

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37201
Docket No. MW-36344
04-3-00-3-588

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Carrier violated the Agreement when it assigned an outside contractor to perform Maintenance of Way Track Subdepartment work (fire patrol of right of way) beginning April 30, 1999 and continuing (Claim No. 34-99).
- (2) The Carrier further violated the Agreement when it failed to give the General Chairman a proper advance written notice of its intent to contract out the work as required by Supplement No. 3.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the two (2) senior employees from the Missabe Division Track Department and the two (2) senior employees from the Iron Range Track Department shall now each be allowed an equal proportionate share of the total number of man-hours expended by the outside contractor at the fire patrolman's straight time rate of pay."

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 claim involves the Carrier's use of an outside contractor to perform aerial fire surveillance of its territory commencing on April 30, 1999 rather than utilizing its employees who had customarily and historically performed fire patrol work throughout the system for 100 years by use of hy-rail equipment following trains on the track during the dry spring and summer seasons.

The record establishes that, unbeknownst to the Organization, the Carrier held a series of meetings with the Minnesota Department of Natural Resources (DNR) which oversees the Carrier's fire patrol responsibilities, in an effort to obtain its approval to change the manner in which fire patrol was performed to the use of aircraft to make preset time surveillance of sections of track and communicate directly with the DNR if brush fires are detected, and to have a Fire Patrol Plan in effect that utilizes employees to combat the fires. Apparently, such approval was granted at the end of April, immediately before the DNR notified the Carrier late in the day on April 29, 1999 that it must commence fire patrols due to weather-related conditions.

By letter dated April 30, 1999 the Carrier gave the Organization written notice that it was beginning fire surveillance by aircraft that day, asserting that it was just notified by the DNR to start fire patrols and this was a more effective way of doing it given problems associated with following and keeping up with trains using hy-rail equipment. A conference was held in response to this notice on May 26, 1999, and thereafter, the Organization objected to the Carrier's decision to contract out this work, which had always been performed by its employees and for which there was a classification in the Agreement, and the Carrier's failure to discuss this decision with it before effectuating the contract. The Organization took issue with the Carrier's assertion of an emergency situation, pointing out that fire patrols are conducted and anticipated each year and the Carrier was aware of the

dry weather for the period prior to April 30, 1999, as well as its assertion that there had been problems with fire patrol in the past.

During the lengthy exchange of correspondence on the property, the Carrier asserted that flying an airplane is not track work, that this is surveillance and not patrol, that it is using new technology to more effectively accomplish the task, it neither owns nor has qualified employees to operate the aircraft permitting the subcontracting under Supplement No. 3, and that the Agreement does not limit the choice of equipment it may use for a specific purpose. The Carrier notes that the actual fire fighting work remains with BMW-represented employees under its 1999 Fire Patrol Plan. The Carrier also set forth some safety concerns with the use of train-following fire patrols as well as the increased work load required of the Dispatchers as additional justification for its action. In response to the Organization's request for an equal share of the hours expended by the pilot conducting fire surveillance, the Carrier pointed out that the claim was excessive because it shared the pilot and equipment with the DW&P Railroad.

The Organization contends that because the Agreement covers work, not equipment (See Third Division Award 28486) Rule 2 specifies a work classification of Fire Patrolmen, and it is undisputed that employees have performed fire patrol work for 100 years on this property, the contracted work is covered by the scope of the Agreement and the Carrier is required to comply with the provisions of Supplement No. 3 to make every reasonable effort to perform it with its own forces and give the Organization advance written notification of its intent to contract and an opportunity to discuss the matter in conference. Third Division Awards 26832, 29394, and 30943. It argues that the Carrier failed to show any urgency in this case because it was well aware of the need for upcoming fire patrol in the spring of 1999 and had been considering a change in how it would be performed for months prior to the date it notified the Organization of the fait accompli that it intended to use air surveillance instead of rail patrol. The Organization asserts that issues regarding efficiency, equipment, employee skills and safety concerns are exactly the types of matters that are intended for discussion in conference prior to the decision to contract being made, citing Third Division Awards 25967 and 30977. It asserts that feasibility, efficiency, and economy are not valid excuses for violating the Agreement. Third Division Awards 29394, 29722, and 31622. The Organization notes that the Carrier possessed sufficient equipment and forces to accomplish the fire patrol work, because it had always done so in the past and there was no showing that it was required to use special equipment, relying on Third Division Award

28590 and Public Law Board No. 2206, Award 56. The Organization relies upon Third Division Awards 30526 and 30943 to support its request for compensation for fully employed Claimants.

The Carrier argues that there have been numerous contracting out disputes on this property, the great majority of which have resulted in a denial of the claims in recent years, revealing that it shows due regard for its contractual commitments and is not a flagrant or frequent violator of the Agreement, citing Third Division Awards 28758, 28883, 28999, 29101, 29141, 29143, 29144, 29150, 29162, 29217, 29286, 29595, 29721, 29722, 29827, 29873, 29887, 30273, 30767, 30943, 31622, 32342, 35977, and 36226. It notes that the delay in its notice to the Organization was the direct result of the urgent message it received from the DNR to begin fire patrols immediately which complies with the emergency provision of Supplement No. 3, and that it did meet with the Organization to discuss the reasons for its decision to use aerial surveillance rather than hy-rail train patrols, setting forth specific problems it had in the past with such patrols and how using aerial surveillance would bring far superior fire detection and fast communication in fighting right-of-way fires. The Carrier contends that this new technology eliminated the necessity of following trains and changed the nature of the work, which is no longer performed on the property, pointing out that the contractor is not performing the work previously done by BMW-represented employees, who continue to fight the fires once they are located. The Carrier also contends that the remedy sought is excessive because all track forces were fully employed and there was no economic loss to any of them as a result of aerial surveillance, the amount of hours claimed was well in excess of the time the pilot was utilized, and such time was shared equally with the DW&P Railroad.

A careful review of the record convinces the Board that the Organization sustained its burden of proving that the fire patrol work in issue, which has admittedly been customarily and historically performed by BMW-represented employees, is encompassed within the Scope of the Agreement, and is subject to the provisions of Supplement No. 3. Subparagraph (a) requires the Carrier to make every reasonable effort to perform such work with its own forces. Subparagraph (c) requires advance written notice of contracting and an opportunity for the General Chairman to meet and conference the issue with Carrier representatives.

While there is an emergency exception to such advance notice and conference requirement, the Board does not find that the facts support the Carrier's contention

that it was prevented from providing advance notice and conference on the issue of the use of aerial surveillance rather than hy-rail train patrol due to the urgent message by the DNR to begin fire patrol immediately. The facts support a finding that the Carrier knew it would be required to begin fire patrol sometime during the spring of 1999, as it had in all years past, and that the time would be weather dependent. It had clearly contemplated making a change to aerial surveillance for months prior to this time, because it was engaged in discussions with the DNR in seeking its approval of such change. This was the time when meaningful notice and discussion with the Organization would have been possible, and where the use of other equipment and the most efficient method of conducting fire patrol could have been discussed. Supplement No. 3 does not prohibit the Carrier from contracting out work. It does, however, require it to do so in good faith, after providing the appropriate opportunity to the Organization to attempt to retain the work for its members who have performed it in the past. This opportunity was glaringly absent in this case. The Board can reach no other conclusion but that the Carrier violated the Agreement by failing to comply with its Supplement No. 3 obligations.

A review of the prior contracting cases relied upon by the Carrier reveals that in all situations where the claim was denied in an actual contracting out case involving work proven to be scope covered, as opposed to a jurisdiction of work case, the Carrier had met its advance notice and conference obligations or had proven that an emergency prevented it from doing so. See, e.g. Third Division Awards 28999, 29101, 32342, 35977, and 36226. On the other hand, in the few cases finding that the Carrier violated the Agreement by contracting out bargaining unit work, the Board relied upon the Carrier's failure to comply with its Supplement No. 3 notice requirement. See Third Division Awards 28883, 29217, 29394 and 29722, which even directed monetary relief for fully employed Claimants as a result of it. See, Third Division Award 30943. There can be no contention that BMW-represented employees did not suffer a loss of work opportunity in this case when all fire patrol work was removed from the bargaining unit. Because the Carrier's contention that one-half of the hours utilized by the pilot in conducting aerial surveillance was attributable to a different railroad was not disputed by the Organization on the property, we direct the Carrier to compensate the Claimants properly identified by the Organization an amount equal to one-half of the hours expended by the pilot contracted by the Carrier to perform fire patrol work during the 1999 season at the Fire Patrolman's straight time rate of pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 28th day of September 2004.