

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40253
Docket No. MW-39565
10-3-NRAB-00003-060355
(06-3-355)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 assigned outside forces to perform Maintenance of Way and Structures Department work (remove/replace shingles and valley tin, siding, install door and window flashing, construct wood platforms with handrails and steps and other associated preparation and construction work) at the Tomah Office Building in Tomah, Wisconsin beginning on October 4, 2004 and continuing (System File C-50-04-C080-17/8-00228-110 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance 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 D. Davis, R. Bowers, G. Brinkmeier and R. Bean shall each now be compensated at their respective and applicable rates of pay for an equal and proportionate share of**

the four hundred (400) 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.

By letter dated February 19, 2004, the Carrier advised the General Chairman of its intent to utilize outside forces in the performance of work at six locations, including Tomah, Wisconsin. The Carrier stated that work at the Tomah location would include “. . . flooring and HVAC work. Use contractor to install new rubberized flooring to ensure warranty and use licensed contractor to evaluate cooling and heating system.” The record shows that the parties met in conference on February 27, 2004 to discuss the proposed subcontracting.

The Organization thereafter filed the instant claim alleging that the Carrier utilized an outside contractor, beginning October 4, 2004, to remove shingles from the roof of the Tomah facility, re-shingle the building's roof; side the building and install flashing around windows and doors; construct wooden platforms with handrails and steps on both ends of the building; and other associated preparation and construction work. The Organization contended that the Carrier failed to provide notice of its intent to contract out this work. The Organization further contended that this was work historically, traditionally and customarily performed by B&B forces and could have been performed by the Claimants had they been provided an opportunity to do so.

The Carrier argued that notice of its intent to contract the work in question was served. It further argued that the work in question was not exclusive to BMW-represented employees and that outside contractors had been utilized in the past to perform said work. Consequently, the Carrier asserted that the Organization failed to meet its burden of establishing that the disputed work was reserved to its members. In addition, the Carrier took the position that the Claimants were not available to perform the work claimed by the Organization because they were on assignment elsewhere.

After careful review of the record, the Board is persuaded that the statements provided by the Organization support the conclusion that the disputed work is arguably within the scope of the Agreement and has been traditionally and historically performed by BMW-represented forces. Notwithstanding the Carrier's contention to the contrary, it is well-established that exclusivity of performance is not the test utilized in determining whether notice is required before contracting out. If the work has been performed by employees subject to the Agreement, even if it has also apparently been contracted out by the Carrier in the past, the Carrier is obligated to give notice before contracting out. See, e.g., Third Division Awards 29547, 32704, 32861 and 35378.

The Organization established its entitlement to advance notice. We find that appropriate notice was not provided. It is plain from reading the February 19, 2004 notice of intent that the disputed work performed by the contractor in this particular case was neither expressly identified, nor encompassed within the work that was identified by the Carrier to be contracted out. A notice of intent that does not reasonably cover the work contracted out is tantamount to no notice at all.

In a similar case, the Board stated in Third Division Award 32704:

“[Subcontracting] . . . without giving a timely notice to the Organization affording it an opportunity to be heard disturbs the letter and spirit of Appendix I, which imposes upon Carrier an obligation to make good faith efforts to reduce contracting out.”

The Carrier failed to meet its obligations under Appendix I of the Agreement. The Carrier's “fully employed” defense has been rejected on numerous occasions by the Board. See, e.g., Third Division Awards 32861, 32863, 35571, 36527 and 37476.

This claim will be sustained. The matter is remanded to the parties to determine the number of hours worked by the contractor. The Claimants shall be compensated accordingly.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 15th day of January 2010.