Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28999
THIRD DIVISION Docket No. MW-27871
91-3-87-3-394

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 the work of leveling the floor of the Duluth Storage Facility on October 16, 17, 18 and 19, 1985 (Claim No. 1-86).

(2) Because of the aforesaid violation, the senior Track Department or Bridge and Building Department employes furloughed at the time of the incident shall each be allowed pay at their respective straight time rates for an equal proportionate share of the man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

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.

In accord with Paragraph (c) of Supplement No. 3 of the applicable Agreement, the Carrier notified the Organization, on September 23, 1985, that it was retaining an outside contractor to place the final dressing on the taconite pellet stockpile base at Duluth. While the Organization was agreeable to, or at least it did not object to, the Carrier's decision to contract out a portion of the work, the Organization asserted that the Carrier should have rented equipment for Carrier employees to operate to level the floor of the storage facility. The Carrier countered that the outside contractor could perform the entire project for $3,000.00 less than the Carrier would expend to rent the specialized equipment needed for performing just the leveling work, a small part of the project. The outside contractor charged the Carrier $5,200.00 to complete the entire project. The Carrier estimated that it would

cost a total of $18,000.00 if its own maintenance of way employees did the leveling work. Of the $18,000.00, $8,200.00 would be expended for equipment rental.

Supplement No. 3, the contracting out rule on this property, is unique. Paragraph (a) of Supplement No. 3 obligates the company to make a reasonable effort to perform maintenance of way work with its own forces. More importantly, Paragraph (b) requires the Carrier to exert reasonable efforts to hold down the amount of construction work contracted out but the rule specifically conditions these efforts on the availability of Carrier-owned equipment. Thus, Supplement 3 severely restricts the contracting out of scope covered work but it does not absolutely prohibit the contracting out of such work.

After carefully reviewing the record, we conclude that it would have been unreasonable for the Carrier to rent the equipment at a sum that was one hundred fifty-nine percent of the amount that it would pay a contractor to perform the entire project merely for the Carrier to perform one segment of the project. While the Organization characterized the Carrier's cost figures as inflated, it failed to come forward with probative evidence showing that the Carrier's estimates to rent the specialized equipment were distorted or otherwise inaccute. If the Carrier's figures were greatly exaggerated, the Organization could easily have procured proof from leasing concerns as to the market rate for renting the specialized equipment.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of September 1991.

LABOR MEMBER'S DISSENT
TO
AWARD 28999, DOCKET MW-27871
(Referee LaRocco)

A dissent is required since this award is palpably erroneous.

The Majority totally disregarded the central issue of the claim, ignored a secondary issue and decided the issue on a third issue that only could arguably be considered once the primary and secondary issues had been resolved.

The first issue to be decided was whether the work involved was work customarily and historically performed by Maintenance of Way employes and, therefore, covered by the Agreement. During the on property handling, the Carrier recognized such and, in fact, stated in its correspondence that its employes had performed this work. There can be no question but that the work was scope covered and should have been assigned to Maintenance of Way employes. The Majority erred by not so ruling.

Having ignored the initial aspect of the claim, the Majority then went to the secondary issue, and decided that Carrier owned equipment was not available. However, the record clearly reveals that during the handling on the property, the General Chairman pointed out that "Also, we had the necessary equipment in Two Harbor Storage Facility." The Carrier did not dispute this statement, so apparently Carrier owned equipment was available but for reasons not disclosed, it chose not to use it. The Carrier

cannot escape the provisions of the Agreement by claiming unavailability of equipment when it does have it available. The Majority erred by not so ruling.

The third aspect of this claim and the part the Majority ruled on involved whether the Carrier could use an economic argument to circumvent the Agreement. Assuming, arguendo, that the Majority was correct in that the Organization did not effectively come forth with probative evidence to dispute the Carrier's figures, the Majority, if it had correctly reviewed the facts of this claim, should have followed the long line of precedent from this Board and held that "*** 'The Carrier's reason for the subject arrangement was economy, which is a laudable objective but an invalid excuse for violating the Agreement....'" (Third Division Award 24810). The Majority erred by not so ruling.

Award 28999 is palpably erroneous and I therefore dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 28999, DOCKET MW-27871
(Referee LaRocco)

Organization has raised "straw men" to give its Dissent some respectability.

On the property, Carrier advised the Organization:

> "In this instance, the Carrier recognized the work as being work which Maintenance of Way Employees had done on other occasions. Because of that, you were served advance notice of our intent to contract the work this time. The Carrier has made reasonable efforts to perform the work with Maintenance of Way forces, but finds it is no longer reasonable to do so under current wage and work rules. On January 24, you were furnished a summary of the cost of doing this work using our own forces ($18,000) versus the price charged by the contractor ($5200). I am sure you recognize it is not reasonable that the Company should be bound to pay $18,000 for work it can have accomplished by other means for $5200." (emphasis added)

Again, on the property, the Organization asserted that the Carrier had "some of the equipment to perform this project" (emphasis added) but the Organization allowed:

> "...the hauling of fill or class five because of the large amount of yardage needed." (to a contractor)

Obviously, the extent of the project as well as the unrebutted triple cost factor were considerations properly taken by the Carrier and this Board in consideration if a contract violation occurred. Award 28999 did not find Carrier's action unreasonable. Organization's Dissent does not point to any evidence of record to support a contract violation. Supplement No. 3 does not "prohibit

the contracting out of such work."; see Third Division Awards 26832, 27902, 28758, 28883.

Further, Supplement No. 3 is markedly different from the contracting rule in place on many other properties, namely, Article IV of the May 17, 1968 National Agreement. The "long line of precedent" regarding economic argument pertains to Article IV disputes and not the unique provisions in force here. Notably, Supplement No. 3 requires a "reasonable effort" on the part of the Carrier to perform maintenance work with its own forces. In this case, the triple cost penalty was deemed unreasonable.

Finally, the Claim sought compensation for, "...the senior Track Department or Bridge and Building Department employees furloughed..." (emphasis added), yet the work in dispute would have accrued only to the B&B per Supplement No. 3(b). The Organization's rationalization for including the Track Department was that, "...at the time the B&B was at full employment in which the Track was not." (emphasis added)

Thus, the on property record substantiated that neither the personnel nor the needed equipment was available and this is by the Organization itself. Dissenter's assertion that the Agreement was circumvented ignores the facts of record and that it was the Organization that was considered first for the work.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost