Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28883
THIRD DIVISION Docket No. MW-28657
91-3-89-3-41

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Duluth, Missabe and Iron Range Railway 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 hauling work in connection with repairing the base at the Duluth Lakehead Storage Facility on October 19, 20, 21, 22 and 23, 1987 (Claim No. 40-87).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the senior furloughed truck driver in the B&B Structures Department shall be allowed forty (40) hours of pay at the straight time 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 employe or employes involved in this dispute are respectively carrier and employes 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.

The basic facts of this case are set forth as follows:

On October 19, 20, 21, 22 and 23, 1987, a contract hauler was utilized by Carrier to truck 3000 cubic yards of gravel from the bay side of the Lakehead Storage Facility to the shore side of the facility floor. Said material was used to repair the base at the above facility and was moved to various locations on the berm floor. It was the Organization's position that the use of the outside contractor requiring a large scale dump truck and driver violated the Controlling Agreement particularly Rules 1, 2, and 26 and Supplement No. 3 regarding contracting of work.

Specifically, the Organization contends that the work of operating a dump truck was encompassed within the Scope of the Agreement and customarily performed by Bridge and Building Forces (truck drivers). It also points that Rule 2(C)II clearly provides for the classification of B&B truck drivers. It submitted numerous statements from present and retired employees attesting that the work involved herein was traditionally assigned to B&B forces.

Furthermore, it asserts that Carrier violated the provisions of Supplement No. 3, since Carrier failed to notify the General Chairman in writing that it contemplated contracting out the work. Supplement No. 3 is referenced as follows:

"SUPPLEMENT NO. 3

Contracting of Work

(a) The Railway Company will make every reasonable effort to perform all maintenance work in the Maintenance of Way and Structures Department with its own forces.

(b) Consistent with the skills available in the Bridge and Building Department and the equipment owned by the Company, the Railway Company will make every reasonable effort to hold to a minimum the amount of new construction work contracted.

(c) Except in emergency cases where the need for prompt action precludes following such procedure, whenever work is to be contracted, the Carrier shall so notify the General Chairman in writing, describe the work to be contracted, state the reason or reasons therefor, and afford the General Chairman the opportunity of discussing the matter in conference with Carrier representatives. In emergency cases, the Carrier will attempt to reach an understanding with the General Chairman in conference, by telephone if necessary, and in each case confirm such conference in writing.

(d) It is further understood and agreed that the Company can continue in accordance with past practice the contracting of right-of-way cutting, weed spraying, ditching and grading."

More pointedly, it contends that Carrier previously notified the General Chairman on numerous occasions of its (Carrier) intentions to contract similar type work, irrespective of whether such notice was prompted out of courtesy or contract obligation. It disputes Carrier's contention that said work did not accrue exclusively to B&B truck drivers, arguing instead that

exclusivity need not be shown against outside contractors. It also disputes Carrier's procedural objections. On this latter point, it contends that the claim was explicit and Carrier failed to raise a timely procedural challenge at the first and second level of the on-situs appeals process that the claim was filed with the wrong officer.

Carrier contends that in view of the limited capacity of its dump trucks, it was necessary to assist the Maintenance of Way employees by trucking the 3000 cubic yards of gravel to the various sites on the berm floor requiring fill. It points out that the Organization was not notified of this work, since large trucking was not performed by B&B forces. It acknowledges that it owns three dump trucks, but observes that the cubic yard carrying capacity of these trucks is limited as compared to the capacity of the contractor's dump truck. The contractor's dump truck capacity is 12 yards as compared to 3 yard boxes on two of its trucks and 4 cubic yards for its other trucks. It argues that the Organization has not shown how Rules 1, 2, 4, 26, Supplement 13 and 38 apply to these facts and/or how Supplement No. 3 was compromised. As to Supplement No. 3, it asserts that hauling of gravel by an outside contractor has been a usual and routine practice, performed without notification to the General Chairman. It also notes that the work was performed on ground area within and under the exclusive jurisdiction of the Docks and Storage Facilities Department. Thus, since Paragraph (a) of Supplement No. 3 relates to maintenance of work in the Maintenance of Way and Structures Department, it argues that it was not impermissible to contract out work performed under the aegis of the Docks and Storage Facilities Department. Conversely, it concedes that B&B employees have, on occasion, hauled small amounts of fill in Carrier owned truck, but argues that B&B employees have not trucked any amount approaching the volume involved herein, namely, 3000 cubic yards. It submitted documentation showing that vendors and contractors have hauled equipment and materials, including gravel on Carrier's property and from the property to outside locations and noted the repetitive use of the contractor herein. In its on-situs denial letter, dated August 5, 1988, it stated, "The practice is so common that we have had a Blanket Order (or 'Standing Order') with Waldholm for several years, and before that, we had a similar arrangement with Peterson Brothers Trucking." It cited Third Division Award 25276 involving another Carrier as support that this work was not reserved by contract.

In considering this case, there are several factors that must first be addressed. Firstly, there is no dispute that B&B subdepartment forces (truck drivers) have hauled gravel on the property in Carrier owned dump trucks. There is no showing that said forces have transported or hauled gravel from outside locations to points on the property or from the property to outside locations. There has been no showing that B&B forces have utilized rental equipment to haul large amounts of gravel on the property or that large or equivalent amounts as herein were hauled on the property by B&B forces in smaller amounts over a purposely extended period of time. There has been no showing that other Carrier forces hauled gravel where such work was performed in connection with maintenance work in the Maintenance of Way and Structures Department or for that matter in connection with maintenance work in the Dock and Storage Facilities Department. Carrier has raised the question of exclusivity and referenced several Third Division Awards dealing with this issue on the property. However, the question in those cases was raised vis a vis other Carrier employed forces and not outside contractors.

On the other hand, we concur that a Classification of Work Rule, by itself, does not ipso facto confer exclusivity, specifically where the Scope Rule is general in nature.

In the case at bar, if the work had involved the hauling of significantly reduced amount of gravel on the property, particularly from the bay side to the shore side of the Duluth Lakehead Storage Facility, B&B forces (truck drivers) would most likely have been used to haul the Class 5 material (gravel). There has been no showing that the Docks and Storage Facilities Department had truck drivers or utilized other craft forces to haul gravel. Thus, presupposing a limited amount of gravel and its movement within the geographical confines of the Lakehead Storage Facility, B&B forces (truck drivers) would have performed this work. The three Carrier owned dump trucks singly or collectively would have been used. Absent a showing that other forces used these trucks for hauling gravel, we must presume that B&B forces (truck drivers) would have been assigned the work.

Similarly, we recognize that Carrier had a mixed tradition with respect to hauling gravel on the property and the size of the volume hauled was an important consideration regarding the question of using outside contractors. Carrier is not barred under Supplement No. 3 from utilizing an outside contractor, but it must do so in accordance with Supplement No. 3, or defensible past practices. Since there is a marked similarity in the character of the work performed, whether the volume of gravel hauled is small or large and since there has been no showing that other Carrier forces hauled gravel on the property in connection with Maintenance of Way and Structures work and since the work did not involve right-of-way grading (trackage) and since there has been no showing that forces assigned to the Docks and Storage Facilities Department hauled limited amounts of gravel at the Lakehead Storage Facility, the Board, of necessity, must find for the Organization. Third Division Award 28411 is on point. We find no basis for issuing a monetary penalty since Carrier had the ultimate right under Supplement No. 3 to contract out the work.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.