Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38026
Docket No. MW-36682
06-3-01-3-220

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 to install roadbed material and asphalt at road crossings on the main line right of way in the vicinity of Laredo, Texas beginning on May 10, 2000 and continuing through June 2, 2000 (System File MW-00-7-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 when it failed to exert a good-faith effort to reach an understanding on the work to be performed or to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces in accordance with Rule 29 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violation referred to in either Parts (1) and/or (2) above, Foreman P. Benavides, Machine Operators J. A. Garcia, T. Vasquez, R. Couling, Laborers A. Vira, L. Serna and N. Saenz shall now each be compensated for one hundred thirty-six (136) hours of pay at their respective straight time rate and fifty-six (56) hours of pay at their respective time and one-half rates."

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.

Although the Statement of Claim alleges a violation of the notice and conference provisions of Rule 29, the record is clear that the Carrier served proper notice by letter dated April 7, 2000. A rail test car running through the seven crossings in question on April 7 detected the need for prompt renewal of the crossings to permit traffic to proceed over them at regular speed. Their renewal also required coordination with the City of Laredo to deal with traffic interruptions associated with the work.

The parties originally scheduled a telephone conference to discuss the notice. The Carrier's representative was to be in Monterey, Mexico, on the conference date, but he planned to call between 1:00 P.M. and 3:00 P.M. Unfortunately, the General Chairman was not at the phone number originally planned. Instead of being in his Houston office, he was in a hotel room in Laredo. The change of telephone number apparently did not get relayed to the Carrier official in time to connect by phone within the planned parameters. Nonetheless, the parties rescheduled the conference and it was held on April 24, 2000. Accordingly, although the Organization challenged the sufficiency of the notice and conference, the on-property record does not support a notice violation. As a result, we must deny the notice-related portion of the claim.

On the merits, the critical issue is one of Scope Rule coverage. The applicable text of the Agreement constitutes a general Scope Rule that does not specifically identify work that is reserved by the Rule. As a result, the Organization must shoulder the burden of proving that covered employees have customarily,

historically, and traditionally performed the work in dispute. If that burden is satisfied, then the work is deemed to be reserved under the general Scope Rule. Generally speaking, carriers are expected to staff, train, and equip their forces to perform such reserved work unless emergency circumstances or similar compelling reasons exist to justify the use of outside contractors.

The on-property record is not an easy one to decipher because the versions contained in the two Submissions do not coincide. As a result, we cannot precisely determine what was exchanged on the property without indulging in an impermissible degree of speculation. That being said, it is apparent from the notice that the Carrier originally intended to contract out all work associated with the renewal of the seven crossings. The Organization objected to the proposal. The claim, however, is limited to the installation of roadbed material and asphalt at each crossing. It does not include any of the track work associated with the renewals. It is relatively clear from pages 4 and 5 of the Organization's Submission that the Carrier's forces were used to do the renewal work except for the paving.

The Carrier's denial of the claim flatly asserted that its forces had never done asphalt paving work in connection with crossing renewals. It also asserted that because it did not own any asphalt installation equipment, asphalting companies had always been used to perform such paving. With the Carrier thus having rebutted the Organization's claims to Scope Rule coverage through past performance, it became the Organization's burden of proof, as previously noted, to establish that BMWE-represented employees had customarily, historically, and traditionally performed the work.

The Organization attempted to satisfy its burden of proof by submitting four employee statements. Careful review of the record, however, shows them to be insufficient. According to Exhibit J of the Carrier's Submission, the Organization solicited its membership to provide statements attesting to the fact that BMWE-represented employees had performed ". . . the same type of work . . ." in the past. The solicitation also asked the members to reference Claim No. EP-2000-32 in their responses.

The text of the four statements suggests that they were indeed targeted at crossing renewal work in general at the time when the amount of work to be done by the contractors was not clearly known. As a result, none of the four statements specifically mentions asphalt paving. Rather, they are limited to general references

to ". . . the work . . ." or ". . . this type of work . . ." and the like. Accordingly, we find them to be insufficient to prove customary, historical, and traditional past performance of asphalt paving in connection with crossing renewals.

Because the Organization has not satisfied its burden of proof to establish Scope Rule coverage of the disputed asphalt paving work, we also find that the Organization has not established a violation of the Agreement as alleged in the claim.

## 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 7th day of December 2006.