

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(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, Lakehead Painting & Sign Co., Inc., to perform preparation, priming and painting work on the stacker at the Duluth Lakehead Storage Facility beginning on June 14, 1988 and continuing until August 3, 1988 (Claim No. 19-88).

(2) The Carrier also violated the Agreement when it failed to timely and properly comply with the advance notice and conference requirements of Supplement No. 3.

(3) As a consequence of the violations referred to Parts (1) and/or (2) above, B&B Structures Department employees S. W. Heskin, J. C. Lee, R. D. Haedrich, P. C. Jacobson, K. A. Struck, J. R. McDonnell, K. E. Lindstrom and B. R. Godmare shall be allowed an equal proportionate share of the total straight time and overtime hours worked by employees of the Lakehead Painting and Sign Company as well as the concomitant vacation and other rights based on said hours."

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 employees 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.

Carrier served written notice on May 17, 1988, of its intention to contract out the surface preparation and painting of the "stacker" at its Lakehead Storage Facility in Duluth, Minnesota. A conference was held on June 6, 1988. The General Chairman lodged his objections to the Carrier's plan, but the Carrier proceeded nevertheless. Work commenced on June 14, 1988, and concluded August 3, 1988. The Claim, on behalf of furloughed B&B employees, was filed on August 4, 1988.

The stacker is a large apparatus which moves by means of wheels on rails. It has an operator's cab. It travels alongside a feed conveyor from which it receives taconite pellets. By means of its operator controlled booms, conveyors and other mechanisms, the stacker then directs the pellets to storage piles. The stacker is also used, essentially in reverse, to retrieve pellets from the various stockpiles and transport them into conveyances for ultimate shipment via the Great Lakes. The stacker has been in use for 22 years and the disputed work is the first time it has been repainted in its entirety.

The parties' Submissions each raise a number of competing contentions while accusing the other of including new evidence and argument. In addition, some correspondence occurred shortly after the on-property record was closed on November 2, 1989. This Board has confined its consideration, as we must, to the evidence and argument that was exchanged on the property. The parties also cited numerous prior Awards in support of their respective contentions. However, we note that, with few exceptions, the Awards cited by the Carrier involve the instant parties while those cited by the Organization do not.

The Claim specifically alleges violations of Rules 1, 2, 26, Supplement No. 3, the December 11, 1981 Letter of Agreement, and a September 24, 1958 letter of abeyance. This latter document is the source of the text of Supplement No. 3, which states 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 therefore, 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."

The Organization also relies heavily on the language of Rule 26. Pertinent portions read as follows:

RULE 26

Classification of Work

"\* \* \*

(c) An employee assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures, including the building of concrete forms, erecting falsework, setting of columns, beams, girders, trusses, or in the general structural erection, replacement, maintaining or dismantling of steel in bridges, buildings or other structures and in the performance of related bridge and building iron work, such as riveting, rivet heating, or who is assigned to miscellaneous mechanics' work, shall be classified as a bridge and building Carpenter and/or Repairman.

(d) An employee assigned to mixing, blending, sizing, applying of paint or other preservatives to structures, either by brush, spray or other methods, or glazing, including the cleaning or preparation incidental thereto, shall be classified as a Painter."

Distilled to its essence, the Organization position is that the work involved painting a structure, that the work is reserved to its members and that Carrier has neither complied with the notice and conference requirements of Supplement No. 3 nor satisfied its reasonableness test in contracting out the work.

Carrier, to the contrary, says the Organization must prove that the disputed work is reserved to the bargaining unit either by specific Agreement language or by evidence demonstrating past performance of the work to the exclusion of all others. Carrier contends that the stacker is not a "structure" and, even if it was, that no Agreement language reserves the work to the Organization's members. Regarding past practice, Carrier says that large scale painting projects, as here, have been historically contracted. Absent exclusive performance rights proven by the Organization, Carrier says Supplement No. 3 does not apply to restrict its rights to contract out the disputed work. Notwithstanding, and without conceding the applicability of Supplement No. 3, Carrier says the disputed work was properly contracted out and all notice and conference requirements were satisfied.

After thorough review of the record, we conclude that the threshold issue is whether the disputed work was "... maintenance work in the Maintenance of Way and Structures Department..." within the meaning of Supplement No. 3. Accordingly, the Organization has the initial burden to show that the disputed work is reserved to the B&B employees so as to bring it within the scope of Supplement No. 3.

The Organization says that Rules 1 (Scope), 2 (Seniority) and 26 (Classification of Work) reserve the work in question to the bargaining unit. Moreover, it cites Supplement No. 9 in support for this contention. Carrier says the cited Rules are general and do not reserve the work.

The Organization also contends that the language of Supplement No. 9 confirms that the stacker is intended to be treated as a structure. The provision reads as follows:

"SUPPLEMENT NO. 9

Jurisdiction of Work - Maintenance of Way -  
Ore Dock Employees

Commencing November 1, 1977, maintenance work to be performed by ore dock employees or B&B Department employees at the Duluth Lakehead, Steelton, or Two Harbors ore storage facilities will be allocated as follows:

Ore Dock Employees

1. Maintenance and running repair of bucket wheel reclaimers, front end loaders, swing loaders, sweepers and other mobile equipment which may be assigned.
2. Maintenance and running repair of rail-mounted trapping machines.
3. Installation, maintenance and running repair of hydraulic systems.
4. Greasing of conveyor systems, except when performed in connection with installation of new idlers or equipment.

Bridge and Building Department Employees

1. Maintenance and repair of conveyor systems and equipment not specifically listed for ore dock employees above.

\* \* \*

It is understood that the purpose of this Supplement is to assist in the orderly distribution of work between the crafts involved and is not to be interpreted as granting exclusive rights to work or infringing on any work rights along to other crafts."

Unfortunately, the provisions of Supplement No. 9 do not specifically name the stacker. While it is true that the stacker includes a conveyor mechanism among its capabilities, which could suggest that the maintenance work would normally be assigned to the B&B forces, it could just as likely fall within the reference to "other mobile equipment," which would mean the work would accrue to the Ore Dock employees. Of more noteworthy importance, however, is the language of the final paragraph. This makes clear that Supplement No. 9 does not grant exclusive rights to work. Without further persuasive evidence in the record, and there is none here, Supplement No. 9, by itself, does not clearly explain which employee group should normally be assigned the work or that the stacker is to be treated as a structure.

In our view, even if Rule 26 were to be treated as a work reservation rule, it is not clear that the stacker would fall within its purview. Carrier says a structure has been defined in Third Division Award 13045 as "... a building, a construction affixed to realty," a definition which would not include a movable piece of machinery. Rule 26(c) uses the terms "...buildings, bridges and other structures...." Thereafter, it lists columns, beams, girders, trusses, etc., all of which are commonly associated with construction affixed to realty. Rule 26(d) merely refers to "... applying paint ... to structures" without clarification of what a structure is within the meaning of the Rule. On the record before us, we do not conclude that the stacker is a structure. The plain meaning of the terms used in Rule 26(c) would more customarily refer to constructions affixed to realty as the Carrier contends.

Our review of the cited provisions persuades us to agree with the prior decisions of this Board involving these same parties. Rules 1, 2 and 26 have been found to be general provisions designed to accomplish other objectives and do not grant exclusive rights to the performance of specific types of work. See, for example, Third Division Awards 18471, 19921, 19969, 27902, 28399 and 28747. This record provides us no basis for departing from this precedent.

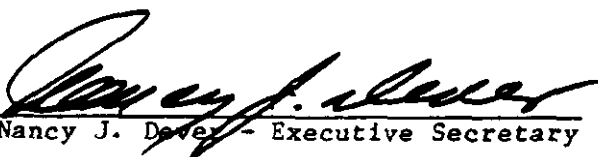
In the absence of specific provisions reserving the work to the employees, the Organization has the burden of proving its rights to performance of the work by demonstrating it has customarily, traditionally and historically performed it. The record reveals only one instance of maintenance work performed on the stacker by the B&B forces in its 22 year history. This consisted of painting a portion of a boom section following unspecified repair work. To the contrary, the Carrier's evidence shows a practice of contracting out large scale painting projects, predominantly bridge painting, over the past forty-some years. On this record, we find that the Organization's evidence falls short of demonstrating the regularity, consistency and predominance in the performance of the disputed work to warrant a finding that it has, by customary and historical performance, become entitled to the work.

From the record under review, we are forced to conclude that the painting of the stacker was not maintenance work in the Maintenance of Way and Structures Department. The Organization had the burden to prove otherwise, but we find that it has not satisfied this burden. Accordingly, we cannot conclude, on this record, that Carrier was in violation of the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dove - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1992.