

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30943
Docket No. MW-28121
95-3-87-3-699

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 carrier violated the Agreement when it assigned outside forces to dismantle Buildings 2359, 108 and 1598 beginning on or about July 22, 1986 (Claim No. 59-86).
- (2) The Carrier also violated Supplement No. 3 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 aforesaid violations, B&B Mechanic R. Lambert and the senior furloughed B&B mechanic as of August 1, 1986 shall each be allowed an equal number of 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 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 July 18, 1986, the Carrier notified the Organization that "Buildings 2359 (Rip Track Building), 108 (Lumber Shed) and 1598 (Addition only) have been retired and will be demolished by a contractor beginning July 21." The Organization also states that the Carrier attempted to notify the Organization's office on July 18, 1986, but was unsuccessful. When the Organization contacted the Carrier on July 21 after receipt of the notice, the Carrier informed the Organization that it was too late and that a contractor was already on the property. According to the Carrier, it took the contractor a little more than two days to remove the structures.

Rule 1 "Scope" states that "The rules contained herein ... shall govern the hours of service, rates of pay, and working conditions of all employees in any and all subdepartments of the Maintenance of Way and Structures Department." Rule 26(c) "Classification of Work" states that "An employee assigned to ... dismantling of buildings ... shall be classified as a bridge and building Carpenter and/or Repairman."

Supplement No. 3 states:

"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 the 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."

As developed on the property, the Carrier takes the position that the work was not covered by the scope of the Agreement; the work was not maintenance work or new construction and therefore was not covered by the notification requirement of Supplement No. 3; and Rule 26 does not reserve work.

The pivotal provision is Supplement No. 3, Paragraph (c). That provision clearly states that "... whenever work is to be contracted, the Carrier shall so notify the General Chairman in writing ..." [emphasis added]. While Paragraph (a) addresses "maintenance work", Paragraph (b) addresses "new construction" and Paragraph (d) addresses "right-of-way cutting, weed spraying, ditching and grading", Paragraph (c) of Supplement No. 3 only, and generally, addresses "work." Given how the parties specifically addressed the different types of "work" in Paragraphs (a), (b) and (d), the only conclusion this Board can draw with respect to the "work" addressed in Paragraph (c) is that if the parties intended limitations in Paragraph (c), they would have specified those limitations as they did in Paragraphs (a), (b) and (d). The failure of the parties to make similar limitations in Paragraph (c) as they did in Paragraphs (a), (b) and (d) of Supplement No. 3 is eloquent silence supporting the conclusion that no such limitations were intended. We therefore reject the Carrier's argument that Paragraph (c) only applies to "maintenance" work or "new construction". Paragraph (c) simply applies to "work."

But, there must be some limitation upon "work" as it is used in Paragraph (c). It cannot be expected that the Carrier would be required to notify the Organization under Paragraph (c) about contracting out "work" that has not been performed by the affected employees. For that answer we look to Rule 26. Rule 26 states that covered employees perform "dismantling of buildings". Whether such "work" is specifically reserved to the employees is therefore irrelevant as far as Supplement No. 3 is concerned. "[D]ismantling of buildings" is "work" performed by employees such as Claimants. Again, had the parties intended "work" to mean work that is specifically reserved to the affected employees, the parties would have put in words to that effect in Supplement No. 3, Paragraph (c). They did not do so.

We therefore find that the Carrier was obligated to give the Organization notice of its intent to contract out the "work" involved in this dispute. Such notice was a requirement of Supplement No. 3, Paragraph (c) and not, as the Carrier asserts, merely a "courtesy."

We also do not find persuasive the Carrier's argument that the structures involved were no longer "active." At least as developed on property, the facts in this case do not show this to be a case where the structures were sold "as is" to a contractor for the contractor to salvage what it could. This is a case where the structures remained Carrier property and were to be "dismantled." "[D]ismantling of buildings" is "work" performed by the affected employees.

The form of the notice is specified in Paragraph (c) as notice "in writing." The Carrier is further obligated to "... afford the General Chairman the opportunity of discussing the matter in conference with the Carrier representatives." The Carrier did provide the Organization with written notice dated July 18, but, by the time that notice was received by the Organization and the Organization contacted the Carrier, the Carrier informed the Organization that it was "to[o] late" and that a contractor was already performing the work. We find the timing of the notice dated only a few days before the contractor began to work and the fact that the Organization did not receive the notice until a time when it contacted the Carrier it learned that the work had already commenced effectively frustrated the conference provisions of Supplement No. 3, Paragraph (c) and was not sufficient.

We shall therefore sustain the claim. The affected employees lost a work opportunity and shall be made whole for the number of hours it took the contractor to remove the structures.

AWARD

Claim sustained.

Form 1
Page 5

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of June 1995.