that the Carrier laid off employees while it knew it had work to perform. The Organization argues that this record does not show good faith bargaining on the part of the Carrier to reduce subcontracting in light of Riney's comments that there was a great deal of work to be performed.

The Board reviewed the fundamental issue of whether the Carrier knowingly failed to have sufficient employees and finds the record unpersuasive. To reach a determination based on increased need for employees, we must first find that the Carrier was required to give notice. We cannot so find in this record. Because the Organization acquiesced with regard to past notice, we cannot thereafter hold that if the parties had met for discussion, the outcome could have been a good faith effort to increase forces related to the work.

On the property, the Carrier argued that it had the appropriate number of employees and did not need "additional employees . . . for special or unforeseen work projects." The Board fails to find any probative evidence in the record to support that the work was other than unplanned or unforeseen.

Accordingly, while the Board finds that the Carrier violated Part 1 and the notice provisions of Part 2 of the claim, we cannot support Part 3 of the claim. A monetary claim is inappropriate where there is no prior protest demonstrated for a lack of notice for the exact work performed. See, Third Division Awards 36598,

32162, 30607 and 29966. There is also no proven lack of good faith bargaining. As such, Part 1 and the notice provision of Part 2 of the claim are sustained. The balance of Part 2 and Part 3 of the claim are denied.

AWARD

Claim sustained in accordance with the Findings.

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 19th day of September 2006.