Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38027
Docket No. MW-36683
06-3-01-3-221

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 (W. T. Byler Construction Company, Inc.) to install 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-00-6-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 violations referred to in either Parts (1) and/or (2) above, Foreman E. Lara, Machine Operators J. P. Lopez, V. Moncivais, Track Laborers A. Garcia, J. Sciaraffa, J. Martinez and M. Paz shall now each be compensated for one hundred thirty-six (136) hours of pay at their respective straight time rate and sixty-six (66) hours of pay at their respective time and one-half rate."

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 is a companion to the claim contained in Third Division Award 38026 arising out of the Carrier's use of a contractor to perform certain crossing renewal work at seven locations in the Laredo, Texas, area. Not surprisingly, the on-property record in this dispute is very similar to the record in the companion claim which dealt with asphalt paving work at the crossings. This claim deals with everything but the paving work.

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 coordinating 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.

Turning to the merits, we find, as we did in the companion claim, that the on-property record is not easily deciphered because the versions contained in the two Submissions do not coincide. As a result, we cannot confidently determine what precisely 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 and the Organization objected to the overall proposal.

Thereafter, the Carrier conceded in its November 24, 2000 final correspondence on the property, which was not included in the Organization's Submission, that "There is no question that some of the work belongs to employees under your organization contract." This same letter was included in the companion case where the Carrier vigorously denied that asphalt work was reserved. It would appear, therefore, that the Carrier was conceding all crossing renewal work other than paving. Moreover, the Carrier did not effectively refute the Organization's assertions that the remaining crossing renewal work, which is the subject of the instant claim, had been customarily, historically and traditionally performed by covered employees. Accordingly, we find, on this record, that the non-paving work was reserved under the Scope Rule.

Upon a finding of Scope Rule coverage of disputed work, the burden of proof shifts to the Carrier to justify its use of outside contractors. The record before us does not establish that the need for the renewal work arose with such suddenness that it could not have been detected sooner through due diligence inspections. Indeed, it appears from the record that the crossings had been allowed to deteriorate gradually over time. Given the state of the record before us, we must find that the Carrier failed to satisfy its burden of proof to justify the use of outside contractors to perform reserved work. As a result, we find that the Agreement was violated.

Despite the violation previously determined, it is undisputed that the Claimants were fully employed and did not lose any compensation during the claim period. Indeed, it is unrefuted that the Claimants actually worked on the renewal of the crossings in question along with the contractor forces to the extent the Claimants were not unavailable due to vacation or sick leave absences. Thus, the

record does not establish any actual loss or lost work opportunity. Moreover, the record does not establish that the Carrier has engaged in a pattern of similar violations. Finally, none of the Awards cited by the Organization in support of its claim for damages pertain to the instant Carrier. Accordingly, an entitlement to a damage award in the absence of actual proven loss has not been established on this record.

Given the foregoing findings, we sustain the claim only in part by noting the Agreement violation; no damage award is provided.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 7th day of December 2006.