Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37471
Docket No. MW-36526
05-3-01-3-14

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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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 Carrier violated the Agreement when it assigned outside forces (Gartner Refrigeration) to perform Maintenance of Way Bridge and Building Subdepartment work (install air conditioning unit) at the Proctor Scale House on August 2, 1999 (Claim No. 44-99).

(2) The Carrier further violated the Agreement when it failed to timely and properly 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, Claimant R. Lambert shall now be compensated for the total number of man-hours expended by the outside forces in the performance of said 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.

On August 2, 1999, the Carrier used Gartner Refrigeration to install an air conditioning unit at the Proctor Scale House. The Organization contends that prior to the date of claim, the installation of air conditioners had customarily, traditionally and historically been assigned to and performed by employees holding seniority in the Carrier's Maintenance of Way and Structures B&B Subdepartment, pursuant to Rules 1, 2 and 26 of the Agreement.

The Organization argues that the Carrier did not give the General Chairman any advance written notice of its intent to contract out the above work, nor did the Carrier offer him any opportunity to discuss the matter in conference. The Organization also contends that the Carrier provided no description of the work to be contracted, gave no reasons for the contracting, and made no effort the assign its own forces to the work. According to the Organization, the Carrier's failure to notify, provide information and conduct a conference violated Supplement No. 3 (a) (b) and (c) of the Agreement and the December 11, 1981 Berge-Hopkins Letter of Understanding. It stresses that B&B forces have installed numerous air conditioners in the past and that such work is maintenance work accruing to B&B employees under Rule 26, Classification of Work.

The Carrier contends that it is incumbent upon the Organization to establish a prima facie case by showing that the Carrier was obligated, by Agreement, to employ B&B workers to install and service all types of air conditioning units. According to the Carrier, given the provisions of Rule 1, a general Scope Rule, the Organization's burden furthermore requires a showing that B&B Subdepartment employees performed all air conditioning work on an exclusive basis, which clearly was not the situation here, it emphasizes. Specifically, the Carrier asserts that the air conditioner installed at the Proctor Scale House was a "split system," larger and more complicated than the simple window units typically installed by B&B Mechanics. Such a system, states the Carrier, required installation by individuals

possessing specialized training and HVAC/EPA certifications, which none of the B&B Subdepartment employees had acquired.

Thus, the Carrier stresses that the Organization was completely unable to show that the work in dispute was encompassed by the Agreement Scope (Rule 1) or that its members possessed the skills necessary for the proper installation of the unit. As a result, the Carrier was not required by Agreement Supplement No. 3 nor the December 11, 1981 Letter of Understanding to notify the General Chairman before subcontracting the work. See Third Division Awards 32351, 33222, 34149, and others, and on-property Third Division Award 29162.

In response to the Carrier's arguments concerning exclusivity and special skills, the Organization asserted that on-property Third Division Award 28883, and other Awards of this Division, have determined that the exclusivity argument does not come into play in cases involving the use of contractors as opposed to other bargaining unit employees for work claimed by members of the grieving organization. With regard to the Organization's disagreement with the Carrier's position that the B&B Mechanics were not sufficiently skilled to install the air conditioner at the Proctor Scale House, the Organization stressed that the issue of skill was a proper topic for discussion contemplated by Supplement No. 3 and the December 11, 1981 Letter of Understanding. Thus, because the Carrier failed to properly notify the General Chairman, the issues of skills and exclusivity were never discussed. See, for example, Third Division Awards 25967, 30970 and 30977.

The Board carefully studied the factual record, the arguments set forth by the parties and the precedent Awards cited in this case. We find that, for the detailed reasons set forth below, the Organization presented sufficient evidence that the Carrier violated the Agreements cited above when it failed to issue a notice of proposed contracting prior to commencing the disputed work contracted here. There has been no showing, nor has it been argued, that the work was undertaken as a result of an emergency. Thus, the Organization should have been notified under Supplement No. 3(c) and given an opportunity to discuss the matter in conference.

At the outset, we stress that Third Division Award 29162, cited above by the Carrier, is of limited relevance to the current case. The factual matter underlying that case involved a claim by the Organization for work which the Board found was performed at a location, a conveyor, not typically maintained by employees of the

Maintenance of Way and Structures Department; therefore the work in that case was found to not have been reserved to the Claimants in that claim. However, Award 29162 does stand for the principle that the notification requirement under paragraph (c) referenced above, should not be read to apply to any and all work contracted out by the Carrier but rather, to work which at least arguably is reserved to the Organization.

Turning now to the instant case, we find that the record shows that from the standpoint of historical practice, B&B Mechanics have installed certain types of air conditioner units, i.e., window units. Indeed, in the Carrier's initial claim response, the October 20, 1999 letter from the B&B Engineer to the General Chairman, the Carrier stated that "*B&B forces have not exclusively performed the installation of* air conditioner units as you attempt to represent in your letter. An outside contractor has installed air conditioner units on the property."

The Carrier, in the above response, then gave examples of the installation work performed by contractors, as opposed to B&B forces, and also described the work performed by Gartner Refrigeration, on the August 2, 1999 claim date, as follows:

> "In the fall of 1998, Gartner Refrigeration performed the installation of an air conditioning unit at building 1726 that is very similar to the unit installed at the commercial ore scale building referenced in your claim. The similarity of the make of units is the only item that is the same. At the commercial ore scale building an existing concrete slab was used as the resting-place for the unit. On the installation at building 1726 no slab was present so B&B forces placed a slab. The hole cut into the building and the six bolts used to fasten piping to the wall are insignificant when compared to the total scope of the project. . . .
>
> The claim is excessive because the portion of the installation that B&B could put in, is insignificant when viewed against the entire installation process. . . ."

From the above, it is clear to the Board that, notwithstanding the fact that Rule 26(c) does not specifically reserve air conditioner installation work to B&B Subdepartment Group A employees, particularly Mechanics or Composite

Mechanics, a mixed practice evidently has existed on this Carrier's property in which both B&B forces and outside contractors have been used for air conditioner installation work. This is shown by the Carrier's own statements, as set forth above, we note.

Turning then to the Carrier's position that it was not contractually required to serve a 15-day notice and offer a conference opportunity to the General Chairman because B&B forces never performed such work "on an exclusive basis," we find that, upon our review of the factual record and in light of the precedent Awards offered by the Organization, it is clearly not incumbent upon the Organization to prove exclusivity as a prerequisite to establishing the Carrier's contractual obligation to serve a notice. As a result, the Carrier violated Supplement No. 3 of the Agreement and the December 11, 1981 Letter of Understanding when it did not notify the General Chairman of its intent to contract out the air conditioner installation to Gartner Refrigeration, and we so rule.

We also find that the details surrounding the air conditioning project at issue here, and the Carrier's reasons for using a contractor instead of its own B&B forces to perform the installation work, as specifically set forth in the Carrier's October 20, 1999 claim response, are exactly the topics for discussion contemplated by Agreement Supplement No. 3 and the December 11, 1981 Letter of Understanding. We note, moreover, that the October 20, 1999 letter made no mention of a need for specialized skills.

We furthermore stress that it is not for the Board to determine whether the Claimant was sufficiently skilled, as the Organization so contended. We emphasize that, in light of the existence of a mixed practice of employees and contractors both doing air conditioning work, our decision is limited to the above ruling that notice should have been served and a discussion held by the parties, if requested by the Organization, to discuss various issues of concern, including employee versus contractor skills.

Turning to the precedent which supports our finding that evidence of a mixed practice of this Carrier's use of both B&B forces and contractors for air conditioner installation work, as opposed to exclusive performance, triggered the Carrier's contractual obligation to comply with the notice and conference requirements discussed above, we cite Third Division Award 28411, a blacktopping case involving these same parties. Upholding the Organization's right to receive notice should be

predicated on the evidence of a mixed practice, as opposed to proof of exclusive performance of the work by Carrier forces, the Board stated:

> "It is clear that the Carrier had a mixed tradition with respect to blacktopping. Some jobs had been done by B&B Forces. Others had been contracted out when equipment and skills were not available. But does the Agreement still require the Carrier to notify the General Chairman when contracting is contemplated? The Board must conclude, as Third Division Award 26832 has already done, that Supplement 3(c) 'requires advance notice' to the Organization by the Carrier when it intends to subcontract."

Furthermore, in another claim between these parties involving gravel hauling by an outside concern, the Board reiterated that exclusivity need not be established as a prerequisite for notice. In Third Division Award 28883 the Board wrote:

> "Carrier has raised the question of exclusivity and referenced several Third Division Awards dealing with this issue on the property. However, the question in those cases was raised vis a vis other Carrier employed forces and not outside contractors."

Last, in support of our finding that again, a Carrier's misplaced reliance on the exclusivity doctrine in a subcontracting dispute (involving the contractor's removal of refuse and debris from a roundhouse and hump yard tracks) resulted in that Carrier's violation of the Agreement notice provisions, in Third Division Award 32861 the Board held:

> "Contrary to the Carrier's argument, in order to be entitled to notice as required by the Rule the Organization does not have to demonstrate that the covered employees performed the work on an exclusive basis. . . . The record demonstrates that in the past covered employees have performed this type of work. That is sufficient for us to conclude that the work falls 'within the scope of this agreement' requiring the Carrier to give the Organization advance written notice as stated in the Rule."

The Carrier's failure to give advance notice as required by Supplement No. 3 of the Agreement and the December 11, 1981 Letter of Understanding before hiring

Gartner Refrigeration to install the air conditioning unit at the Proctor Scale House on August 2, 1999 resulted in a lost work opportunity, we conclude. As a result, the claim is sustained and the Claimant must be made whole. The matter is remanded to the parties to determine the number of hours worked by the contractor. See Third Division Awards 28411, 30943 and 32861.

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 19th day of April 2005.