

**PUBLIC LAW BOARD NO. 7201
CASE NO. 6**

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 authorized and assigned outside forces (Lunda Construction) to perform Maintenance of Way & Structures Department work (bridge rehabilitation and related work) on Bridge #368.95 at Red Wing, Minnesota beginning on November 19, 2001 and continuing through May 23, 2002 to the exclusion of B&B Concrete Crew #47Z employees J. Gallagher, N. Bush, S. Smith, C. Rentz, P. Betsinger, B&B Steel Crew #47X employees G. Wieting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, K. Shortreed and Crane Operator W. Olsen (System File C-41-01-C080-12/8-00228-065 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 said work as required by Rule 1 and failed to enter good-faith discussions 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, N. Bush, S. Smith, C. Rentz, P. Betsinger, G. Wieting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, K. Shortreed and W. Olsen shall now each be compensated at their applicable rates of pay for a proportionate share of the total of five thousand eight hundred forty-one and one-half (5841.5) man-hours expended by the outside forces in the performance of the aforesaid work.”

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.

All Claimants to the instant dispute have established and hold seniority in their respective positions and were assigned and working as follows. Claimants J. Gallagher, N. Bush, S. Smith, C. Rentz and P. Betsinger were assigned and working on System B&B Concrete Crew #472. Claimants G. Wieting, T. Lancaster, J. Cornewell, B. Horstman, R. Beckman and K. Shortreed were assigned and working on System B&B Steel Crew #47X. Claimant W. Olsen was assigned and working as a crane operator assigned to System B&B Crews.

On March 24, 2000, the Carrier served Notice of intent to contract the replacement of an existing span on new abutments over the Mississippi River at Red Wing, Minnesota. The Carrier advised the Organization that this was a State funded Project and the contractor would be utilized to provide equipment and expertise not possessed by the Carrier. Further, Canadian Pacific Railway forces would be used in conjunction with the contractor on the project. The Carrier indicated that the Bridge in dispute was sold to the City of Red Wing for the price of \$1.00. This was done because it was necessary for the City to own the Bridge to secure funding from the State of Minnesota.

A conference concerning Carrier's Notice was held on April 28, 2000 and in its post-conference confirmation letter of May 15, 2000, the BMWWE requested that a B&B flag person be assigned to the project and that BMWWE reserved future rights to maintenance and repairs of the bridge once completed. The BMWWE further advised that if Carrier forces were not utilized to assist the contractor, the BMWWE reserved its right to file Claim. The Carrier pointed out that the Carrier did not design the bridge. The funding for the bridge, the design review, flagging and cost of removal of the old bridge was paid for by the State of Minnesota and the City of Red Wing. The City of Red Wing owned the bridge and Carrier forces would maintain at City expense. The bid for the construction of the new bridge was handled entirely by the City of Red Wing. The Carrier was not party to the contract and had no input on staffing by the contractor.

The Organization contends that the Agreement was violated when the Carrier allegedly assigned outside contractors to perform the work of building a

new railroad bridge. First, it claims that the Carrier did not provide adequate Notice to the Organization as is required. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to the Organization. According to the Organization, the Carrier sold the property to the City of Red Wing for \$1.00 in order to avoid the financial liability of having to pay the Organization's employees. The Organization claims that this is work reserved to the Organization and that the Carrier violated its obligation. The Organization argues that because Claimants were denied the right to perform the relevant work, Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. This is not a case in which the Carrier has sought to abrogate the Agreement by arbitrarily and unreasonably contracting out work to persons outside the Agreement without Notice or discussions with affected employees. Clearly the record supports the Carrier's position that selling the bridge for \$1.00 was not in any way an attempt to avoid the obligations of the Agreement, but rather merely a means to provide the City of Red Wing with a way to secure the funding to support the project. The \$1.00 sale was based upon normal depreciation occurring over many years. The Carrier was required to relinquish control in order for the City to receive funding necessary to perform the work. Without State funding, the work would not have been performed at all.

The bridge in question was sold in "good faith" and said sale has not been proven to be a violation of the Agreement. Once the bridge was sold, control over the work in dispute was relinquished. Numerous Awards support the Carrier in this regard. The Carrier contends that the bridge was sold to a third party, which historically has been allowed, and all work performed subsequent to the sale is not the province of the Organization. The Carrier contends that the work in question was performed not at the Carrier's request, but rather at the request of a third party, the City of Red Wing. According to the Carrier, the work was performed for the benefit of the City of Red Wing and was outside the control of the Carrier. Because the work was performed pursuant to said sale, Notice to the Organization was not required.

After a review of the record, we find that the Organization has been unable to meet its burden of proof. We find instead that the work was performed for the benefit of a third party and as such, was not under the control of the Carrier. Other Referees have similarly held:

The determinative issue inn this case is whether the disputed work of moving dirt to an area adjacent to the West Chicago station was contracted out under the Carrier's control... As noted in Third

Division Award, 31234, the Board has long held that where work is not performed at the Carrier's instigation, under its control, at its expense or exclusively for its benefit, contracting is not a violation of the Scope Rule of the Agreement. ... The record also establishes that the Carrier was not involved with the subject contracting, retained control over the work performed under it, was not exclusively for its benefit, and did not pay for its completion. Under such circumstances, we conclude that the work did not fall within the Scope rule of the Agreement in this case, and the Carrier was not obligated to give the Organization notice of the dispute contracting.

Third Division Award No. 37143 (Referee Newman)

In the instant case, we have reviewed the record and find that the instant contracting was performed for the benefit of a third party and was not within the control of the Carrier. Therefore, the Carrier was not required to provide Notice to the Organization. Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the building of a new railroad bridge by the contractor hired by the City of Red Wing was improper. The Organization has been unable to meet its burden of proof. The Claim is therefore denied.

The Claim is denied.

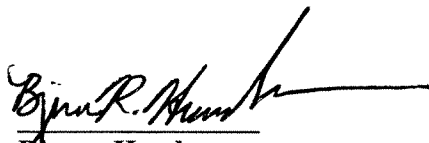
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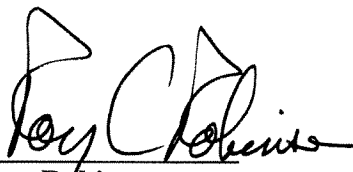
Claim denied.

Steven Bierig

Digitally signed by Steven Bierig
DN: cn=Steven Bierig, o,
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Date: 2010.06.14 16:22:09 -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.