

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37991
Docket No. MW-36921
06-3-01-3-546

The Third Division consisted of the regular members and in addition Referee Joan Parker 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 (Lone Star Contractors) to perform Maintenance of Way and Structures Department work (install bridge caps, braces and bridge shims) on the main line bridges at Mile Posts 149.71 and 150.00 in the vicinity of Corpus Christi, Texas on October 27, 28 and 29, 2000 instead of B&B Foreman L.H. Serna, Machine Operators J. Garcia, J. Rodriguez and A. Garcia (System File MW-01-3-TM).**
- (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, J. Garcia, J. Rodriguez and A. Garcia shall now each be compensated for twenty-four (24) hours' pay at their respective straight time rates of pay and for thirty-one and one-half (31.5) hours' pay at their respective time and one-half rates 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.

The Claimant L. H. Serna holds seniority as a Foreman in the Bridge and Building Sub-department as of January 16, 1978. Claimants J. Garcia, J. Rodriguez and A. Garcia hold seniority as Machine Operators in the Machine Sub-department as of September 15, 1997, October 18, 1996 and October 18, 1996, respectively. The Claimants also hold seniority as Track Laborers in the Track Sub-department.

On October 26, 2000, an adjacent property owner, concerned about the condition of a bridge along the Carrier's main line (a six-span, open deck timber pile bridge over the Oso Creek in Corpus Christi, Mile Post 149.71) contacted the Texas Railroad Commission (TRC). The TRC sent an inspector to evaluate the bridge. The condition of the bridge included "a cap almost fully displaced off the top of the piles . . . the bridge could have suffered a catastrophic failure under traffic at any time." The TRC contacted the Federal Railway Administration (FRA) to request authority to take the bridge out of service.

The Carrier subsequently voluntarily placed a five mile per hour restriction on the bridge and took it out of service for the performance of immediate repairs. An outside contractor, Lone Star Construction, performed the necessary repairs on Friday, October 27, Saturday, October 28, and Sunday, October 29, 2000. The contractor installed bridge caps, braces, and shims, using equipment including a backhoe, electric saws and drills, and hand tools. The work required contractor forces to work eight straight-time hours and six overtime hours on October 27; 15½

overtime hours on October 28; and ten overtime hours on October 29. Claimant Serna worked with the contractor as a B&B Foreman during those hours, on those days.

The Agreement between the parties provides in pertinent part:

"RULE 1 – SCOPE

- (a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all sub-departments of the Maintenance of Way and Structures Department and such employees shall perform all work in the Maintenance of Way and Structures Department. . . .

RULE 29 – CONTRACTING OUT

When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the regular forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out of such work. The carrier and organization representatives shall make a good faith attempt to reach an understanding on the contracting out of the work to be performed. In event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter or modify any provisions of the Scope Rule or any rules of the applicable agreement in the handling of such matters."

In addition, a December 11, 1981 Letter of Understanding provides in pertinent part:

"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the

procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties of subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore [sic]."

On December 23, 2000, the Organization filed the instant claim on behalf of the Claimants, which the Carrier denied. Having failed to resolve the matter during on-property handling, the parties submitted it to the Board for final and binding resolution.

The Organization contends that the Carrier violated the parties' Agreement by contracting out the work in question. According to the Organization such work is reserved to BMW-employees under Rules 1 and 2 of the parties' Agreement. Moreover, M of W forces have customarily and historically performed such work in the past, according to the Organization. The Organization further argues that the Carrier violated the Agreement by failing to provide notice and engage in a good faith effort to reach an understanding with the Organization regarding the matter, and reduce the incidence of subcontracting, as required by Rule 29 and the December 11, 1981 Letter of Understanding.

The Board finds that the Organization failed to meet its burden of proving that the bridge repair work at issue was reserved to M of W forces. The Organization's argument that Rules 1 and 2 of the parties' Agreement contractually reserve such work to M of W employees is without merit. Rule 1 (Scope) is general in nature, and the Board has found on numerous occasions that in order to prevail in a contracting out claim, under such a general Scope Rule, the Organization must present evidence that BMW-employees have performed the contracted-out work in the past, to the practical exclusion of others. In the instant case, the Organization presented only the statements of two of four Claimants, which establish only that M of W employees have indeed performed bridge repair work in

the past. The Organization has not provided evidence that such work has been performed by Carrier forces historically and customarily, or to the practical exclusion of others.

Moreover, even assuming arguendo that the Organization had demonstrated the bridge repair work in question to be contractually reserved to Carrier forces, the Organization failed to refute the Carrier's assertion that it is nevertheless permitted to contract out work where the work is of an emergency nature. Rather, the Organization challenges only whether the work at issue in the instant case constituted a legitimate emergency. According to the Organization, the Carrier severely reduced its forces and allowed the bridges in question to deteriorate. The Organization cites arbitral precedent in support of its proposition that FRA-reported defects that are the result of such alleged neglect do not constitute an emergency. The Board finds the Organization's argument in this regard to be unpersuasive. The prior Awards cited by the Organization, involving work performed during normal hours rather than on an emergency basis, or involving circumstances where the Carrier failed to identify the actual location of the alleged emergency repairs, are not analogous to the instant case.

The record is clear that a citizen-triggered TRC inspection on October 26, 2000 led to the identification of a serious, hazardous condition that required immediate repair to prevent imminent bridge failure. It is undisputed that repairs were made on an emergency basis, requiring the contractor to work significantly long hours to complete the necessary repairs within a period of three days. The Board finds that a legitimate emergency existed, for which the Carrier was permitted to seek outside help. Furthermore, the Board finds that in the emergency circumstances of this case, there simply was no time for the Carrier to provide the Organization with 15 days' notice and then engage in discussion about the work in an attempt to reach an understanding with the Organization. To require strict compliance with Rule 29 while a six-span bridge is about to fail would be absurd and irresponsible.

The Board finds that the Organization failed to meet its burden of proving that the Carrier violated the parties' Agreement in contracting out the emergency bridge repair work at issue. It is therefore unnecessary for the Board to address the parties' arguments regarding whether the Claimants are proper Claimants in the

instant matter. However, the Board notes that it is a matter of record that Claimant Serna worked with the contractor as a B&B Foreman all three days of the emergency repairs in question, matching them hour for hour according to his timesheet, and therefore performed and was compensated for the very work for which he is seeking compensation herein.

For all of the foregoing reasons, the Board finds that the Organization's 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 25th day of October 2006.