

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39618
Docket No. MW-39069
09-3-NRAB-00003-050552
(05-3-552)**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee
(St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier authorized additional outside forces (Edward Kramer and Sons) to perform Maintenance of Way & Structures Department work (bridge rehabilitation work) on the Black River Bridge #282.21 at LaCrosse, Wisconsin beginning on June 30, 2003 and continuing through July 1, 2004 to the exclusion of B&B employees G. Wieting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, K. Shortreed, R. Bean, J. Gallagher, C. Rentz, S. Smith, P. Betsinger, S. Bushera and Crane Operators J. Giraud, T. Thibado, L. Wieting, R. Bartels and P. Lubeck (System File C-29-03-C080-06/8-00228-093/0-0011-297 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract said work as required by Rule 1 and failed to enter good-faith discussions and efforts to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.**

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Wieting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, K. Shortreed, R. Bean, J. Gallagher, C. Rentz, S. Smith, P. Betsinger, S. Bushera, J. Giraud, T. Thibado, L. Wieting, R. Bartels and P. Lubeck shall now each be compensated at their applicable rates of pay for a proportionate share of the total of fifty-two thousand seventy-two (52,072) man-hours expanded by the outside forces in the performance of the aforesaid work."

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 above could be read to suggest the instant controversy is a relatively routine contracting of work dispute, the voluminous Submissions demonstrate otherwise. The project in question was a multi-year replacement of a 310-foot center-pivoting swing bridge and associated approach spans that crossed the Black River at LaCrosse, Wisconsin. The old bridge was replaced with a 147-foot Bascule-type of cantilevered lift bridge with new approach spans.

Contrary to the allegations in Paragraph (2) of the Statement of Claim above, the Carrier did provide advance written notice of its intention to contract out the

project by letter dated January 10, 2002. The parties did conference on the notice on January 31, 2002. The Organization's letter of that same date acknowledges the fact of the conference and, in the Organization's view, the content of the conference. Accordingly, this aspect of the claim must be rejected.

The facts in the following summary come from assertions made by the Carrier that stand unrefuted by the Organization. Many of these facts come from a 34-page Carrier letter dated April 5, 2005 and many pages of enclosures. For reasons not explained in the record, neither the letter nor the extensive set of supporting documents were included in the Organization's Submission. Other facts come from a DVD that the Carrier produced to visually show the various stages of the project, some of which were shown in time-lapse photography accompanied by music from Rossini's William Tell Overture. The DVD demonstrated why the adage about a picture being worth a thousand words came into being.

Work began on the project in 2002. This included the construction of new piers in the river to support the new span arrangements. This work continued into April 2003. The Carrier assigned not more than four of its B&B employees to assist the contractor forces with track work. Much of the time, only one employee was assigned to perform flagging for the contractor.

Sinking of the support structures was discovered in early 2003. Apparently unanticipated riverbed conditions permitted some of the structures to settle by as much as 17 inches. This required a redesign of the project which eventually required underwater concrete jetting to stabilize the structures.

Because of the redesign needed, the Carrier provided an updated notice of changed circumstances to the Organization by letter dated April 14, 2003. The letter notified the Organization that its entire B&B Steel Crew would be sent to the Milwaukee area to deal with exigent problems that had arisen in that area. The notice also informed the Organization that only one B&B employee would remain on the project to perform flagging. The Steel Crew actually relocated to Milwaukee on April 28, 2003. There is no evidence in the record that the Steel Crew was told their relocation would be temporary.

The project required the use of certified divers and underwater demolition personnel to use explosives. It also required the use of tugboat-controlled barges to float the old and new spans out and into the project. Barge-mounted cranes were also needed extensively. The Carrier did not own such equipment, nor did any of its B&B employees have the expertise to perform the associated work.

Although the Organization received timely notice of the change in plans, it chose not to re-conference the matter. In addition, it chose not to file a claim within the usual 60-day time limit of the Agreement. Instead, it filed its claim by letter dated August 8, 2003, which was substantially more than 60 days after the reassignment of the Steel Crew. The claim asserted that it was a "continuing claim" running from June 30, 2003. The claim explained that June 30 was "... the first working day following the sixtieth (60) day from April 28, 2003." In its initial denial of the claim dated September 29, 2003, the Carrier directly challenged the validity of the so-called continuing claim. In its March 9, 2004 denial of the Organization's appeal, the Carrier renewed this challenge and further explained that the Organization was in default because it was aware of the reassignment of the Steel Crew on April 14 and its actual relocation on April 28, but failed to claim until August 8, 2003.

The Carrier also directly refuted the Organization's assertions that the work in question had been customarily performed by B&B forces. The Carrier also asserted in its April 5, 2005 letter that it had "... provided ample evidence of its previous contracting of similar work." Although the Organization requested an extension of time limits to permit it to review the Carrier's letter and enclosed evidence, the record does not show that the Organization ever responded.

After careful review of the extensive record in this dispute, we are compelled to find that the Organization's claim is fatally deficient on both procedural and substantive grounds.

To be valid and timely, a continuing claim must be filed within 60 days of at least one of a series of violative Carrier acts. It then becomes valid as to that act and any later acts in the series. It is thereby able to claim a remedy that reaches back to

that violative act, but not more than 60 days. It cannot reach back to claim a remedy for violative acts that occurred more than 60 days previously.

The record before us shows that the Carrier's reassignment and relocation of the Steel Crew was a single, identifiable, clearly defined, and complete act not later than April 28, 2003. There were no new allegedly violative acts after that date. To be sure, the effects of the Carrier's act in April 2003 remained for more than one year until the project was completed, but those effects flowed from the Carrier's single act and not a series of repeated allegedly violative acts.

The need to carefully distinguish between new violative acts and the long-lasting effects of a previous single act is important to the understanding of continuing claim theory. It is often confused.¹ On the record before us, the Carrier was correct in challenging the validity of the claim. Because it was not filed within the applicable time limit after the Carrier's actions in April 2003, the claim was not timely filed. The natural result of this procedural deficiency would be to dismiss the claim.

On the merits, it is clear that the applicable Scope Rule is a general Rule. It does not explicitly reserve work. When confronted by such a Rule, it is necessary for the Organization to establish that it has customarily, historically, and traditionally performed the disputed work. On the record before us, the Organization provided no evidence whatsoever to satisfy this burden of proof. To the contrary, it stands unrefuted in the record that the Carrier has contracted out such projects in the past. Accordingly, we must find that the instant record fails to establish a violation of the Agreement as alleged in the claim.

Given the foregoing discussion, we must deny the claim.

¹ For a comprehensive discussion of the subject, see Arbitration: Time Limits and Continuing Violations by Arbitrator Richard I. Bloch in the Michigan Law Review, August 1998, Volume 96, No. 8.

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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 1st day of April 2009.