

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38015
Docket No. MW-37176
06-3-02-3-158**

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 Employes
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Jim Dobbas Construction Company) to perform Maintenance of Way work (re-decking of bridge and related work) at the bridge at Mile Post 139.92 on the Valley Subdivision beginning October 3, 2000 and continuing through December 2, 2000 (Carrier's File 1257458 SPW).
- (2) The Agreement was further violated when the Carrier failed to provide General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above, or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violation referred to in Part (1) and/or (2) above, Claimants T. A. Oxford, T. L. Kelly, K. Roth, R. L. Luckett, F. H. Young and A. H. Zambrano shall now each be compensated for three hundred and sixty (360) hours' pay at

their respective straight time rates of pay and for thirteen (13) 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.

By letter dated December 2, 2000, the Organization alleged a violation of the Agreement when the Carrier engaged Jim Dobbas Construction Company to perform Track Sub-Department work at mile marker 139.92 on the Valley Sub Division of the Roseville Service Unit 3. The Organization maintained that the Claimants were fully qualified to perform the work and that the work itself belonged to BMWWE-represented employees by virtue of the Scope Rule of the Agreement.

The Carrier denied the claim asserting that the work did not exclusively belong to BMWWE-represented employees because it had been "customarily and traditionally" contracted out in the past. The Carrier also argued that the Claimants were not qualified, and that the project was supplemented with both employees and the outside contractor due to a mandatory completion date set by the State of California.

The Board makes several preliminary points. First, the record and arguments contained in the Submission before the Board and the on-property record are disjointed. Suffice it to say that the Board carefully reviewed the entire record and ignored all arguments, issues and evidence not clearly discussed while

the dispute was being handled on the property. Additionally, the Board notes a discrepancy between the claim on the property and that presented in the Notice of Intent, but does not find this sufficient to consider the claim of the Organization to be jurisdictionally flawed.

The Organization has the burden of proof for its claim. It must demonstrate with probative evidence that the work performed belonged to BMW-employees and was removed from their protected rights and assigned to those foreign to the Agreement. The Carrier clearly stated that the work was not exclusively reserved to BMW-employees and had been contracted out continuously in the past. There is no record of proof presented by the Organization to demonstrate otherwise.

The Organization points to the Carrier's statement in defense of its position. The Carrier denied the claim on the property, stating in part:

"The Bridge Department started to work on this project on October 17, 2000; and we had to have this project completed by November 30, 2000, by order of the State of California Levee Commission. We used our own truck to haul material with Bill Oljker our truck driver and supplemented it with Jim Dobbas' trucks to haul out the old bridge girders to get them off the levee by November 30, 2000. The only crane operator who was named as [a] Claimant is Tim Kelley; and he, as a Bridge Department employee is qualified to run the on-track rail crane; however, he was fully employed at the time of the project. The other Claimants work for the Track Department; and Trent Allen states that they are not qualified on the other pieces of equipment. . . . this claim should be denied in its entirety due to the fact that we had to complete this project by November 30, 2000, due to the State of California Levee Commission order."

The Organization points out that the employees worked on this project, so it was clearly scope protected. The Organization argues that the time constraints are only alleged, never proven, and had the Carrier properly worked to arrange its forces, the Claimants could have performed work that belonged to them. The

Organization also argues that the work not only belonged to its members, they were qualified to perform the work.

Regardless of arguments on notice failure, which the Board rejects after full review, the notice requirements must follow proof that the work belongs to BMW-represented employees and that they were qualified to perform the work. The Carrier stated that the work performed was due to an emergency and that "the work in dispute is not work within the scope." The Carrier contended that "the Claimant involved in this case does not possess sufficient fitness and ability to safely and efficiently perform the duties or operate the equipment in question."

The Organization's rebuttal stated that, "This Committee is not convinced . . . to an eleventh (11th) hour emergency notification by the California Levee Commission." With regard to the Carrier's position that "none of these employees posses the necessary skills," the Organization enclosed Seniority Rosters and argued that the Claimants had previously driven bridge pilings.

The Organization did not provide even one statement supporting its allegations, their past performance, or the qualifications of the Claimants. The Organization may not be convinced, but it never demanded proof and the Carrier's above quoted statement is sufficient in this record. Further, this is a general Scope Rule without mention of the work of removing old bridge girders. We reject the Organization's proof that this work is reserved. We reject the Organization's evidence which consists solely of assertions, denials and a seniority list. There is no showing that the work actually performed belonged to or could have been performed by the Claimants. We thus conclude, given the state of this record, that the Carrier did not violate the Agreement when it contracted out the work.

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 25th day of October 2006.