

**PUBLIC LAW BOARD NO. 7201
CASE NO. 4**

PARTIES TO THE DISPUTE: | **[Brotherhood of Maintenance of Way Employees**
|
| **and**
|
| **[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 to perform Bridge and Building Sub-department work (painting and related work) on the State Street Bridge in Milwaukee, Wisconsin on June 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28 and July 18, 2002, instead of Messrs. T. Rueda, C. Bath and S. Kitzman (System File C-28-02-C080-04/8-00228-070 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract said work as required by Rule 1 and failed to enter good-faith discussion 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 T. Rueda, C. Bath and S. Kitzman shall now be compensated for two hundred eighty (280) hours’ pay at their respective straight time rates of pay. ”**

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant T. Rueda, C. Bath and S. Kitzman have established and hold seniority in the B&B Sub-department. All were regularly assigned and working positions in their respective classes on their assigned territory on the dates of the instant dispute.

On June 17-22, 24-28 and July 18, 2002, the Carrier allegedly assigned or otherwise allowed outside forces to perform alleged Maintenance of Way and Structures Department, B&B Sub-department work of preparing to paint, and painting the State Street Bridge in Milwaukee, Wisconsin. On July 18, 2002, the outside contractor used 2 of its employees to perform touch up and incidental work. On all remaining relevant dates, the contractor assigned 3 of its employees to perform the work of preparing to paint, and painting the Bridge. Outside forces expended approximately 280 hours performing the above described B&B bridge maintenance.

The Organization contends that the Agreement was violated when the Carrier contracted the work of preparing to paint and painting the State Street Bridge in Milwaukee, Wisconsin, which is work that is properly reserved to the Organization. First, it claims that the Carrier did not provide adequate Notice to the Organization as required. According to the Organization, the Carrier had customarily assigned work of this nature to the Carrier's Maintenance of Way Employees. The Organization further claims that the work in question is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way Employees were fully qualified and capable of performing the designated work. According to the Organization, Claimants were available, qualified and willing to perform the work involved had the Carrier rescheduled the work to which they were already assigned. The Organization argues that because Claimants were denied the opportunity to perform the relevant work, Claimants should be compensated for the lost work opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that it acquiesced to a third party's request for permission to sandblast lead based paint and paint the Carrier's overpass in Milwaukee, Wisconsin. The Carrier claims that the work was performed for cosmetic purposes only and therefore does not belong to the Carrier's BMW represented Employees under either the express language of the Scope Rule or any binding past practice. In addition, the Carrier contends that the work of removing lead based paint is specialized work that BMW forces do not have the ability to perform. Because the relevant work is outside the scope and expertise of Organization forces, the Carrier contends that it was not required to send Notice to the Organization.

Appendix D, Article IV of the May 1968 National Agreement indicates as follows:

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file ... claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding ..."

Having reviewed the instant case, there is no question that the Carrier did not provide to the Organization the advance Notice required. The work in question was arguably scope-covered and at a minimum, the Carrier should have provided Notice to the Organization before contracting out the work. After a review of the matter, this Board finds that the Carrier did not provide the required advance Notice of the proposed contracting to the General Chairman. Such a requirement must have been fulfilled by the Carrier in order to sustain its position. "... If the Organization has established that BMW-represented Employees have, at times, performed the disputed work, then advance notice is required even if Organization forces have not performed the work to the exclusion of other crafts or contractors." Third Division Award 36516 (Kenis, Referee 4/23/03) See Also Third Division Award 36514 (Kenis, Referee 4/23/2003) See Also Third Division Award 36292 (Mittenthal 10/28/02) Thus, the claim will be sustained.

As a remedy, due to lost work opportunities, Claimants, other than Kitzman (See below), shall be made whole for the actual number of hours of contractor-performed work at Claimants' respective rates of pay. Because the record in this case is unclear as to the exact number of hours expended by the contractor, the matter is now remanded to the parties to determine the number of hours that the contractors expended on the matter. It appears that the work in question was contracted by Miller Brewing Company and as such, the Carrier does not have

records of said work. In the event that the parties are unable to determine the number of hours worked on the project, the Neutral Chairman shall retain jurisdiction in order to fashion a proper remedy.

It appears that subsequent to the instant Claim, Claimant Kitzman executed a release terminating any claims then currently in existence. That language of the release reads as follows:

Please be advised that Scott A. Kitzman has settled his personal injury claim with the Canadian Pacific Railway Company and on October 3, 2007, signed a release which contains the following clause:

"It is understood and agreed that in consideration of the above, I, Scott A. Kitzman, will never attempt to return to duty or seek employment of any kind with the parties released and discharged above and will never attempt to exercise any seniority rights I may have to return to duty or employment of any kind with the Soo Line Railroad Company and/or Canadian Pacific Railway Company.

It is further understood and agreed that in consideration of the above, I, Scott A. Kitzman, hereby fully release and waive any labor claims or employment claims (including but not limited to any claims related to my dismissal from service), or discrimination claims under the Americans with Disabilities Act (ADA) or similar federal or state acts, which I may now have or hereafter have against the parties released herein. I also agree that I will, as needed, expeditiously execute any documentation required to terminate such claims already in existence."

Based on the language of the above-mentioned release, it appears that the instant Claim is encompassed therein and therefore Claimant Kitzman is not entitled to any remedy.

Claim sustained in accordance with the findings.

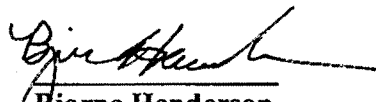
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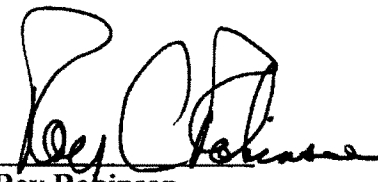
Claim sustained in accordance with the findings.

**Steven
Bierig**

Digitally signed by Steven Bierig
DN: cn=Steven Bierig, o,
ou=Attorney- Arbitrator-Mediator,
email=arb438@comcast.net, c=US
Date: 2010.06.14 13:24:22 -05'00'

Steven M. Bierig
Chairperson and Neutral Member


Bjarne Henderson
Carrier Member


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 14th Day of June 2010.