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**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40090  
Docket No. MW-39217  
09-3-NRAB-00003-050407  
(05-3-407)**

**The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Alton & Southern 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 (Kelly Hill Contracting Company) to perform Maintenance of Way and Structures Department work (remove relay track and related work) at Tracks 52 and 55 at the Bowl Yard in East St. Louis, Illinois beginning on July 6, 2004 and continuing through August 6, 2004, instead of its Maintenance of Way employees (Carrier's File 1407580).**
- (2) The Agreement was violated when the Carrier assigned outside forces (L&N Contracting Company) to perform Maintenance of Way and Structures Department work (remove ballast and grading roadbed for track installations) at Tracks 52 and 55 in the Bowl Yard at East St. Louis, Illinois on July 12, 13, 14, 15 and 16, 2004 instead of its Maintenance of Way employees (Carrier's File 1407579).**
- (3) The Agreement was further violated when the Carrier failed to provide a proper notice of its intent to contract this work or**

**\*\*CORRECTED\*\***

**Form 1**

**Page 2**

**Award No. 40090  
Docket No. MW-39217  
09-3-NRAB-00003-050407  
(05-3-407)**

**make a good-faith effort to reach an understanding concerning the aforesaid contracting as required by Article IV of the 1968 National Agreement and the December 11, 1981 Letter of Understanding.**

**(4) As a consequence of the violations referred to in Parts (1) and/or(3) above ‘. . . all of the Carrier’s Maintenance of Way employees be paid for all hours worked by this contractor at their applicable straight time and overtime rates of pay. \*\*\*’**

**(5) As a consequence of the violations referred to in Parts (2) and /or (2) above ‘. . . all of the Carrier’s Maintenance of Way employees be paid for all hours worked by the contractor, at their applicable straight time and overtime 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 Organization maintains that the Carrier violated the Agreement when it used outside forces, specifically Kelly Hill Contracting Company and L&N Contracting Company, on a project that rebuilt Track 52 and Track 55 at the Bowl Yard in East St. Louis, Illinois, during July and August 2004.**

**\*\*CORRECTED\*\***

**Form 1**

**Page 3**

**Award No. 40090**

**Docket No. MW-39217**

**09-3-NRAB-00003-050407**

**(05-3-407)**

**The record indicates that on June 9, 2004, the Carrier notified the Organization of its:**

**"Fifteen-day notice of its intent to utilize an outside contractor to totally rebuild tracks 052 through 055 in its bowl yard in East St. Louis, Illinois.**

**It is Carrier's intent to utilize a contractor to totally rebuild tracks 052 through 055 in its bowl yard in East St. Louis, Illinois. The work will consist of the removal of all rail, ties and ballast and relaying new ballast, ties and rail. It is anticipated that the contractor will commence work on this project on or about July 5, 2004.**

**The Carrier does not have the manpower to complete a project of this size. It is also a well established practice of utilizing contractors in performing work of this nature. As I indicated in our phone call yesterday, we shall discuss this matter during our conference of June 10, 2004."**

**The Organization and the Carrier each sent letters dated June 10, 2004. Those letters indicated that the conference had been held to discuss the subcontracting and the parties could not agree to use Carrier forces for the work. The Carrier's stated reasons for the subcontracting were: that "company forces could not be spared from their normal duties for this length of time to complete this project." The Carrier also stated that, contrary to the assertions of the Organization, the Carrier's prior discussion with contractors was not in bad faith. It is routine and the Carrier was not opposed to discussing discrete portions of the project with the Organization. The Carrier continued that it had contracted out this type of work in the past and that the forces could not complete this project in the time frame. The Carrier also stated that Carrier forces would unload material, flag, pickup scrap, surface and tamp on the 052-055 rebuilding project.**

**\*\*CORRECTED\*\***

**Form 1**

**Page 4**

**Award No. 40090  
Docket No. MW-39217  
09-3-NRAB-00003-050407  
(05-3-407)**

**In a letter dated August 17, 2004, the Organization filed a claim for the subcontracting done in the East St. Louis Bowl Yard on the 052-055 project. The Organization also alleged a lack of good faith by the Carrier in the conduct of the meeting to discuss the subcontracting.**

**The Organization maintains a violation of the Agreement by a lack of good faith by the Carrier in the subcontracting and by having a subcontractor perform work reserved to BMW-employees. The Carrier responds that the (1) notice was issued in a timely manner (2) the parties met to discuss the matter prior to subcontracting (3) the Scope Rule does not reserve the work to BMW-employees and (4) there is a mixed practice of performing this work.**

**The Board carefully reviewed the evidence. The Carrier's notice was within the 15-day requirement of the Agreement. The Organization proposed an agreement for use of Carrier forces at the June 10 conference and it was rejected by the Carrier. The Carrier had contacted contractors prior to the notice being sent to the Organization. Rejection of the Organization's proposal, absent more, is not sufficient evidence of bad faith. Simply, failure to reach an agreement that is satisfactory to the Organization is not conclusive proof of bad faith. Contacting contractors, absent more, is also not sufficient evidence of bad faith. Taken together, there is insufficient evidence of the Carrier's bad faith in the contracting notice or the meeting to discuss contracting to sustain the claim.**

**The Organization also claims that the work is reserved to the BMW-employees and the Carrier counters that there is a mixed practice on the property of using contractors for large projects like the instant project. The evidence shows that, although Carrier forces participated in those prior large projects, there is insufficient proof that the work is reserved to them under the Agreement. Further, a review of the evidence shows that the Carrier has utilized contractors on similar projects going back to the 1960's. The burden is on the Organization. It's has not been met. Accordingly, the claim is denied.**

**\*\*CORRECTED\*\***

**Form 1**

**Page 5**

**Award No. 40090  
Docket No. MW-39217  
09-3-NRAB-00003-050407  
(05-3-407)**

**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 19th day of November 2009.**