

****CORRECTED****

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37963
Docket No. MW-37186
06-3-02-3-190

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 (Trev-Bo Construction Company) to perform Maintenance of Way and Structures Department work (install bridge caps and bridge shims) at Bridge # 152.65 between Mile Posts 152 and 153 in the vicinity of Corpus Christi, Texas on March 21, 22 and 23, 2001 (System File MW-01-7-TM/159).**
- (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 twenty-four (24) hours' pay at their respective straight time rates of pay and for 7 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.

The Organization alleges that the Carrier violated a number of Rules pertaining to the contracting out of bridge caps and bridge shims at Bridge No. 152.65. It maintains that the work performed on March 21, 22 and 23, 2001 was scope protected work performed by outsiders without proper notice of intent and without a good-faith effort to reduce contracting out. The Organization argues that this small job of three days with only four employees was performed while the Carrier could well have planned ahead to have BMW-represented employees perform the work. In fact, the Organization argues that the Carrier reduced forces by more than half and then argued that there were too few employees to perform the job. The Organization contends that the claim is proper and compensation is required for this planned reduction, as indicated by the Carrier's statement submitted to the Surface Transportation Board.

The Carrier states that its actions were proper. It provided a correct notice for the large scale upgrading that it proposed and all elements of the project that it was aware of at the time. It maintained that it lacked manpower and equipment. It also contended that it had all employees working and could not perform the work in a "timely fashion" without subcontracting. More to the point, the Carrier argues that contracting of this type of work has been a practice on this property.

The Board paid close attention to arguments of work force reductions, planned and known work needs, and good faith bargaining. In each instance, the

Board has not been convinced by the evidence of record that the Carrier violated any Agreement Rule or its contractual good-faith obligations. Assertions are not proof. The Organization asserts that the Carrier reduced the work force below its obligation to maintain sufficient manpower. There is no proof in the record that the work performed by the outside contractor was maintenance work. The Organization asserts that the work was scope protected, but did not rebut the Carrier's assertion that its subcontracting of this type of work has been the practice. Certainly, the Organization brought forth no proof that bridge shimming and capping work is reserved, rather than a mixed practice. Nor did the Organization demonstrate with evidence that BMW-represented forces have done this work, or that the work disputed was of such limited and separate scope as to have been precluded from subcontracting.

The facts indicate that this was a large scale project. The project was preceded with notice of intent. The fact that the named contractor changed does not void the notice. There was a conference. Insufficient proof was presented by the Organization to substantiate that the Carrier failed in its negotiated responsibilities. After reviewing the extensive record and Award support presented by the Organization, the claim is denied for many of the same considerations as those presented in Third Division Award 37009.

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 19th day of September 2006.