

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29722
Docket No. MW-29239
93-3-90-3-114

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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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 remove and replace concrete side walks and curbs at the Duluth Ore Docks and Storage Facility beginning August 24, 1988 (Claim No. 28-88).
- (2) The Carrier also violated Supplement No. 3 when it failed to timely and properly notify and confer with the General Chairman concerning said contracting transaction.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the five (5) senior furloughed B&B employees on the Missabe Division shall each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours expended by the outside contractor performing the work identified in part (1) above."

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 employee 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.

By letter dated August 10, 1988, the Carrier notified the General Chairman in pertinent part as follows:

"This is to advise you that a contractor will be on the property, possibly within a week, to perform certain roadway and parking lot work at Duluth Docks. Changes in traffic routing, and deterioration of existing surfaces will require:

- removal of concrete gutter
- removal of washed rock
- removal of sidewalk sections
- installation of new sidewalk
- installation of new curb
- landscaping
- blacktopping

. . . .

This work will be contracted due to the fact that the equipment and skills necessary are not available on the Carrier's property. This notice is given without prejudice to the Carrier's position that blacktopping and the associated work is not work covered under the Maintenance of Way rules."

The General Chairman responded to the Carrier on August 19, 1988, stating in part as follows:

"The B&B [forces] can perform the majority of the work in question. We have the means and the equipment and employees willing and able and available to perform this work. In an effort to come to a compromised agreement to allow some of the work to be contracted [t]he Organization would be willing to come to a agreement and allow the black topping....

If we cannot agree to some type of compromise, [t]he Organization is again forced by the Carrier to file a claim or claims for the above work. We will be happy to meet with you at your convenience."

The contracted work thereafter commenced and was completed on September 9, 1988. On October 10, 1988, the Organization initiated a Claim in reference to all of the work. However, on March 31, 1989, the Organization modified the Claim to eliminate reference to the blacktopping work (which was approximately three-quarters of the project), leaving intact the claim as to sidewalks and curbing in particular.

In further correspondence on December 14, 1989, the Organization referred to the requirement in Supplement No. 3 (c), quoted below, that the Carrier give sufficient notice so that the matter can be discussed in conference, pointing out that the notice which was given was so close to the starting date of the work (apparently already contracted) as to prohibit the possibility of reaching any meaningful agreement as to the work.

At issue here is Supplement No. 3, Contracting of Work, which reads in pertinent part as follows:

- (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...."

The Board finds that the Organization's position has merit as to the contracted work other than the blacktopping. The Board concludes that the Carrier failed to meet its requirements under Supplement No. 3 (a) and (b). A "reasonable effort" would reveal that the sidewalk and curbing work could have been performed by

Carrier employees who are qualified and who have done so in the past.

The Carrier argues that it is not required to piecemeal a construction project, given the inefficiencies which would accompany such effort. This argument carries great weight in many instances, but not in the circumstances here. Carrier forces did perform some of the preliminary work for the project. In addition, it turns out that the contractor itself subcontracted the sidewalk and curbing work, so that it was clearly separate from the blacktopping work.

The Carrier also notes that it currently had insufficient supervision to cover projects such as involved here. This, however, is hardly the type of justification for contracting contemplated in Supplement No. 3. Finally, there is no showing that the necessary skills or equipment were unavailable for the limited portion of the work sought by the Organization.

The Carrier may well argue that, throughout the initial stages of the claim handling procedure, it was defending its position as to the entire project, with the Organization's modification only coming at a later point. While this is correct, it is reasonable to assume that, if advance written notice had been given prior to the apparent full commitment to outside forces, an accommodation might well have been reached with the General Chairman as to a portion of the work.

Supplement No. 3 is indeed limited in its coverage, as pointed out in many other Awards. It is, however, meaningful, and it cannot be relied on to cover any and all types of contracting.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Deyer
Nancy J. Deyer - Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.