

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37008
Docket No. MW-37353
04-3-02-3-386

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The 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 (Trev-Bo Construction Company) to perform Maintenance of Way and Structures Department work (install ties and related work) on main line track between San Diego, Texas at Mile Post 107.00 and Bruni, Texas at Mile Post 49.00 beginning June 19 through August 16, 2001 and continuing (System File MW-01-9-TM/164).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in either Parts (1) and/or (2) above, Claimants P. Benavides, E. Lara, R. Garza, J. Garcia, T. Vasquez, R. Couling, J. Lopez, G. Vasquez, V. Moncivais, A. Vira, L. Serna, N. Saenz, J. Rodriguez, M. Paz, A. Garcia, A. Jimenez and J. Sciaraffa shall now be compensated for three hundred twenty (320) hours' pay at their respective straight time rates of pay, one hundred ninety-**

four (194) hours' pay at their respective time and one-half rates of pay and the Claimants shall be compensated for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the aforesaid work beginning August 17, 2001 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.

This claim protests the Carrier's contracting of work involving the installation of ties as part of the extensive upgrading of the Carrier's main line and bridges that occurred as a result of its ability to obtain private funding for such project. The record reveals two separate notices of its intent to contract out such work sent by the Carrier to the Organization, one dated January 19 with a follow-up dated March 31, 2001, after the parties held a conference on January 23, 2001 to discuss the Carrier's asserted reasons for the contracting. The original notice outlined four programs involved in the upgrading project, and the subsequent notice specified the actual contractors who would be doing work on two of the four programs and their anticipated locations. The Carrier's asserted reasons for the contracting were the lack of sufficient manpower, tools and equipment to perform a job of this magnitude in a timely manner, and the fact that its workforce was busy on other projects. The correspondence on the property sets forth specifically what each Claimant was working on during the claim period, which Claimants worked alongside the contractor's employees, and the number of hours of overtime worked by each, establishing that each was fully employed during the claim period.

The Organization contends that the Carrier violated the language and intent of the December 11, 1981 Letter of Understanding by systematically reducing its workforce by over 50% to the point where there is insufficient manpower to perform admittedly scope-covered work, and then contracting out such work based upon such fact. The Organization asserts that the Carrier failed in its good faith obligation to reduce the incidence of subcontracting and utilize BMW-represented employees to perform scope-covered work, noting that this was pre-planned work that could have been performed by BMW members with leased equipment, if necessary. The Organization argued that the Carrier was obliged to supplement its workforce to meet its contractual responsibilities. It requests that the Claimants be made whole for the lost work opportunities, citing Public Law Board No. 6086, Award 12.

The Carrier initially argues that this claim is duplicative of other claims filed by the Organization on behalf of the same Claimants for contracted work during the same period of time, supporting the appropriateness of dismissing it, citing Third Division Awards 36510, 31569, 27456 and 27122. The Carrier asserts that its actions were in conformance with its obligations under the Agreement, because it (1) served adequate notice of its intent to contract (2) held a conference prior to contracting the work, and (3) supported its asserted reasons necessitating the use of a contractor for the extensive work involved. The Carrier notes that its total workforce is sufficient for the maintenance of the small amount of track it owns, that it need not hire new employees for special, unforeseen work projects such as in this case, and that no employees were furloughed or adversely affected by the contracting in issue. The Carrier contends that the Organization failed to sustain its burden of proving that work of this nature was customarily or historically performed by BMW-represented employees, and did not rebut its assertion that it has had a practice of contracting such work, citing Third Division Awards 36515, 36290, 36283, 36282, 36234, 35822, 30287, 29610, 29034 and 21287. Finally, the Carrier argues that it is inappropriate to award damages to fully employed Claimants where the Carrier has acted in good faith and no loss of work opportunity has been shown, relying upon Third Division Award 32865.

A careful review of the record convinces the Board that the Organization failed to prove a violation of the Agreement in this case. While the work of installing ties is arguably scope-covered work, the Carrier met its notice and

conference obligations with respect to this contracting transaction, and supported its asserted reasons of insufficient manpower and equipment, time constraints, and the need for its existing 19 employees to attend to regular maintenance. Because the Organization was unable to show that work of this scope and nature is reserved to employees and failed to rebut the assertion that it has been contracted in the past, the Board cannot support a finding that the Scope Rule has been violated. Based upon the confusing state of the on-property record concerning the nature and existence of duplicative claims encompassed by this period of time covering the named Claimants, we deem it appropriate to dispose of this claim on its merits rather than on the Carrier's procedural argument.

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 18th day of May 2004.