

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37352
Docket No. MW-36957
05-3-01-3-589

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 (Progress Rail and/or sub-contractor) to perform Maintenance of Way work (pick up and haul tie plates for Carrier re-use) between the Adolph area and the Diamond area in Proctor to the Material Yard on July 19 and/or 20, 2000 (Claim No. 25-00).
- (2) The Carrier further violated the Agreement when it failed to notify and confer with the General Chairman concerning its intent to contract out the above-referenced work as required by Supplement No. 3.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the senior crane operator whose bid includes the Proctor location shall now be compensated for all hours expended by the outside forces in the performance of the aforesaid work at his respective 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.

Without prior notice to the Organization, the Carrier utilized a contractor to pick up and haul tie plates for re-use. This claim followed.

Supplement No. 3(c) provides:

“(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 a conference with 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.”

The Carrier concedes that it did not give prior notice to the Organization (“You claim that DM&IR did not notify you concerning the use of a contractor to perform this work. That is true.”). The Carrier therefore violated its notice obligations under Supplement No. 3(c).

The fact that the Carrier used a contractor “in the interests of safety for train crews” because its crane was engaged elsewhere does not qualify as an emergency under the notification provisions. There was no emergency. However, even if an emergency, the Carrier was still obligated to “. . . attempt to reach an understanding with the General Chairman in conference, by telephone if necessary. . . .” Even that was not done.

The Carrier's failure to give the required notice is not a mere technical violation. The parties agreed upon a notice and conference procedure for situations where the Carrier intends to contract work. The Carrier must be held to the clear language of that negotiated procedure.

With respect to the remedy, the fact that a Laborer worked along with the contractor and received B-Machine Operator pay does not relieve the Carrier from a monetary remedy. Had the Carrier given the General Chairman the required notice, perhaps that is the arrangement they would have been able to work out. But, by failing to give the required notice, the procedure designed by the parties in Supplement 3(c) was not allowed to function.

Here, because the Carrier failed to give the required notice, a Crane Operator lost a potential work opportunity. The fact that the Carrier defended the claim on the basis that "[t]he contractor was used in this manner because the DM&IR crane and crane operator were working elsewhere picking up scrap materials" sufficiently shows that a Crane Operator was deprived of a potential work opportunity. That individual should be made whole for the amount of hours of work performed by the contractor. See Third Division Award 30943 (between the parties where, for the remedy due to lack of proper notice, it was held that "[t]he affected employees lost a work opportunity and shall be made whole for the number of hours it took the contractor to remove the structures"). See also, Third Division Award 28711 (between the parties, sustaining a claim for failure to give notice and making employees whole for lost work opportunities as requested in the claim).

The Carrier's reliance upon Third Division Award 26832 between the parties is not persuasive. There, the Board found that there was a "... mutual drift away from contract compliance" and therefore denied the Organization's request for a monetary remedy. However, the Board in that case advised the parties that before the terms of the Agreement can be strictly applied, the Carrier should be put on notice. In a similar situation in Third Division Award 28411, the Board again denied monetary relief, but advised the Carrier that prior Awards such as Third Division 26832 "... should, therefore, serve as notice to the parties involved that in the future the Board may well be disposed to conclude differently on the issue of relief." Third Division Awards 28711 and 30943 which made whole employees for lost work opportunities due to the Carrier's failure to give the required notice issued after Third Division Awards 26832 and 28411. The notice violation in this matter occurred in 2000 when the Carrier was previously warned by the Board that

monetary remedies could be imposed for future violations and the Carrier was further aware of the make whole remedies actually imposed in Third Division Awards 28711 and 30943. The Carrier was therefore on notice of the potential consequences of its failure to give the required or proper notice before contracting work. Yet, it again failed to give the mandated notice. A full remedy is therefore required.

AWARD

Claim sustained.

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 24th day of February 2005.