

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40322
Docket No. MW-40036
10-3-NRAB-00003-070237
(07-3-237)**

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 authorized and assigned outside forces (Edward Kramer and Sons) to perform Maintenance of Way & Structures Department work (bridge construction and related work) at Mile Post 288.8 on the River Subdivision at Dresbach, Minnesota beginning on September 20, 2004 and continuing (System File C-48-04-C080-15/8-00228-112 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out said work as required by Rule 1 and failed to enter good-faith discussions and efforts to reduce the use of contractors 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 J. Gallagher, P. Betsinger, S. Bushera, A. Avila, J. Galvan and K. Kruser shall now each be compensated at their respective and applicable rates of pay for an equal and**

proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work, beginning September 20, 2004 and continuing.”

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 March 8, 2004, the Carrier notified the General Chairman of its intent to contract the construction of a new three span single track bridge at Mile Post 288.4 on the River Subdivision at Dresbach, Minnesota. The notice stated that the State of Minnesota and local authorities were funding the construction of the bridge, which would remove five existing grade crossings in the immediate vicinity. The Carrier indicated in the notice that BMWE-represented track forces would be used to shift and tie in track segments, dump ballast, and surface tracks. In addition, a flag person would be required during the bridge construction portion of the project. The Carrier's notice stated that it was necessary to contract out the bridge construction work because Carrier forces did not possess the equipment, expertise, and manpower to complete the project within the time frame required. The Carrier further noted that similar work had previously been contracted out, specifically the construction of a bridge at Red Wing, Minnesota. The approximate time frame for the project was July 1, 2004 and continuing for 120 working days.

At the request of the General Chairman, a conference was held on March 15, 2004 to discuss the proposed subcontracting. The Carrier thereafter proceeded to contract out the work and the instant claim ensued.

The Organization argues that the work described in the notice is reserved to BMW-represented employees by virtue of the fact that they customarily and historically performed bridge work of the very same nature "on innumerable occasions." The Organization further argues that the Carrier is not making good faith efforts to reduce the use of subcontractors on the property, contrary to Appendix I. In this instance, the Organization asserts, the Claimants were ready, willing, and available and qualified to perform all of the work in question. The bridge construction work was non-emergency in nature and, therefore, the Carrier could have planned in advance to utilize its own forces to perform the project in its entirety.

The Carrier contends that the construction of an entire bridge is not work customarily performed by BMW-represented forces. The Carrier further contends that its crews do not maintain pile driving equipment which would be required in a project of this nature. Moreover, certified welders were required to perform welding on bridges. For these reasons, projects such as this one must be, and have been, contracted out, the Carrier maintains.

The Organization has the burden of proving that the Carrier violated the Agreement. In order to claim the protections of scope coverage where, as here, the Scope Rule is general and does not explicitly reserve work, the Organization must establish that it has customarily, historically, and traditionally performed the work at issue. That evidentiary predicate is lacking in this record. The time records supplied by the Organization do not substantiate the claim that employees have performed the disputed work as a matter of practice. On the contrary, the record supports the conclusion that bridge construction work on this scale has been contracted out.

The Carrier provided timely advance notice of its intent to contract out and it met with the Organization to discuss the notice. It was not obligated to use BMW-represented forces absent scope coverage which would entitle them to perform the

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work. In light of these factors, there is no basis for a finding that the Carrier violated the Agreement.

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.