

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32342  
Docket No. MW-32048  
97-3-94-3-414**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employes  
PARTIES TO DISPUTE: (  
(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 (Braxton Industries) to perform tie distribution and recovery work near the Colby Yard on April 21, 1993 and continuing (Claim No. 10-93).**
- (2) As a consequence of the violations referred to in Part (1) above, the five (5) track employees named by the Organization shall each be allowed an equal proportionate share of the total number of man-hours expended by the employs of the outside concern while performing the tie distribution and recovering work."**

**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 were given due notice of hearing thereon.

This dispute involves Carrier's contracting of tie distribution and pick up work performed in conjunction with its 1993 maintenance program. By letter dated March 22, 1993, Carrier gave the Organization notice of its intention to contract out the distribution of new crossties due, in part, to its lack of equipment to efficiently accomplish the task.

A conference was held between the parties on March 30, 1993, during which a video was shown of the contractor's hi-rail equipment with a boom designed for high speed tie handling. During the conference the parties also discussed Carrier's intention to contract out the pick up of old ties, and its notice was amended thereafter to include the recovery and disposal of used crossties. Carrier offered the Organization a similar arrangement concerning the contractor's pick up of all used ties as had been agreed to the prior year which guaranteed full employment to the track group installing the ties.

By letter dated April 7, 1993 the Organization objected to the contracting, contending that its employees have always distributed ties and should continue to do so. After the contractor commenced work on April 21, 1993, the instant claim was filed.

The Organization argues that its employees have traditionally performed the tie distribution work, Carrier failed to present evidence of past practice for such work, there were furloughed employees at the time who were capable of using Carrier equipment to perform tie distribution just as efficiently as the contractor, and that Rules 1, 2, 26 reserved this work to Maintenance of Way employees and Supplement No. 3 prohibited its contracting under the circumstances. The Organization took issue with Carrier's estimation of cost savings, and the dates upon which Carrier indicated that employees were recalled from furlough and the work was completed by a contractor. No specific furloughed employees were identified by name during the correspondence on the property.

Carrier initially contends that past practice establishes that it has routinely contracted out pick up work, and that it is not precluded from doing so under Rules 1, 2, 26 which are not reservation of work rules, see Third Division Awards 29827 and 29144, or that Supplement No. 3, which does not prohibit contracting out, especially where Carrier does not have the same equipment used by the contractor. See Third Division Awards 29721, 29286, 28758. Carrier argues that it would not have been

reasonable for it to perform the volume of this tie work with its own equipment, which would have taken longer, been less safe, been more labor intensive, and have cost approximately \$15,000 more out of an already restricted budget. Carrier asserts that if it had not contracted this work there would have been less maintenance work accomplished under its 1993 program and employees would have been furloughed earlier. Carrier contends that efficiency and cost savings factors must be considered in determining if it made a "reasonable effort" under the terms of Supplement No. 3, and notes that it assigned an extra employee along with the contractor's forces throughout the term of the contract who would not otherwise have been working in an effort to assure safety. Carrier contends that, with the exception of the period of September 15-21, 1993, employees were fully employed during the duration of the contracting in issue.

There appears to be little dispute in this case with Carrier's ability to contract out the tie pick up work, after proper notice and discussion with the Organization, based upon its established past practice of doing so. We find that it complied with its notice obligation to the Organization, and there was no violation of the Agreement in such aspect of the contracting.

The evidence respecting the tie distribution work is far different. The Organization has proven that it customarily and historically has performed this work, as admitted by Carrier, and Carrier has failed to show that it has previously contracted this aspect of the work. Thus, prior Board holdings that Rules 1, 2 and 26 do not specifically reserve work to the Organization are not determinative herein.

The record supports a finding that the provision for notice contained in Supplement No. 3 has not been violated, as Carrier has satisfied its notice and conference obligations regarding tie distribution work in this case. The Board must consider the following sections of Supplement No. 3 in resolving the remaining issue of whether the contracting of tie distribution work violated the Agreement.

"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."

We have carefully reviewed the record and conclude that Carrier satisfied its obligation to make "every reasonable effort" with respect to its determination that the use of the contractor's hi-rail equipment to perform the volume of tie distribution work involved in this project was far preferable to using its own forces with the equipment it had on hand. First, Carrier considered prior safety concerns and complaints as well as injuries incurred as a result of its method of handling ties. Second, Carrier attempted to maximize the number of employees working in conjunction with the project in an effort to assure full employment during this period. Third, Carrier permissibly considered the efficiency, time and cost attributable to both the contractor and employees' performance of the disputed work and there is no basis in the record to conclude that its overall assessment was unreasonable. Fourth, Carrier considered the impact that the cost savings would have on continued employment for its own forces on its 1993 maintenance program.

Further, the Organization failed to rebut Carrier's allegation that employees were fully employed during the contracting period by naming any employees it contended were on furlough until May or prior to September 21, 1993. The Organization's identity of a different named contractor who was alleged to have performed some of this work on specified dates in October, 1993 is not encompassed by the instant claim.

Under the specific circumstances of this case, we find that Carrier did not violate the provisions of Supplement No. 3 in contracting out the extensive tie distribution work involved in this project to a contractor with specialized equipment to more efficiently and safely handle it.

**AWARD**

Claim denied.

Form 1  
Page 5

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**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 13th day of November 1997.**