

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37950
Docket No. MW-36711
06-3-01-3-264**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (Johnson Brothers) to perform Maintenance of Way Bridge and Building Subdepartment work (deck renewal and related repair) on No. 2 Dock in Two Harbors beginning on January 17, 2000 and continuing (Claim No. 02-00).**
- (2) The Carrier further violated the Agreement when it failed to properly notify the General Chairman concerning its intent to contract out the above-referenced work and when it failed to make every reasonable effort to assign said work to Maintenance of Way and Structures Department forces or to minimize such contracting as required by Supplement No. 3.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants A. Pappas, M. Klug, P. Iverson, S. Knutie, D. Larson and M. Lennartson shall now each be allowed an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of said work at their respective straight time rates 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.

The work involved herein was the major renovation of the No. 2 shipping dock at Two Harbors, Minnesota. The project called for dismantling and rebuilding the steel structure and decking of the dock.

Although the Statement of Claim alleges that the Carrier failed to properly notify the General Chairman of its plans to contract the work, the record makes it clear that proper notice was served twice. Notice was first served on October 30, 1998, and a conference was held on November 16. When the project was delayed for one year, the Carrier again served notice by letter dated June 23, 1999. It attached a copy of the original notice from 1998. A conference was held regarding the second notice on July 19, 1999. Accordingly, the Organization's claim regarding that the Carrier failed to properly notify must be rejected.

Although the claim cited Rules 2, 26, and Supplement No. 3 as having been violated, our review of Rules 2 and 26 does not reveal any apparent relevance to the contracting of work. Rule 2 deals with seniority while Rule 26 pertains to classification of work. However, Supplement No. 3 to the parties' Agreement is pertinent. It reads as follows:

"SUPPLEMENT NO. 3 - 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.
- (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 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."

Paragraphs (a) and (b) of Supplement No. 3 do not prohibit the Carrier from contracting out maintenance of way work in non-emergency situations, but they do require the Carrier to make every reasonable effort to use its own forces instead of using contractors. What is reasonable in any given situation must be determined on a case-by-case basis as the particular operative circumstances apply.

The instant record is somewhat unusual in that it contains considerably more correspondence on the property than is commonly seen. Just the notice phase of the record contains three letters from the Carrier and four from the Organization. Thereafter, the claim and its subsequent handling, consists of 16 exchanges – eight by each party. We confined our analysis to only those matters that were properly raised in the on-property record. We have not considered new contentions raised for the first time in the parties' Submissions.

It is undisputed that the dock renovation was a large scale project. The General Chairman agreed that it was in his December 23, 1998 response following the notice conference. Certain other material facts are also free of conflict: all of the Carrier's B&B employees were employed; there were no B&B employees on furlough; the work had to be completed in approximately two and one-half months from mid-January to the end of March while there was no shipping due to the freeze up of Lake Superior; and the project involved considerable working at a height of 70 feet, which required extensive use of fall protection measures. Beyond these facts, however, the parties' assertions about the capability of the B&B employees to successfully perform the work in the allotted time diverge widely.

The extensive on-property record contains a multitude of assertions, refutations, counter-assertions, and counter-refutations about the ability of the B&B employees to do the work. For example, the Organization asserted that it had performed comparable work in the past. The Organization cited specific examples. The Carrier, on the other hand, countered that the Organization's examples were not comparable and explained why they were not. As previously suggested by the 16 exchanges, these kinds of contentions went back and forth for some time on the property. Without more, these exchanges would have set up an irreconcilable conflict of fact that is effectively beyond the capability of the Board to resolve. But there is more.

The Carrier's contribution to the on-property record contained a multi-page, single-spaced memorandum from its Engineering Department that explained in detail the magnitude and complexity of the renovation project and why it required the expertise of a contractor with considerable bridge-building experience. As such, it constitutes evidence in support of the assertions in the Carrier's portion of the on-property record. The Organization provided no such evidence to counter the evidentiary impact of the engineering memorandum. As we read it, the engineering memorandum provides a rational explanation why it would not have been reasonable to use Carrier forces to perform the work.

Given the state of the record described herein, we find that the Carrier did not violate its obligations under the Agreement when it contracted the work as it did.

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AWARD

Claim denied.

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 19th day of September 2006.