

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39723
Docket No. MW-38507
09-3-NRAB-00003-040474
(04-3-474)

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 (Osmose Preservative Company) to perform Maintenance of Way and Structures Department work (replacing mud blocks, bridge ties, bridge piling, bridge caps, X braces, shims, head walls, wing walls and related work) on bridges between Mile Posts 74.52 and 108.19 beginning on January 14, 2004 and continuing. (System File ETPM-04-07/266).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a 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 L. Serna, J. Garcia and G. Vasquez shall now each be compensated for ninety-eight (98) hours pay at their respective straight time rates of pay, seventy-eight (78) hours pay at their respective time and one half rates**

of pay, one (1) hour pay at their respective double time rates of pay as of February 25, 2004 and an equal proportionate share of the man-hours expended by the outside contracting forces in performing the B&B work continuing thereafter.”

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.

The Organization protested subcontractors performing bridge repair work between MP 74.52 and MP 108.19 as part of the extensive upgrading of Carrier's main line and bridges. This extensive project was the result of the Carrier obtaining millions of dollars in funding for the upgrade project.

The Organization maintains that (1) the instant work of performing bridge repairs was clearly work of the Claimants (2) the Carrier did not conduct good faith discussions with the Organization about contracting out and (3) the Claimants were willing and able to perform the work, but the Carrier did not give them a good faith opportunity to have the work assigned to them. By reducing the workforce by more than 50 percent, the Organization asserts that the Carrier has not operated in good faith and now seeks to avoid having Organization members perform scope covered work through subcontracting. The Organization claims that the Carrier was obligated to supplement its workforce to meet its responsibilities.

The Carrier responds that the bridge repairs at MP 74.52 were pursuant to an emergency and the notice requirements for contracting out do not apply. The bridge began to lean and needed to be immediately repaired. The Carrier continues that the repair of the bridge at MP 108.19 did not violate the Agreement because (1) the work is not covered by the Scope Rule (2) the scope and urgency of the entire project met the requirements of Rule 29 for contracting (3) the Carrier engaged in the notice and conferencing process as required under Rule 29 and (4) stare decisis requires the instant claims to be denied. The record shows that the Carrier's stated reasons for the subcontracting of the upgrading work pertained to the lack of sufficient manpower, as well as special tools and equipment that were required for the work to be completed in a timely manner. The Organization cannot show that the work of this extensive nature was customarily or historically performed by Organization represented employees. Moreover, BMW-represented employees were not adversely affected by this subcontracting because they were fully employed.

The Board carefully reviewed the evidence and finds that the Organization failed to prove a violation of the Agreement in this case. The bridge at MP 74.52 was repaired pursuant to an emergency. Assuming this type of bridge work is covered by the Scope Rule, there is an exception for an emergency found in Rule 1(a). Here, there was an emergency situation at MP 74.52. A leaning bridge requiring a slow order certainly suggests immediate action. We find that the Agreement was not violated in this emergency situation at MP 74.52 when no notice was served on the Organization - because the emergency situation required immediate action. (See Third Division Award 30868.)

The work at MP 108.19 is similar to the work addressed in Third Division Award 37009. That Award dealt with an earlier phase of the extensive upgrading project on the Carrier's line. Here, the Carrier served the Organization with a subcontracting notice on April 23, 2003. The Organization replied on April 29, claiming the notice was vague. The Carrier provided additional information in a letter served April 29, 2003. This letter included the five bridges to be repaired and included the bridge at MP 108.19. The parties conferenced the Carrier's notice on May 8, 2003 and no understanding was reached. While Award 37009 dealt with an

earlier phase of the upgrade project, the Carrier's rationale for subcontracting was the same.

As the Board found in Award 37009, we so find here because the Organization failed to prove that work of this extensive nature was reserved to BMW-represented employees under the Scope Rule, that the work had been historically and customarily performed by them as opposed to contractors, or that Rule 29 precluded the Carrier from contracting out work on this extensive upgrade project.

The Carrier complied with the notice and conferencing requirements and supported its reasons for contracting the bridge work at MP 108.19. Accordingly, the claim is 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 26th day of June 2009.