

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27112
Docket No. MW-26432
88-3-85-3-159

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Chesapeake and Ohio Railway Company
(Southern Region)

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

(1) The Carrier violated the Agreement when it failed and refused to assign a B&B Foreman to work with an outside concern engaged in dismantling and/or removing the Roundhouse at Peach Creek, West Virginia beginning November 2, 1983 (System File C-TC-2003/MG-4342).

(2) Because of the aforesaid violation, the senior cut-back B&B Foreman or the senior B&B Mechanic entitled to the work shall be allowed four hundred eighty (480) hours of pay at the B&B Foreman's rate."

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 employees 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 waived right of appearance at hearing thereon.

On October 21, 1983, the Carrier sent the following notice to the General Chairman:

"This is to advise you of the Carrier's intent to contract with Crabtree Demolition Company to furnish labor and equipment for the demolition and removal of all debris from the former Roundhouse at Peach Creek, West Virginia. Carrier property is to be left in satisfactory level condition.

It is estimated that this project will take 60 man-days to accomplish. Work is scheduled to commence November 1, 1983 and to be completed November 20, 1983.

Carrier has no alternative but to contract this work as Company forces and equipment are actively engaged in other equally important program work and cannot be assigned to do this work in a timely manner without impeding progress of the established program. Also, Carrier has no suitable area to dispose of the resulting debris.

There will be no furloughed B&B Mechanics on the seniority territory involved during the period the contractor is working on the property."

On October 27, 1983, the General Chairman took exception with the portion of the notice indicating that there were no furloughed B&B mechanics on the seniority roster and he requested, pursuant to Rule 83(b), that a B&B Foreman be assigned to assist the contractor.

A "B&B" Foreman was not assigned and on November 23, 1983, the following claim was submitted:

"This office is in receipt of a time claim from Irvin Wiley, Clifford Hanshaw, Kenneth Brown, Walter P. Stub, David T. Farnsworth and Ruben E. Adkins. This claim states that beginning November 2, 1983 a contractor began demolition of the Round House at Peach Creek, West Virginia. Mr. Comiskey's letter of intent to contract dated October 21, 1983 stated that the contractor would consume sixty (60) man-days to accomplish the work. The Carrier did not place a B&B Foreman Inspector with this contractor and therefore they are in violation of the rules as stated above.

I request that the senior cut back B&B Foreman or the Senior B&B Mechanic who would be entitled to this work be paid sixty (60) days or four hundred eighty (480) hours at his respective rate as the Carrier did not comply with the Agreement, specifically Rule 83.

Please investigate and advise."

The claim was declined and ultimately appealed to the Board for resolution.

This claim centers around the interpretation and application of Rules 66(c), 83(b) and (c). They are quoted below:

"RULE 66--CLASSIFICATION

* * *

(c) In carrying out the principles of Paragraph (a), bridge and structures forces will perform the work to which they are entitled under the rules of this agreement in connection with the construction, maintenance, and/or removal of bridges, tunnels, culverts, piers, wharves, turntables, scales, platforms, walks, right of way fences, signs and similar buildings or structures ***."

The contracting out of scope covered work is controlled by Rule 83(b) and (c), which reads:

"(b) It is understood and agreed that maintenance work coming under the provisions of this agreement and which has heretofore customarily been performed by employees of the railway company, will not be let to contract if the railway company has available the necessary employees to do the work at the time the project is started, or can secure the necessary employees for doing the work by recalling cut-off employees holding seniority under this agreement. Cut-off employees on a seniority district who will go to other territories to prevent having to contract work hereunder will be considered upon notification in writing to the Manager-Engineering or other corresponding officer of the territory on which the particular employee holds seniority by that employee. This shall not preclude letting to contract the building of new lines, sidings, and yards; the extension of existing lines, sidings, and yards; the construction of new buildings or other facilities which has customarily been handled by contract in the past; or the doing of maintenance work requiring equipment which the railway company does not have or skill and tools not possessed by workmen covered by this agreement; on the other hand, the railway company will

continue its policy of doing construction work with employees covered by this agreement when conditions permit. Where maintenance work coming under the provisions of this agreement which has customarily been performed by employees of the railway company is let to contract, the railway company will place an extra force foreman in charge of the work if the contracted work is roadway or track work. If the contracted work is bridges and structures work, a B&B foreman will be assigned with the contract force if the job is such as would justify assignment of a foreman if the railway company were doing the work with its own forces. If the contracted bridges and structures work is such that a carpenter would be used if the work were being done with railway company forces, a carpenter will be assigned. If painting work is contracted, a foreman will be used.

(c) See Letter of Agreement of October 24, 1957 in Appendix B."

There is much which is clear about these Rules. First, under Rule 66(c) employees "will perform" work to which the Rules entitle them in connection with among other things "removal" of buildings. Obviously this would encompass demolition as involved with this claim.

Rule 83(b) and (c) entitles the employees to perform work which has customarily been performed by them. When, at the time the project is started, there are available employees (active or furloughed), the Rule states clearly and strongly, with certain exceptions, that contractors will not be used under such circumstances. One of the exceptions relevant in this case is where the company does not have the skills or tools available. The last part of Rule 83(b) indicates where contracts are let for work customarily performed by the employees, a foreman of some type, depending on the type of work will be assigned.

Thus, there are a number of relevant questions which must be answered in sequence. The first relevant question is whether the work of demolishing buildings has customarily been performed by the employees. The Board is satisfied on the basis of this record that they have.

The next relevant question is whether the Carrier had employees available at the time to perform the demolition. The Carrier stated in its notice that it did not and it is noted there was no particular exception taken to this by the Organization since they did not request that B&B forces demolish the building in question. Their response was limited to requesting that a B&B Foreman be assigned.

Given that the work has been customarily performed by Carrier forces and that contracting out of the demolition was necessary due to lack of personnel availability, the last relevant question is whether the Carrier has fulfilled its obligation under the last portion of Rule 83(b) to assign a foreman. This obligation is a clear requirement if the Carrier contracts out, for legitimate reasons, work customarily performed by the employees.

The Carrier makes at least one erroneous argument in defending its failure to assign a foreman. For instance, it suggests it is not required to since the Carrier has customarily contracted work such as that herein without the assigning of a foreman. First of all, there is no evidence of such a practice, in fact the evidence is to the contrary. Moreover, even if there was, the language is clear and plainly stipulates that when an outside contractor is required to perform work, the assignment of a foreman is necessary when the contracted work is maintenance work that has been traditionally performed by those employees covered by the Agreement and where a foreman would have been assigned had the work been done by Carrier forces. Thus the fact the Carrier may not have complied with this requirement in the past is irrelevant.

The Carrier also argues that all the Claimants were fully employed as foremen or B&B mechanics. However, this does not mean that they weren't available. Certainly the Carrier is not obligated to provide a foreman if they are not available. However, the burden is on the Carrier to demonstrate this unavailability. Just because there was full employment and just because the Carrier couldn't free up enough people from other projects to perform the entire demolition job doesn't mean necessarily it was impossible or would pose significant impracticalities to release a B&B mechanic, qualified as a foreman, to be upgraded for the demolition project.

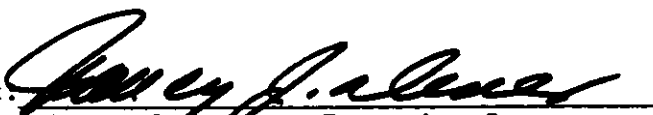
In view of the fact we are not convinced that someone could not be made available the senior cut back B&B Foreman is entitled to be compensated for the differences between his earnings and the foreman rate for only the number of hours the contractor's crew was on the property, not the aggregate hours extended on this project by contractors.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.