

**PUBLIC LAW BOARD NO. 7201
CASE NO. 12**

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 with the Carrier assigned outside forces (Arrow Crete) to perform Maintenance of Way and Structures Department work (removal of debris and associated work) at parallel concrete box culverts at Mile Post 175.35 on the Watertown Subdivision beginning December 2 and continuing through December 10, 2002 instead of Messrs. D. Davis, R. Bowers, R. Bean, G. Brinkmeier and K. Popp (System File C-50-02-C080-20/8-00228-082/CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract said work as required by Rule 1 and when it failed to enter good-faith discussion to reduce the use of contractors and increase the use of the 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 D. Davis, R. Bowers, R. Bean, G. Brinkmeier and K. Popp shall now be compensated ‘... for a proportionate amount EACH of three hundred (300) hours at the applicable straight time rate of pay and ninety-five (95) hours at the applicable overtime rate of pay ...’ (Emphasis in original)”

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.

Claimants to the instant dispute have all established and hold seniority in the B&B Subdepartment of the Maintenance of Way and Structures Department. At the time of the instant dispute, all were assigned and working their respective positions on the Watertown Subdivision.

By letter dated October 8, 2002, the Carrier informed the General Chairman that the Carrier intended to subcontract work on the M&P Subdivision that is part of the Portage Flood Control Project. The Notice indicated that the project was being sponsored by the Army Corps of Engineers. The specifics of the project that is relevant to the instant case are the excavation of a toe trench area and the disposal of material. In addition, the Notice called for the installation of a geomembrane and crushed rock cover covering 3400 square yards and the cleaning out of Culvert C-210 under the Watertown Subdivision main track. Specifically, the Carrier submitted that in order to complete this portion of the project, the Carrier would have to lease a specialized piece of equipment, and utilize an operator trained for said equipment, from GREX.

On December 2-7 and 9-10, 2002, the Carrier assigned outside forces (Arrow Crete) to perform the removal of debris and associated work at the parallel concrete box culverts at Mile Post 175.35 on the Watertown Subdivision. Five employees of the Contractor worked a total of 300 straight time hours and 95 overtime hours in the performance of these duties. The Organization has alleged, and the Carrier has not disputed that the work did not involve the use of the specialized equipment that initially had been suggested by the Carrier. It appears to be uncontested that the Contractor's employees used shovels to dig out the debris from the culverts.

The Organization contends that the Agreement was violated when the Carrier contracted the removal of debris and associated work 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. The Organization specially alleges that while the Carrier went to great lengths to indicate to the Organization that specialized equipment would be used, the Contractor in fact never used said equipment; instead, employees with shovels were utilized to perform the project. Further, 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. 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. First, the Carrier contends that it gave proper Notice to the Organization of its intent to contract out the relevant work. The Carrier claims that the work does not belong to the Carrier's BMWWE represented Employees under either the express language of the Scope Rule or any binding past practice.

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, this Board finds that the Carrier did not provide to the Organization the proper advance Notice that was required. This Board notes that the Notice specifically indicated that the work would be performed with a piece of specialized equipment that the Carrier did not own. In addition an outside operator would be required to operate the specialized equipment. The Notice and conference were premised upon this information. However, ultimately, no specialized equipment was utilized; the project was performed by the Contractor's employees working with shovels.

In the instant case, this Board finds that the Notice was faulty and did not adequately appraise the Organization of the nature of the work. This Board has determined that the Organization effectively did not receive Notice. While the Carrier has argued that the Organization did not raise the issue of the faulty Notice

on the property, a review of the correspondence proves that the Organization did properly raise this issue. Thus, because the work in question was arguably scope-covered, at a minimum, the Carrier should have provided proper Notice to the Organization before contracting out the work. 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, as a result of the faulty Notice, the Claim will be sustained.

As a remedy, due to lost work opportunities, Claimants shall be made whole for the actual number of hours of contractor-performed work at Claimants' respective rates of pay.

Claim sustained.


AWARD


Claim sustained.

**Steven
Bierig**

Digitally signed by Steven Bierig
DN: cn=Steven Bierig, o=
ou=Attorney-Arbitrator-Mediator,
email=marb438@comcast.net, c=US
Date: 2010.06.14 13:30:57 -0500

**Steven M. Bierig
Chairperson and Neutral Member**


**Bjarne Henderson
Carrier Member**
I dissent


**Roy Robinson
Organization Member**

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