

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26351
Docket Number MW-26371

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Chesapeake and Ohio Railway Company (Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when, without a conference having been held as required by the October 24, 1957 Letter of Agreement, it assigned outside forces to perform grading work at Mile Post A150 on January 25, 1984 (System File C-TC-2204/MG-4525).

2. Because of the aforesaid violation, furloughed Machine Operator R. P. Brown shall be allowed ten (10) hours of pay at the Class A machine operator's rate."

OPINION OF BOARD: On January 25, 1984, a derailment occurred at MP A150 in the vicinity of Lynchburg, Virginia. As a result the Carrier contacted an outside contractor to bring in equipment from Selma, Virginia to grade the right-of-way. According to a time Claim filed by the Organization it took the contractor some four (4) hours to move the equipment in both directions and some six (6) hours to actually work the site. The Claim for ten (10) hours pay was made on behalf of Equipment Operator R. P. Brown of the Carrier's Clifton Forge Division on the grounds that C&O machines should have been used to do the work. According to the Organization Carrier Equipment was only ten (10) miles from the site. In its denial of the Claim the Carrier's Officer stated that it had been anticipated ". . . because of extreme cold" that the sub-contractor's 977 Tracked Loader equipped ". . . with ripping teeth" was needed to prepare the subgrade after the derailment occurred. The Claim was denied, therefore, because special equipment was needed according to the Carrier, instead of the C&O D-4 bulldozer ". . . equipped with a straight cutting blade."

Since the Claim could not be resolved on property it was docketed before the Third Division of the National Railroad Adjustment Board for final adjudication. First of all, the Carrier alleges in its Submission to this Board that the Organization is in procedural error in its Statement of Claim submitted to this Board at Part 1. A study of the record shows that the Carrier is correct and all reference in the statement of Claim to a "conference" in Part 1 of the Claim is in procedural error. This part of the Claim is, therefore, dismissed by the Board. The rest of the Statement of Claim, however, is substantively similar to that filed by the Organization with the Carrier on property and it will remain subject to the deliberations by this Board. Such conclusion is not at variance with the spirit of precedential decisions issued by this Board relative to amended claims (See Third Division 13235, 20279 inter alia).

A study of the record fails to convince the Board that it was factually necessary for the Carrier to call in a subcontractor to do the work after the derailment on January 25, 1984. First of all, the argument by the Carrier that extremely ". . . cold" weather was anticipated is unconvincing. The Organization states, and the Carrier at no time denies this, that the actual temperature was between 60 and 70 degrees. If it took the sub-contractor only some two (2) hours to get to the location, which the Carrier also does not deny, it is not reasonable to conclude that the weather could have varied from "extreme" cold to over 30 degrees above freezing in such a short period of time. Secondly, it appears that the piece of equipment which the Carrier thought the sub-contractor was going to use, the 977 Tracked Loader, and as it apparently still thought he used as much as four months later when the Claim was first denied on May 18, 1984, was really a completely different piece of equipment.

The sub-contractor really used a "175 International Loader" with no ripping teeth, and with street pads which would have made it impossible for it to have kept its traction on frozen ground if there had been the cold weather which the Carrier said it anticipated. On the other hand, the B&O D-4 Bulldozer with grouser pads could have been used if the ground would have been frozen. The Carrier has failed to bear its burden of proof that special equipment was needed, and/or in fact that it was ever even used when it subcontracted the grading work on January 25, 1984. On merits the Carrier was in violation of Rule 83(b) of the current Agreement which reads as follows:

"(b) It is understood and agreed that maintenance work coming under the provisions of this agreement and which has heretofore customarily been performed by employees of the railway company, will not be let to contract if the railway company has available the necessary employees to do the work at the time the project is started, or can secure the necessary employees for doing the work by recalling cut-off employees holding seniority under this agreement. Cut-off employees on a seniority district who will go to other territories to prevent having to contract work hereunder will be considered upon notification in writing to the Manager-Engineering or other corresponding officer of the territory on which the particular employee holds seniority by that employee. This shall not preclude letting to contract the building of new lines, sidings, and yards; the extension of existing lines, sidings, and yards; the construction of new buildings or other facilities which has customarily been handled by contract in the past; or the

doing of maintenance work requiring equipment which the railway company does not have or skill and tools not possessed by workmen covered by this agreement; on the other hand, the railway company will continue its policy of doing construction work with employees covered by this agreement when conditions permit. Where maintenance work coming under the provisions of this agreement which has customarily been performed by employees of the railway company is let to contract, the railway company will place an extra force foreman in charge of work if the contracted work is roadway or track work. If the contracted work is bridges and structures work, a B&B foreman will be assigned with the contract force if the job is such as would justify assignment of a foreman if the railway company were doing the work with its own forces. If the contracted bridges and structures work is such that a carpenter would be used if the work were being done with railway company forces, a carpenter will be assigned. If painting work is contracted, a foreman will be used."

According to the Submission by the Organization ". . . the Claimant was available to perform the work in question on the claim date". A search of the record fails to contradict this. In its May 18, 1984, denial letter to the Organization the Carrier only states that: "(w)e have also determined that Mike Mann was upgraded to the Equipment Operator's rate of pay because of this contractor performing this work." The Claimant shall, therefore, be compensated for ten (10) hours of pay at the Class A Machine Operator's rate in accordance with the Statement of Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

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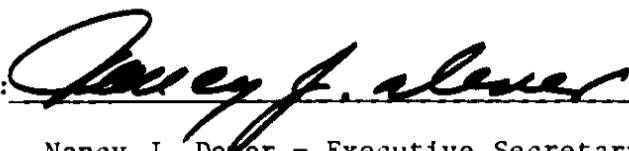
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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", is written over a horizontal line.

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of June 1987.