Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29217
THIRD DIVISION Docket No. MW-28270
92-3-88-3-42

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
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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 Carrier violated the Agreement when it assigned outside forces to operate a backhoe in connection with installing a culvert at Colby on November 10, 1986 (System File 69-86).

(2) The Carrier also violated Supplement No. 3 of the Agreement when it did not give the General Chairman advance notice of its intention to contract said work.

(3) As a consequence of Parts (1) and/or (2) above, B&B Mechanic D. Zimmerman shall be allowed ten (10) hours of pay at the B&B Mechanic's 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 underlying facts are not in dispute. Carrier assigned its four-man B&B crew to replace a culvert near Colby, Minnesota. It also leased a backhoe to assist in the job. The rental vendor chosen by Carrier, however, would lease the backhoe only if it would be run by the vendor's operator. The backhoe was on the job one day for a total of ten hours. Claimant and the Organization seek compensation for the time worked by the vendor's operator.

While a number of arguments and assertions were made in the parties' respective Submissions, we are confining our analysis of the record, as we must, to the evidence and argument that was presented on the property.

Distilled to its essence, the Organization position is that the disputed work is reserved by rule and practice to the bargaining unit. As such, Supplement No. 3 to the Agreement required that Carrier serve advance written notice of its intention to contract out bargaining unit work. The Organization says Carrier failed to do so. In addition, the Organization asserts that Supplement No. 3 also required Carrier to make every reasonable effort to perform the disputed work with its own forces. The Organization challenges the Carrier's contentions that it chose the only reasonable alternative available to it. It asserts that Carrier could have rented from a Duluth area supplier, whose equipment had been leased in the past and who permitted its equipment to be operated by Carrier's forces.

Carrier, to the contrary, asserts that it did not own a suitable backhoe and that its only reasonable option was to rent the equipment from a vendor who insisted on providing its own operator. Carrier says, since Colby, Minnesota was some 80-90 miles from the Duluth area, it had no choice, from a cost and travel standpoint, but to rent from the Ely, Minnesota vendor. Carrier says it made every reasonable effort to use its own forces. Carrier also asserts that the disputed work is not reserved to the bargaining unit by any Agreement provisions cited by the Organization. Finally, Carrier asserted that its four person crew was larger than necessary, was paid at the "Composite Mechanic" rate for ease of cross-utilization and that the crew size would not have been increased had the backhoe been operated by Carrier forces. Carrier denies that its actions violated Supplement No. 3.

Aside from the underlying facts of the event itself, there is scant factual evidence, from either party, in the record. The record is comprised, almost exclusively, of assertions and counter-assertions without supporting evidence. Many of the key assertions are unrefuted.

While Carrier did assert that no cited Rule reserved the disputed work to the Organization, it did not challenge the Organization's contention that the B&B forces had customarily, historically and traditionally performed the work system-wide. Moreover, at no time, on the property, did Carrier contend that Supplement No. 3 did not apply to the events in question. We find, therefore, on this record, that the disputed work was within the scope of the Agreement.

Supplement No. 3 reads, in pertinent part, 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, * * *"

Carrier did not challenge, on the property, the Organization's contention that Carrier had failed to provide the requisite advance written notice. We must find, therefore, that Carrier violated this provision of the Agreement.

Carrier did assert that the Ely, Minnesota vendor was its only reasonable rental option. The Organization, to the contrary, asserted that Carrier had reasonable rental alternatives in the Duluth area. In view of the Organization's challenge, Carrier had the burden to support its defensive assertion with probative evidence. The record does not contain any such supporting evidence.

On the one hand, it would appear that Carrier's reasonableness defense should fail for lack of proof and a violation on the merits should be found. On the other hand, however, the Organization did not respond to Carrier's assertion that the crew would not have been larger without the vendor supplied operator. The presence of the vendor's operator, we are forced to conclude, did not deprive any B&B employee of a work opportunity he might otherwise have had.

Third Division Award 26832 involving these same parties, suggests that, at the time of this dispute, the Organization had not been enforcing the Supplement No. 3 notice provision for some time. The Board there concluded that Carrier should be directed to comply with the notice requirement prospectively but that no monetary remedy was appropriate.

We find the same result to be in order here. While we must sustain the Claim as to the notice and reasonableness violations, there is no proven lost work opportunity. Accordingly, we must deny the requested relief.

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 7th day of May 1992.