

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40317
Docket No. MW-39981
10-3-NRAB-00003-070162
(07-3-162)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Delta Services, Inc. and Lough Roofing) to perform Maintenance of Way and Structures Department work (roof replacement) at the Latta Diesel House beginning on May 5 and continuing through July 23 2004 (System File C-19-04-C080-07/8-00228-101 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper notice of its intent to contract said work as required by Rule 1 and failed to enter good faith discussions to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as set forth in Appendix I.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Prell, L. Williamson, R. Emanus, D. Davis, R. Bean, R. Bowers and G. Brinkmeier shall now each be compensated at their respective and applicable rates of pay for an equal proportionate share of the one thousand two hundred**

ninety-six (1,296) man hours expended by the outside forces in the performance of the aforesaid work.”

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.

On February 17, 2004, the Carrier provided notice to the Organization of its intent to use an outside contractor for roof replacement at the Latta Diesel Shop. A conference was held on February 27, 2004 at which time the parties were unable to reach an understanding concerning the utilization of BWME-represented forces. Beginning May 5, 2004, the Carrier contracted out the roofing work at the Latta Diesel Shop.

The Organization thereafter filed the instant claim, alleging that the contractor expended 1,286 man hours using common roofing tools and equipment to remove and replace the old roofing material. The Organization contended that this was scope-covered work that was traditionally, customarily, and historically performed by BWME forces. The Organization maintained that the Carrier failed to make a good faith effort to reduce the use of contractors as required by Appendix I when it subcontracted work which could have been performed by the Claimants, who were fully qualified and available during the time period in question. In support of its position, the Organization provided time records and employee statements showing past performance of roofing work.

The Carrier responded that there was no violation of the Agreement. It argued that the project was not maintenance and repair, but rather a complete roof tear down of a significantly large magnitude and that contractors have been utilized for this type of work in the past. The Carrier further advised that the warranty required installation by the contractor. In addition, it argued that the roof was leaking and that its BMW forces were not available to perform this work within the time constraints required.

The Board carefully reviewed the lengthy record. At the outset, the Board finds that the alleged notice violation asserted in Paragraph 2 of the Statement of Claim represents a different issue from that handled on the property. Both parties acknowledged during the handling of the case that the Carrier provided advance notice of its intent to contract out the work and met with the Organization in conference to discuss the issue. It is well-established that when there is a material variance between the issues raised by the parties on the property and those advanced to the Board, the faulty aspect of the claim must be dismissed. See, Third Division Award 37998. Accordingly, the alleged notice violation is not properly before the Board and must be dismissed.

With regard to the remaining issues, we conclude that the Organization did not provide sufficient evidence to meet its burden of proving that the Carrier was in violation of the Agreement. The Organization's evidence consisted of employee statements as well as time records. The Carrier responded that the evidence proffered by the Organization did not establish that covered employees have historically, traditionally, and customarily performed the work at issue. We agree with the Carrier, particularly in light of the evidence demonstrating that such work has also been performed on a consistent and regular basis by contractors.

The Organization failed to demonstrate the regularity, consistency, and predominance of past performance that is necessary to establish scope coverage. The claim must be denied.

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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 1st day of March 2010.