

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 38968  
Docket No. MW-37250  
08-3-NRAB-00003-0020253  
(02-3-253)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (Railworks and W. T. Byler Construction Company) to perform Maintenance of Way and Structures Department work (install rail and related work) on the main line track between Alice, Texas at Mile Post 117.08 and Hebronville, Texas at Mile Post 62.00 beginning July 23, 2001 and continuing (System File EP-2001-37-TM/166).
- (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 violation referred to in either Parts (1) and/or (2) above, Claimants P. Benavides, E. Lara, R. Garza, J. Garcia, T. Vasquez, R. Couling, J. Lopez, G. Vasquez, V. Moncivais, A. Vira, L. Serna, J. Sciaraffa, N. Saenz, J. Rodriguez, M. Paz, A. Garcia and A. Jimenez shall now each be compensated at their respective rates of pay for an equal

proportionate share of the total number of man-hours expended by the outside forces in the performance of the aforesaid work beginning July 23, 2001 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.

Although the Statement of Claim alleges a violation of the notice and conference provisions of the parties' Agreement Rule 29, the record is clear that the Carrier did serve notice by letter dated January 19, 2001 and supplemented by letter dated March 31, 2001. The Organization's letter on the property dated November 21, 2001 acknowledged receipt of the initial notice and confirmed that there were two conferences on the notice: January 23 and telephonically on March 22, 2001. Accordingly, this portion of the claim must be denied.

Our review of the record shows that the instant dispute challenges one part of a major rehabilitation project on the Carrier's main line that was undertaken in 2001. Other phases of the overall project, which were encompassed by the same notice and conferences described earlier, were the subject of claims that have already been addressed by the Board. The background circumstances are sufficiently described in the previous Awards that they need not be recounted here. See Third Division Awards 37008, 37009, and 37963.

Rule 29 of the parties' April 1, 1982 Agreement controls the contracting of work. It reads as follows:

**"When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the repair forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out such work. The carrier and organization representatives shall make a good faith attempt to reach an understanding on the contracting out of the work to be performed. In event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter or modify any provisions of the Scope rule or any rules of the applicable agreement in the handling of such matters."**  
(Emphasis added.)

It is undisputed that the small number of Carrier's Maintenance of Way forces were fully employed during the claim dates on other required maintenance work. In addition, no employees were on furlough. The record also establishes that the work in question was major rehabilitation work that was needed to be accomplished in essentially the same time frame as other significant phases of the overall project. According to the Carrier's correspondence on the property, the project could only be accomplished by using outside forces because it did not have the tools, skills, or manpower to complete the work in a timely and cost effective manner. These assertions were not effectively refuted on the property and must be accepted as proven fact. Indeed, it is clear from Third Division Award 37008 that the instant Claimants are the same group of employees who claimed there that they should have been used to accomplish other project work elsewhere on the same claim dates. Logic tells us that the same employees could not have accomplished their regular maintenance work while simultaneously completing two demanding projects in two different locations. This reality is a testament supporting the Carrier's unrefuted assertion that it could not timely complete the work with its own forces.

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On the record before us, we find that the Organization has not satisfied its burden of proof to establish the violation of the Agreement that is alleged in the claim. Accordingly, it 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 29th day of February 2008.