

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40224
Docket No. MW-39420
09-3-NRAB-00003-060074
(06-3-74)**

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

**(Brotherhood of Maintenance of Way Employes 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 replacement work) on Bridge #375.82 at Red Wing, Minnesota beginning on November 5, 2002 and continuing through November 21, 2002 in place of B&B Steel Crew #47X employees G. Wieting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, K. Shortreed and Crane Operator R. Bartels (System File C-45-02-C080-15/8-00228-077 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 and R. Bartels shall now each be compensated at their applicable rates of pay for a proportionate share of the total of three hundred ten (310) man-hours expended 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.

January 10, 2002, the Carrier provided the following notice to the Organization:

“RIVE 375.82. Replace bridge over Vermillion River at Duke, MN with a new single track bridge and re-align track.

Company will replace the existing double track bridge over the Vermillion River at Duke, MN with a new single track bridge and will re-align the main line and relocate the west end of Duke siding to accommodate. CP will employ its Preferred Service Provider for bridge construction and will include CP forces in all phases of the bridge construction as we have done in the past. CP forces will also handle all track work and flag protection. Project is scheduled to start in the spring of 2002 and be completed by the end of the year.

The Carrier's right to subcontract is based upon Agreement language, Board Award and past practice. Should you desire to discuss further, please advise and a member of my staff will be available to meet with you."

Upon the request of the General Chairman, a conference was held on January 31, 2002 to discuss the proposed project. By letter on that same date, the General Chairman set forth his understanding of what had transpired at the conference:

"RIVE Bridge 375.82

The Organization advised the Carrier that its current B&B system forces have performed similar and identically related work in the past without the assistance of contractors and should be allowed to continue to do so. It is also stated that BMWWE disagrees that past practice, Board Award or Agreement language allow Carrier to subcontract this work. However, the Organization advised it would listen to Carrier's reasoning for its plans to go forward with this contracting.

Mr. Hill advised that the project costs will range in the neighborhood of \$2 million. The work duration will be 26-28 weeks, beginning in 2002 as soon as weather permits. Mr. Hill advised the Carrier intends to fully utilize System B&B crews in all phases of the bridge construction project as outlined in Carrier's intent to assist the contractors that are eventually assigned.

It was at this point, that the Organization advised the Carrier that without prejudice and precedent, and with non-referability by either party or a third party, the BMWWE would be agreeable to not advancing a time claim on behalf of B&B forces due to Carrier's intent to contract this bridge work as outlined herein and as committed by Carrier. This agreement is predicated on two (2) conditions:

- 1. That Carrier's B&B System Crews (one or the other or a mixture of both) will fully assist the contractors in all phases of this project.**
- 2. That Carrier's B&B System forces will not be furloughed by Carrier during the time that this bridge replacement project is underway until its conclusion.**

Additionally, the Carrier is hereby on notice that should the Carrier fail to meet these conditions, the Organization intends to file a claim to grieve the matter on behalf of MOW forces."

According to the Organization, seven employees on the System B&B Steel Bridge Crew assisted six contractor employees on the Vermillion River Bridge Project from April 8 until November 4, 2002. From November 5 through November 21, 2002, however, the Carrier split the B&B crew, sending three employees to begin work on another bridge project at LaCrosse, Wisconsin, while the remaining four employees continued to work on the Vermillion bridge replacement project. On December 2, 2002, one of these four employees was directed to report to work in Milwaukee to perform steel repairs on the Menominee Bridge.

The Organization contends that the contractor brought in additional employees to work on the Vermillion bridge replacement project as a result of the diminution of the B&B Steel Bridge Crew at that location. Accordingly, the Organization filed the instant claim, alleging that the Claimants were denied an opportunity to perform or even to assist in the performance of the bridge replacement work when additional outside forces were assigned to the project and Carrier forces were assigned elsewhere.

The Organization submits that the parties reached an understanding at the January 31, 2002 conference pursuant to the subcontracting notice and the Carrier reneged on that understanding. To the Organization, the Carrier did not act in good faith in accordance with the Scope Rule and Appendix I. The Organization asserts that the work at issue is encompassed within the scope of the Agreement and

has historically and customarily been performed by BMW-employees. This project was planned well in advance and the work to be performed was not of an emergency nature. In the Organization's view, the Carrier could have utilized BMW-employees to assist in the performance and completion of the project as the Carrier initially committed to do. For these reasons, the claim must be sustained in its entirety.

The Carrier denies that there was any violation of the Agreement. It contends that the subcontracting notice informed the Organization that BMW-employees would be included in the Vermillion bridge replacement project and that is what occurred. The Carrier contends that there was never any agreement to utilize a specific number of BMW-employees or any specific crew. The Carrier further contends that when several of the BMW-employees completed their work on the Vermillion bridge replacement project, they were moved to another project. The Carrier insists that the contractor did not bring in any additional employees to replace the departing BMW-employees.

In addition, the Carrier takes the position that the bridge replacement work at issue was properly contracted out. The Carrier does not have the equipment, expertise, or manpower to perform an entire project of this magnitude. It has traditionally utilized outside forces to perform this type of work and it properly utilized BMW-employees to assist with track work and flag protection.

Finally, the Carrier argues that the claim presented is excessive. All Claimants were on duty, under pay and suffered no wage losses. No B&B employees were furloughed during the period of the instant claim. The Organization presented a claim for work performed by contractor employees which its members have never performed and are not qualified to perform. For all these reasons, the claim must be denied in full.

The Board carefully reviewed the voluminous record and the lengthy arguments presented by the parties. As an initial matter, we observe that the burden was on the Organization to establish that the Carrier violated the

Agreement. We find that the Organization has not shouldered its burden in the instant case.

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.

In Third Division Award 37476, the Board sustained a subcontracting claim after the Carrier reneged on a commitment to utilize BMW-represented employees and instead contracted out the disputed work to outside forces. The Board concluded that the Carrier breached its good faith obligations under the Agreement.

The instant case is factually distinguishable, notwithstanding the Organization’s arguments to the contrary. There are conflicting assertions on this record as to whether the January 31, 2002 conference yielded an agreement concerning the work to be performed by the Carrier’s forces. Ultimately, we must conclude that the Organization did not establish that there was a commitment on the part of the Carrier to maintain a full B&B crew or a specific number of Carrier employees for the duration of the project.

This was a large and complex project. The evidence shows that there is, at best, a mixed or shared practice whereby outside contractors and Carrier forces have traditionally performed similar bridge replacement work in the past. The Carrier provided notice to the Organization of its intent to subcontract and it entered into good faith discussions concerning the use of BMW-represented forces on the project. The Carrier utilized a B&B crew to assist. No BMW-represented employees were furloughed. The Board is not convinced that the Carrier was required under the Agreement to do more than it did in this case.

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Having failed to prove a violation of the Agreement, the Organization's claim 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 21st day of December 2009.