

BEFORE PUBLIC LAW BOARD NO. 7386

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE
and
SOUTH KANSAS & OKLAHOMA RAILROAD**

Case No. 1

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier violated Article 3, Sections A, B, E and F, Article 11 and Article 13, Section A and D of the Agreement on July 9, 10 and 11, 2009 when it released Track Foreman J. Pierce, Boom Truck/Backhoe Operator B. Peck and Trackmen M. Hempen and L. Thomison from duty and assigned outside forces (Lonestar Railroad Contracting Services) to perform routine track maintenance work with Carrier owned equipment (System File SK-4000-1).
2. As a consequence of the violation referred to in Part 1 above, Track Foreman J. Pierce, Boom Truck/Backhoe Operator B. Peck and Trackmen M. Hempen and L. Thomison shall each be compensated for a total of twenty-four (24) hours at their respective time and one-half rated of pay.”

FINDINGS:

The Organization filed a claim on the Claimants’ behalf, alleging that the Carrier violated the parties’ Agreement when it assigned outside forces to perform routine track maintenance work, using Carrier equipment, instead of assigning this work to the Claimants. The Carrier denied the claim.

The Organization contends that the instant claim should be sustained in its entirety because there is no dispute that the work in question is contractually reserved to Carrier Maintenance of Way forces and cannot be contracted out unless the express exception within Article 3F applies, because that exception under Article 3F did not apply to the situation at issue despite the Carrier’s arbitrary and improper “determination” that the

Claimants were “unavailable” to continue performing the subject work during overtime hours in an effort to circumvent the Agreement, because the Carrier’s contentions regarding a “full work week” and a “full schedule” are entirely disingenuous and without merit, because the Claimants were available and willing to perform the subject work beyond their standard forty-hour work week, because the Carrier’s defenses are entirely without merit, and because the requested remedy is warranted. The Carrier contends that the instant claim should be denied in its entirety because the Claimants were unavailable to perform the subject work in that they were assigned to and working full schedules on the dates in questions, because the Agreement does not provide that employees will work overtime in lieu of contractors being on the property or that the Carrier is prohibited from taking the action that it took in assigning the subject work to the contractor during the Claimants’ off time, because there was no requirement that the Carrier authorize overtime, and because the Organization failed to meet its burden of proof.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it failed to allow the Maintenance of Way Team Members the opportunity to continue performing the work that they had been performing repairing the damage from the train derailment on July 9, 2009. The Organization has correctly pointed out that the Carrier violated Article 3 when it subcontracted Organization team work in violation of the Agreement.

Article 3, Section E, states the following:

MW Team Members included within the scope of this Agreement perform work in connection with the construction, maintenance, repair, and dismantling of track, road beds, structure facilities, and appurtenances related thereto, located on the right of way and/or used in the operation of the Carrier in the performance of the common Carrier service, and other duties as assigned.

Consequently, the work at issue was clearly Maintenance of Way work. As a matter of fact, the Claimants performed the work until approximately 2 p.m. on July 9, 2009, using Carrier tools and equipment to perform the work, when the Assistant Roadmaster told them they would no longer be performing that work and sent them home for the balance of the week.

Article 3, Paragraph F, states the following:

The Carrier may subcontract the performance of maintenance, repair, and construction work or services if beyond the skill and capabilities of available MW Team Members, or if necessary personnel, machinery, equipment, tools, or material are not available. For purposes of this Article, personnel are not available when all MW Team Members are assigned and working a full schedule. No MW Team Member's position will be cut off or duties performed by someone not subject to this Agreement, except as otherwise provided.

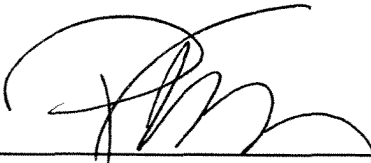
The key language here is that the personnel were available because MW Team Members were not assigned and working a full schedule. The Carrier argues that they had worked their full schedule because a full schedule is forty hours. That may be true, and that need not be decided here. The problem is they have to be assigned and working a full schedule. In this case, the Claimants were not assigned because they had been sent home. Consequently, even if they had worked a full schedule, they were not "assigned." The contract language requires that they be both assigned and working a full schedule to

be considered personnel that are not available. Since the personnel at issue did not meet the requirement of being "assigned," the Carrier was prohibited from subcontracting the work on this particular job when the Claimants were available to perform that work.

The Organization has met its burden of proof that the Carrier violated the Agreement when it took the work away from the MW Team Members and subcontracted it to an outside firm. Therefore, this claim must be sustained.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: Sept. 17, 2012



ORGANIZATION MEMBER

DATED: 9-17-2012