

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37952
Docket No. MW-36746
06-3-01-3-321**

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 (Industrial Welders) to perform Maintenance of Way Bridge and Building Sub-department work (install hubs on drive pulleys) for the Duluth Lakehead Storage Facility on February 24, 2000 (Claim No. 07-00).**
- (2) The Carrier further violated the Agreement when it failed to timely and properly notify 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 violation referred to in Parts (1) and/or (2) above, Claimant R. Lilleberg 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.

The instant claim arose in connection with the Carrier's installation of new gear boxes on its No. 3 conveyor belt assembly at its Duluth Lakehead Storage Facility. According to the record, a new gear box with shaft and pulley already installed and a new hub for the shaft were received from the manufacturer. Instead of installing the hub onto the shaft while the parts were on the Carrier's property, the Carrier sent them off the property to Industrial Welders to have the hub pressed onto the shaft. Upon return of the gearbox assembly from the contractor, scope-covered employees then mounted it onto the No. 3 conveyor belt.

It is undisputed that the Carrier did not provide written notice to the General Chairman of its plans to contract the work pursuant to Supplement No. 3, which reads, in pertinent part, 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."

The claim herein alleges a violation of both Supplement No. 3 and Supplement No. 9 when the Carrier contracted the hub installation as it did. The claim went on to make the following assertions:

"... The work of installing hubs has historically been performed by the B&B Department. Over the years, the B&B Department has mounted hubs continuously on drive pulleys at both ports. It is a normal part of the mechanic's duties."

The Carrier's initial reply to the claim, by letter dated April 27, 2000, did not refute the assertions about past performance in any manner whatsoever. Instead, it contended that timeliness of the installation was an important factor and proceeded to deny the claim.

The Organization's May 22, 2000 appeal made similar assertions about past performance of the work by scope-covered employees. Once again, by its denial letter of July 18, 2000, the Carrier did not refute the assertions about past performance. The denial only advanced the timeliness contention as the basis for the contracting.

It was not until its third piece of correspondence on the property that the Carrier raised two additional contentions. First, it contended that Supplement No. 3 did not apply at the Ore Docks per the findings of Third Division Award 29162. Second, it justified the contracting on the basis of a mixed practice of using the same contractor for the same work in the past.

The Carrier's work forces at its Duluth ore dock facilities are represented by two different Organizations. As a result, Supplement No. 9 was developed to guide work assignments at the docks by providing general descriptions of the kind of work that would be performed by each group of employees. Supplement No. 9 reads, in pertinent part, as follows:

“Commencing November 1, 1977, maintenance work to be performed by ore dock employees or B&B Department employees at the Duluth Lakehead, Steelton, or Two Harbors ore storage facilities will be allocated as follows:

Ore Dock Employees

- 1. Maintenance and running repair of bucket wheel reclaimers, front end loaders, swing loaders, sweepers and other mobile equipment which may be assigned.**
- 2. Maintenance and running repair of rail-mounted trapping machines.**
- 3. Installation, maintenance and running repair of hydraulic systems.**
- 4. Greasing of conveyor systems, except when performed in connection with installation of new idlers or equipment.**

Bridge and Building Department Employees

- 1. Maintenance and repair of conveyor systems and equipment not specifically listed for ore dock employees above.**

New maintenance to be allocated to ore dock or B&B Employees will be allocated in accordance with the foregoing pattern of work distribution.

It is understood that the purpose of this Supplement is to assist in the orderly distribution of work between the crafts involved and is not to be interpreted as granting exclusive rights to work or infringing on any work rights belonging to other crafts.”

Although the Carrier maintains that Supplement No. 3 does not apply at the ore docks because of the findings of Third Division Award 29162, our review of the

Award does not produce the same conclusion. Third Division Award 29162 dealt with a three-hour job of installing window shades in the cabs of the "Stacker" and "Shuttle Conveyor No. 5." The Award does not provide any details about the two pieces of equipment. As a result, we are unable to determine where this type of window shade maintenance would fall under Supplement No. 9. It is clear, however, that the instant dispute involves the No. 3 conveyor belt at the Duluth ore dock. Supplement No. 9 explicitly allocates the maintenance and repair of conveyor systems to BMW-employees. Indeed, B&B employees, not ore dock employees, actually installed the gearbox assembly on the conveyor system when it came back from the contractor. This is strong evidence of how Supplement No. 9 applied to the equipment involved. On the record before us, therefore, we conclude that the disputed work was allocated to covered employees by Supplement No. 9.

The record also fails to provide sufficient support to the Carrier's mixed practice contention. While the Carrier supplied examples of past usage of the contractor in question, the evidence is sporadic at best. It shows only four instances where the contractor was used. None of the instances occurred more than 15 months prior to the incident in question. In addition, it is not clear from the Carrier's records that the instances involved the same work. Moreover, there is no evidence that the Organization was aware that the Carrier was using the contractor for the same work. Absent such evidence of awareness, it cannot be said that the Organization acquiesced in the practice.

When a past practice is claimed as an affirmative defense, the party so claiming bears the burden of to prove all requisite elements necessary to perfect the defense. On this record, the Carrier failed to establish the elements of clarity, consistency and longevity, as well as the Organization's knowledge of and acceptance of the claimed practice.

Given the foregoing circumstances, we find, on this record, that the disputed work was reserved to BMW-employees by both material assertions of historical past performance that were not effectively refuted, as well as the text of Supplement No. 9. Accordingly, the Carrier was required to provide notice to the General Chairman pursuant to Supplement No. 3. It violated the Agreement when it failed to do so.

As we turn to the discussion of remedy for the violation, it must be remembered that the general purpose of the notice requirement is to provide the

Organization with the opportunity to confer with the Carrier about the contemplated project. This provides the Organization with the opportunity to convince the Carrier to have the work in question performed by the employees it represents. When the lack of notice denies the Organization this conference opportunity, as a practical matter, the employees it represents are denied the opportunity to perform the work. Accordingly, we must sustain the claim. We must clarify, however, that the remedy is limited to the hours expended by the contractor to do the hub installation in question. We do not provide any remedy for any other work that may have been performed by the contractor that is outside the parameters of the instant claim.

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 September 2006.