

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40223
Docket No. MW-39296
09-3-NRAB-00003-060127
(06-3-127)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(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 assigned outside forces (Robert Carr & Associates, Nakesons Painting and Spriggs Plumbing & Heating) to perform Maintenance of Way and Structures Department work (various remodeling projects) within the depots at Hastings and Winona, Minnesota beginning on March 8 and continuing through March 31, 2004 (System File C-18-04-C080-06/8-00228-100 CMP).**
- (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 said work as required by Rule 1 and failed to enter good-faith discussions to reduce the incidence of subcontracting 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 L. Wieting, Jr., P. Lubeck, E. Arnold, M. Norby, A. Anderson, D. Bechly, D. Cooper and J. Ackerman shall now be compensated ‘for a proportionate share EACH of three hundred thirty-six (336) hours for all lost time at the applicable straight time and/or time and one-half (1½) rate of pay, wages, benefits and work**

opportunities as a result of the Carrier assigning recognized and contractually approved maintenance of way work, to be performed by outside contractors and their employees who possess absolutely no seniority or other contractual rights under the Schedule of Rules Agreement, Form 2625, as amended, from March 8 through March 31, 2004.' (Emphasis in original)"

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 instant claim was presented on behalf of Division B&B Crew No. 47K and three other employees for 336 hours after the Carrier assigned outside forces to perform remodeling work within the depots at Hastings and Winona, Minnesota. The work claimed by the Organization included:

“ . . . the remodeling work at Hastings, included but not limited to demolition of the bathroom, renewal and building of walls, removal of floor tile, installation of new inlaid flooring, and renewal of plumbing and heating. The remodeling work at Winona included but was not limited to painting the depot offices, door installation, building of a wall, assembly of desks and lockers, and installing of new flooring. . . .”

The Organization contends that this work is contractually reserved to its members and has customarily, historically, and traditionally been performed by BMW-represented forces. The Organization further contends that the record is

devoid of any evidence that the outside forces utilized special tools or materials unavailable to Carrier forces to accomplish this ordinary B&B work.

In addition, the Organization argues that the Carrier did not engage in meaningful, good faith discussions concerning the utilization of Carrier forces to perform the subcontracting work. On the contrary, the Organization asserts that the Carrier had a plan to contract out the work before meeting with the Organization in conference. To the Organization, the conference was nothing more than a sham, intended to give the illusion of compliance with the contracting Rule. For these reasons, the Organization submits that the claim must be sustained.

The Carrier contends that there was no violation of the Agreement. It submits that proper advance notice was provided and a conference was held. The Carrier submits that the Claimants were fully employed, unavailable, and not qualified to perform the disputed work. In addition, the Carrier asserts that the work is not exclusive to the BMW and there is a past practice of utilizing contractors.

After careful study of the lengthy explications provided by the parties, the Board finds that the Organization has not proven that the Carrier violated the Agreement when it contracted out the interior remodeling work at the Hastings and Winona depots.

The language contained in the Note to Rule 1, the Scope Rule, sets forth the notice and conferencing requirements with regard to the contracting out of work within the scope of the Agreement. When the parties meet in conference, they are required to “make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting . . .” subject to the Organization’s right to protest by filing a claim. Appendix I reaffirms the parties’ good faith obligations in subcontracting cases.

The Organization’s assertion that the Carrier contracted out the work before meeting with the Organization in conference was denied by the Carrier and not substantiated by the Organization. Assertions are not evidence. In the absence of probative evidence to support the claim that the contracting out decision was a “fait accompli” when the parties met in conference, the Board rejects the Organization’s argument that the conference was a mere pretense.

The Organization has not advanced any other reason which would persuade the Board that the Carrier lacked good faith in the instant case. We find that the Organization received notice, the matter was conferenced, and the Organization had an opportunity to respond to the Carrier's position. It is true that the Carrier determined that it was unable to utilize BMW-represented forces, but the mere fact of disagreement with the Organization on that point does not establish bad faith or failure to adhere to the requirements of Rule 1, the Scope Rule, or Appendix I. The Carrier presented valid reasons for contracting out the work at issue. Although some of the work at issue might have been within the capabilities of the Claimants, there was evidence that the Carrier has contracted out this type of work in the past. Moreover, the Organization has not shown that the Claimants, who were fully employed, were denied work opportunities as a result of the Carrier's determination. Accordingly, the Board finds that the Organization has not shown that the Carrier was in violation of the Agreement when it contracted out remodeling work at the two depots.

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 21st day of December 2009.