

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38244
Docket No. MW-37306
07-3-02-3-322

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson 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 (Lone Star Construction Company) to perform Maintenance of Way and Structures Department work (operate tamper and regulator) in connection with track surfacing work between Mile Posts 106.0 and 101.0 in the vicinity of San Diego, Texas on August 21, 22 and 24, 2001 (System File LHS-2001-10-TM/169).**
- (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 T. Vasquez and V. Moncivais shall now each be compensated for twenty-four (24) hours' pay at their respective straight time rates of pay and for twelve and one-half (12.5) 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.

Operation of a tamper and ballast regulator by outside forces for track resurfacing work in a major mainline and bridge rehabilitation program undertaken by the Carrier gives rise to the claim herein.

Claims protesting the Carrier's engagement of outside contractors for work involving this rehabilitation project have been the subject of five prior cases advanced to the Board by the Organization. In all five instances, each involving a phase of the rehabilitation project, claims challenging the contracting out of work were denied. See Third Division Awards 37008 (installing ties and related work) 37009 (removal, replacement and related repair work at bridges and culverts) 37963 (installing bridge caps and bridge shims) 27986 (installing ties) and, 37992 (replacing, installing and welding rail). The only difference between the facts and arguments in the instant claim and the denial Awards that issued in the five prior cases is the type of work, which here involves operation of a tamper and ballast regulator by a subcontractor of the outside contractor to provide tamping and aligning in order for the contractor to continue work on the rail relay project.

We studied the facts and arguments of the parties and the rationale for the decisions of the Board in each of the prior cases. The positions of the parties in those disputes are essentially not unlike those advanced to the Board in the instant claim. The work here at issue must be viewed as covered by the same contracting notices and conferences as in the prior disputes.

While we are not bound to follow the decisions of the above mentioned Awards, we find that they are without question well founded. Clearly, as the findings in those prior Awards point up, nothing of record supports the argument that the Carrier was precluded by applicable Agreement language from contracting out the work at issue under the circumstances existing in this major mainline and bridge rehabilitation project, an overhaul program that could only be accomplished by using outside forces in a timely and cost effective manner.

In light of the above considerations and overall study of the record the Board is constrained to conclude, as the Carrier contends, that the claim before us is not a new grievance, but rather an attempt to seek a reversal of decisions rendered in the above mentioned Awards. We find no reason to do so. Further, as has been stated in numerous prior Awards, it is essential that disputes once heard and settled by the Board should stay settled unless it can be shown by competent and compelling evidence that a clear change exists in facts and circumstances that gave rise to a prior claim or it can be shown that the decision was palpably wrong.

The Board will accordingly follow the prior decisions of the Board involving this particular contracting out of work program in the absence of a showing of error as relates to a consideration of the facts and arguments of the parties, and hold that the instant claim likewise must be denied.

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 July 2007.