

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37009
Docket No. MW-37390
04-3-02-3-428**

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 (Osmose and Bill's Welding Service) to perform Maintenance of Way and Structures Department work (remove, replace and related repair work at bridges and culverts) on dates beginning October 2 through 22, 2001 (System File LHS-02-13/170).**
- (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 Parts (1) and/or (2) above, Claimants L. H. Serna, Jr., J. A. Garcia and J. Rodriguez shall now each be compensated for one hundred twenty (120) hours' pay at their respective straight time rates of pay, fifty-seven and one-half (57.5) hours' pay at their respective time and one-half rates of pay and Claimant A. T. Jimenez shall be compensated for forty (40) hours' pay at his respective straight time rate of pay and twenty and one-half**

(20.5) hours' pay 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.

This claim protests the Carrier's contracting of work involving bridge rehabilitation as part of the extensive upgrading of the Carrier's main line and bridges that occurred as a result of the Carrier's ability to obtain \$9 million in private funding for such project. The record reveals that two separate notices of its intent to contract out such work were 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 instant claim deals with one aspect of the second phase of bridge rehabilitation that was apparently subcontracted by the main contractor (Osmose) to a welding company (Bill's Welding Service). 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, the fact that Claimant Serna worked alongside the contractor's employees and the other Claimants were not even assigned to the B&B Subdepartment at the time, as well as 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 served adequate notice of its intent to contract and held a conference prior to contracting the work, and 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 BMW-represented 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 extensive 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 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. This case is similar to the one dealt with by the Board in Third Division Award 37008. It involves a different phase of the same extensive project of upgrading the main line and bridges, was covered by the same contracting notices and conference, and utilized the same rationale for the contracting. As we found in Award 37008, the Organization failed to prove that work of this extensive nature was reserved to BMWWE-represented employees under the Scope of the Agreement or had been historically and customarily performed by them, rather than contractors, or that the Carrier was precluded under the language of Rule 29 from contracting under the circumstances existing in this extensive project. Because the Carrier met its notice and conferencing obligations, and supported its asserted reasons for contracting, the 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 18th day of May 2004.