

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39909
Docket No. MW-38082
09-3-NRAB-00003-030548
(03-3-548)

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
(BNSF Railway Company (formerly The Atchison,
(Topeka and SantaFe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (E-80 Plus Construction) to perform Maintenance of Way and Structures Department work (renew bearing pads) on bridges at Mile Posts 87.89, 95.37 and 98.72 on the Texas Division in the vicinity of Wichita Falls, Texas commencing on September 6 and continuing through September 26, 2002, instead of B&B Foreman A. C. Thorn, B&B Assistant Foreman B. McKinney and B&B Welders L. Shoffner and R. Kindle [System File F-02-28C/13-03-0001 (MW) ATS]**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman a proper advance written notice of its intent to contract out said work or make a good faith effort to reach an understanding concerning said work as required by Appendix No. 8 (Article IV of the May 17, 1968 National Agreement.)**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. C. Thorn, B. McKinney, L. Shoffner and R. Kindle shall ‘ . . be compensated an equal and proportionate share of all straight time and overtime hours worked by the four**
- (4) E-80 Plus construction employees performing this claimed**

work of renewing bearing pads on the three (3) bridges located at Mile Post 87.89, 95.37 and 98.72. In the case where the contractors utilize only three (3) employees the Organization requests that the three (3) Claimants with the highest seniority be compensated accordingly.”

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 maintains two distinct arguments. First, that the Carrier's initial notice of intent to contract out the involved work was inadequate, and second, that the work should have been assigned to BMW-represented employees. The Carrier's response to the Organization's notice argument is also two-fold. First, that the notice was sufficient, and second, that the notice requirements did not apply because the Organization cannot prove that the work is customarily performed by BMW-represented employees. The Carrier also counters that it retained the right to contract out the work at issue and prior Awards have recognized that right.

In a letter to six General Chairmen dated December 18, 2001, the Carrier stated, in pertinent part:

“Gentlemen,

As information the Carrier plans to continue the ongoing program of bridge and culvert concrete repair at various locations across the [Carrier's] system during 2002. The Carrier is not equipped, nor do its

employees possess the necessary expertise to perform all phases of this work, which utilizes special equipment and material available through the contractor. Therefore, as in the past, this work will be performed by contract.

Attached are the locations where repair of concrete bridges and culverts is expected to occur in 2002. This listing is complete, but changes could occur as the work season progresses.

This letter is intended to inform you of our maintenance programs, and keep you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between [the Carrier and the Organization].”

The letter contained two pages of attachments labeled “Concrete Restoration Projects for 2002.”

In a letter to General Chairman Hemphill dated July 8, 2002, the Carrier stated, in pertinent part:

“Referring to original letter dated 12/18/02 concerning the ongoing program of bridge and culvert repair at various locations across the [Carrier’s] system.

In addition to the locations/structures listed in the 12/18/01 letter, we plan to contract concrete restoration repairs to Bridge 95.87 on line segment 485 located near Henrietta, TX. This work will consist of epoxy injection, polymer grout replacement and grout injection of piers and bearing areas. Work is expected to begin approximately July 29, 2002 and be complete by August 30, 2002.”

In a letter to General Chairman Morgan dated March 17, 2003, the Carrier stated, in pertinent part:

“The Organization claims work on Bridge 98.72. This bridge had emergency repairs made to it in February 2001. The only work at this bridge during the time frame of the claim was a warranty check of the

work performed in February 2001. There was no renewal of bearing pads.”

The Rules require the Carrier to provide notice to the Organization of contracting. Here, the Organization received the notice, but challenged its form because it did not identify the specific reasons for contracting at each separate location. A review of the notice reveals that it placed the Organization on notice that concrete repair work would be done at the stated locations. The subsequent letter of July 8, 2002, indicated that epoxy work would be done on Bridge 95.87. The notice and subsequent letter did not violate the applicable Rules.

On the merits, the Carrier points to a number of Awards that have addressed the contracting of epoxy injection bridge repair. Specifically, Third Division Award 32603, Public Law Board No. 4768 Award 29 and Public Law Board No. 6538 Award 4, all dealt with epoxy injection. These Awards demonstrate that the contracting of epoxy injection has occurred for many years and that the “piecemealing” of concrete repair work is not required. Although under different Agreements than the instant Agreement, the reasoning is sound. Further, the record indicates that there was an inspection of Bridge 98.72 and no repair work was done at that location.

Based on a thorough review of the record and the parties’ Submissions, the Board finds the reasoning of the cited Awards as compelling and sees no reason to reach a different result. The Organization has not met its burden of proof.

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 31st day of August 2009.