

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41280
Docket No. MW-40481
12-3-NRAB-00003-070425**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Texas Mexican Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Blattner Construction Co.) to perform Maintenance of Way and Structures Department work (install piping, filling bridges and related work) between Mile Posts 00.00 and 155.00 between Laredo and Corpus Christi, Texas beginning July 14, 2006 and continuing (System File WGF-06-04-TM/T04066082).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the work in question as required by Rule 29 and the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Serna, T. Vira, G. Vasquez and A. Andrade shall now each be compensated at their respective and applicable rates of pay for all of the straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning July 14, 2006 and continuing.”**

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, 2006 the Organization filed a claim alleging a continuing violation by the Carrier when it assigned outside forces to perform Maintenance of Way work instead of the Claimants. The Organization described the work as “. . . installing pipes and filling bridges, on the Main line between Mile Post 00.00 and Mile Post 155.00, between Laredo, Texas and Corpus Christi, Texas, starting on July 24, 2006 and continuing. . . .” It described the contractor forces as consisting of one Foreman, two Machine Operators and one Laborer performing bridge work, eight hours daily plus overtime. The Organization further alleged that the Carrier failed to provide advance notice to the Organization about this contracting transaction in violation of Rule 29 and the December 11, 1981 Berge/Hopkins Letter of Agreement.

On December 7, 2006 the Carrier denied the claim on the grounds that the Organization had failed to meet its burden of proof that the named contractor had performed any scope-covered work; that the claim failed to identify the bridges where the contractor purportedly worked; and that there was no accounting for the time expended by the contractor’s forces. Finally, the Carrier argued that the Claimants were improper in that they held no B&B Subdepartment seniority and that they were employed at all times relevant to the claim, hence suffered no loss.

In response, the Organization submitted written statements reiterating that the Carrier had assigned the contractor to work between Mile Post 00.00 and Mile

Post 155.00 as well as written statements showing that the Carrier's own employees had performed identical work in the past.

The first question that the Board is faced with is whether the Organization, as the moving party, met its burden of proof. In Third Division Award 31930, we found:

"The substantive portions of the claim lack evidentiary support. Once the allegations of the claim, including their accuracy as to types of equipment, hours and dates of the work, were placed in controversy via the Carrier's denial, it was incumbent upon the Organization to prove such allegations by submission of probative evidence."

In view of the facts in the record, we find that the Organization's failure to identify with requisite specificity the location or locations where the work in question was allegedly performed is fatal to the claim. Once the Carrier put the basic facts concerning the identification of the work allegedly performed by the contractor and the location(s) at which the work was allegedly performed in controversy, the burden shifted to the Organization to prove those factual elements by submission of probative evidence. However, when the Carrier put the Organization to the proof, no further evidence was forthcoming concerning the purported nature and specific location of the bridge(s) where the work was allegedly performed. In view of the foregoing, we find that the Organization failed to meet its burden of proof. Accordingly, the claim must be denied.

Finally, the Board notes that the issues and arguments raised during the handling of this dispute on the property regarding the merits of the claim were confined to the issues discussed above. Although both parties included additional information and argument in their Submissions and presentations to the Board, we confined our consideration and findings, as we must, to only those facts and contentions that were properly part of the evidentiary record.

AWARD

Claim denied.

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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 28th day of March 2012.