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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37600
Docket No. MW-36542
05-3-01-3-37

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 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 outside forces to perform routine Maintenance of Way Bridge and Building Sub-department work (furnace maintenance) at the Proctor Car Shop on September 8 and 9, 1999 (Claim No. 52-99).
- (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 seven (7) hours' pay at the composite mechanic'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.

According to the Organization, on September 8 and 9, 1999, the Carrier assigned a contractor to perform "routine furnace maintenance at the Proctor Car Shop (Building No. 168)." The Organization specifically contends that employees of the contractor expended seven hours on both dates, "changing filters, tightening belts, lubricating and making minor adjustments to the furnaces at the Proctor Car Shop." It asserts that the Carrier's B&B forces have performed "normal furnace maintenance in the past," and that the General Chairman's statement providing details of prior maintenance and installation work, included in his June 23, 2000 letter to the Carrier confirming the claims conference of June 6, 2000, was not refuted by the Carrier. According to the General Chairman:

"... The contractor performed normal maintenance work that the Bridge and Building Department should and could have done. The B&B performs furnace repair and maintenance work all over the system. In fact, the B&B just installed a complete furnace and duct work at the Wales Section. The furnace at the Allen Junction Car House is maintained by the B&B as well as the heating system at Biwabic. The furnaces in Proctor have been repaired and maintained by the B&B for years..."

In light of the above, the Organization contends that pursuant to Rule 26(c) and Supplement No. 9 of the Agreement, the work performed by the contractor was "miscellaneous maintenance work" that accrued by "custom, history and tradition" to the Claimant, a B&B Department Composite Mechanic assigned at Proctor. Thus, the Organization avers that, pursuant to Supplement No. 3(c) of the Agreement, the Carrier was required to give the General Chairman advance written notice of its intent to contract out the "routine furnace maintenance work," and

allow him an opportunity to discuss the matter in conference. The Organization asserts that because the Carrier did not provide the General Chairman with the requisite notice and conference opportunity, a fact which the Organization contends stands unrefuted in the record, the Board must fully sustain the instant claim.

The Carrier contends that the Scope Rule does not mention heating systems and that by progressing the instant claim, the Organization now attempts to obtain work for which B&B Department employees simply are not qualified. According to the Carrier, the work described by the Organization was "far more complicated than routine maintenance." It further argues that "an experienced BMW-represented foreman" made the decision to call the contractor given his assessment that there were no employees available who possessed the necessary skills to service the furnace. Moreover, the Carrier contends that the General Chairman essentially acknowledged that qualified employees were lacking given his statement that, "... Even if the work went beyond that, it is the Company's obligation to have trained people on hand...."

The Carrier emphasized that it does not consider the furnace maintenance work at issue here as "miscellaneous mechanics work" under Rule 26(c), Classification of Work. In Carrier's view, such work "is not reserved to the Bridge and Building Sub-department in the language of the Agreement or by past practice."

The Carrier additionally argued that in order for the Organization to prevail in its burden of proof, it must establish a prima facie case by showing that the Carrier was obligated, by Agreement, to assign the maintenance work to B&B employees. According to the Carrier, the Scope Rule is general, thus, the Organization must substantially establish that BMW-represented employees have performed "all furnace repairs and maintenance exclusively." The Carrier further argues that "the facts of record demonstrate that the Carrier has routinely contracted the installation and servicing of furnaces throughout the property." The Carrier points to the B&B Engineer's statement in his November 23, 1999 claim response, as follows:

"Repair and maintenance of furnaces has routinely been left to skilled trades. This is appropriate given the increasing technology

applied to furnaces that our people do not have the knowledge, experience, or skills to repair. By submitting this claim, it appears that the BMW is questioning the Foreman's decision on the matter. . . ."

Moreover, the Carrier states that in its February 8, 2000 claim denial, the Chief Engineer wrote that the furnaces "are increasingly technical and beyond repair or maintenance by those not skilled in the trade. B&B forces . . . have routinely declined to work on furnaces. They have even regularly worked alongside outside vendors on the replacement of furnaces such as in the repair shop lunchroom."

Thus, the Carrier stresses that the Organization was completely unable to show that the work in dispute was encompassed by Rule 26 or that its members possessed the skills necessary for the proper performance of furnace maintenance work. It argues that because the Organization did not show that the work is Scope-covered, Supplement No. 3 imposed no duty upon the Carrier to notify the General Chairman before subcontracting the work.

The Board carefully studied the factual record, the arguments set forth by the parties and the precedent Awards cited in this current case. Although we acknowledge the Organization's burden in this case, we note that the Carrier expressed its disagreement with the Organization's sweeping contentions in generalities of its own, and without any probative documentation. For example, the Carrier furnished no specific information to support its position that furnace maintenance work "has routinely been left to skilled trades," if not contractors. To a certain extent, therefore, the Board does not disagree with the Organization's contention that the Carrier did not support its affirmative defense with persuasive evidence of its own if the Board was able to get that far in its analysis. However, the Organization's failure to first establish a prima facie case precludes the Board from such a finding or from sustaining this claim, we rule.

In light of the above, the Board concludes that, from our review of the on-property record, the true factual situation cannot be distilled from the record. Thus, we hold that the record lacks sufficient information for the Board to render

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either a sustaining or denial Award. We rule, therefore, that under the particular circumstances, the claim must be dismissed.

AWARD

Claim dismissed.

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 22nd day of September 2005.