

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40320
Docket No. MW-40033
10-3-NRAB-00003-070231
(07-3-231)**

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 work (ditching and related work) in the vicinity of Mile Posts 243.5 to 243.8 at Tunnel City, Wisconsin beginning on September 27 and continuing through October 8, 2004 (System File C-49-04-C080-16/8-00228-114 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work as required by Rule 1 and failed to enter a good faith discussions 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, Claimant W. Olsen shall now be compensated for ninety (90) hours' pay at his respective straight time rate of pay and for eighteen and one-half (18.5) hours at his respective time and one-half rate of pay.”**

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.

On September 8, 2004, the Carrier notified the General Chairman of its intent to contract out ditch line work in order to maintain proper tunnel drainage at Mile Post 243.88 near Tunnel City, Wisconsin. The notice gave an approximate start date of September 27, 2004 and indicated that the work would be completed by October 8, 2004. The General Chairman promptly responded by fax dated September 9, 2004, requesting that the parties meet on September 13, 2004 to discuss the matter. The General Chairman also requested that "... said contracting should not begin prior to our discussions."

The Organization asserts that it expected the Carrier to postpone the proposed contracting until the parties could discuss the proposed contracting out. The parties met on October 8, 2004 and discussed the September 8, 2004 contracting out notice. According to the Organization, the Carrier did not advise at that meeting that the contracted work had already commenced and in fact was nearing completion while the conference was in progress.

The Organization contends that the contracted work comes within the Scope of the Agreement and that ditching work has historically, customarily, and traditionally been performed by BMW forces. During the handling of this claim on the property, the Organization strongly argued that the Carrier failed to meet its contractual obligation to engage in good faith discussions when it utilized a contractor to perform scope-covered ditching work prior to the "pre-contracting" conference between the parties.

The Carrier asserts that it met its good faith obligations and gave proper advance notice prior to contracting out. The Carrier further states that the work in question is not exclusive to BMW-represented forces. Moreover, the Carrier argues that it had valid reasons for contracting out, because it did not have the available equipment, employees, or expertise to accomplish the work.

Whether the Carrier had proper reasons for contracting out is a matter that should have been discussed with the General Chairman under the clear language of Rule 1 of the Agreement. The pertinent provision states:

“NOTE: In the event Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization shall 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, and the Organization may file and progress claims in connection therewith.

Nothing in this Note shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice, and, if requested, to meet with the General Chairman or his representative to discuss, and, if possible, reach an understanding in connection therewith. . . .”

The foregoing Rule echoes the language in Appendix I.

Notwithstanding the Carrier’s argument to the contrary, exclusivity is not the test in determining whether the notice and conferencing obligations of the Agreement must be satisfied. See, e.g. Third Division Awards 29979, 32861, and 35378. It is sufficient to show, as the Organization has in this case, that the work in

question has been performed by its members on a historical and customary basis. There is considerable evidence in the record to support that conclusion.

The Carrier failed to demonstrate that it complied with the foregoing contractual requirements in good faith. Holding a conference at the same time the contracted work is nearing completion renders the conference obligation meaningless. Such actions by the Carrier preclude any good faith attempt to reach an understanding concerning the contracting. Third Division Awards 30823, 30943 and 30970. Consistent with the numerous Awards on this subject which emphasize the seriousness of the breach of good faith obligations under the Agreement and the lost work opportunity of the affected employee(s) the Claimant is to be compensated at his straight time rate of pay for the hours indicated in the claim. See, e.g., Third Division Awards 38012, 38965 and 39883.

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 1st day of March 2010.