

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38205
Docket No. MW-37790
07-3-03-3-159

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 (install ties, rail and other track material and tamp and level track) on main line track in the vicinity of Corpus Christi, Texas between Mile Posts 157.00 and 160.00 on September 13, 14, 15 and 16, 2002 and continuing (System File EP-02-38/195).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with 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 E. Lara, J. Garcia, T. Vasquez, R. Couling, J. Lopez, G. Vasquez, V. Moncivais, A. Vira, L. Serna, N. Saenz, J. Rodriguez, M. Paz, A. Garcia, J. Sciarraffa and A. Jimenez shall now each be compensated for twenty-four (24) hours' pay at their respective straight time rates of pay and for sixteen (16) hours' pay at their respective time and one-half

rates of pay for the aforesaid work performed by the outside forces on September 13, 14, 15 and 16, 2002 and the Claimants shall be compensated for an equal and proportionate share of the total number of man-hours expended by the outside forces in the performance of the aforesaid work beginning September 17, 2002 and continuing."

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 Thursday, September 12, 2002, a derailment occurred near the Corpus Christi Yard at approximately Mile Post 157.00. Resulting damage included a derailed locomotive and damage to the main line. The Carrier called in Lone Star Contractors to clear the derailment and get the main line back into service.

The Organization filed the above claim on September 16, 2002. It contended that the work performed at the derailment site by the outside contractor was work "highly recognized" as maintenance of way work. It insisted that the work at issue was thus covered under the Scope Rule of the Agreement and should rightfully have been performed by BMW-represented employees. Accordingly, the Organization argued that the Carrier was obliged to give the Local Chairman notification of its intent to contract out and make a "good faith attempt" to come to an understanding regarding the contracting out of the work to be performed, before giving the work to an outside contractor. The Organization demanded that the Claimants named be compensated for the work opportunity lost.

The claim was denied by letter of October 9, 2002. The Carrier denied having violated any portion of the Agreement. It further insisted that, without prejudice to its position that it had not violated the Agreement, there was no basis for the monetary claims. The claim was subsequently progressed in the usual manner including conference on the property on December 2, 2002.

The Organization's position is that the original notice of intent to contract out work, which was sent to the Organization on July 29, 2002, made no mention of the work at issue. It also contends that the site at issue was not a derailment site and that the work involved in the project at issue was clearly scope covered work. It further insists that the Carrier's need to contract out the work in this case was precipitated by its own failure to maintain an adequate workforce, not by any emergency situation.

The Carrier contends that the Organization's claim is without merit for several reasons. First, it insists that the work at issue was utterly unrelated to the referenced subcontracting notice – rather, it involved an emergency derailment repair. Moreover, because it was an emergency, there clearly was not time to notify the Organization and engage in discussions regarding performance of the contracted out work. Second, it notes that according to its records all Claimants were employed on the dates in question and some had worked overtime during that period. Thus they were unavailable to do the work at issue. Finally, the Carrier notes that the Organization failed to prove that the work at issue was work reserved exclusively to BMW-represented employees. The Carrier contends that there is and has been a mixed practice of using BMW-represented employees as well as other employees and/or occasional outside contractors to perform the work at issue.

The Board reviewed the record with care. We find that the Organization failed to meet its initial burden of presenting a prima facie case that the work was reserved to the Organization. Because the Scope Rule is general in nature, the Organization must proffer evidence that the work was customarily and historically performed by BMW-represented employees. (See for example, Third Division Award 29034). This burden cannot be met merely by assertion. The Organization provided no evidence that the work at issue was customarily and historically reserved to BMW-represented employees.

Furthermore, the Organization provided no evidence to contradict the Carrier's position that such derailment work was normally contracted out. The Board notes that the Carrier provided the Organization with an extensive list of the contractor's recorded work for the Carrier. Moreover, there is no evidence in the record to contradict the Carrier's assertion that it does not have the equipment or manpower to perform such derailment work, especially not within the time frame involved following a derailment. (See, for example Third Division Awards 37991 and 37008.)

In light of the foregoing, the instant claim is denied in its entirety.

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 18th day of May 2007.