Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28411
THIRD DIVISION Docket No. MW-26796
90-3-85-3-554

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup 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 to perform paving work at the Car Shop the first week of September, 1984.

(2) The Carrier also violated Supplement No. 3 of the Agreement when it did not give the General Chairman advance notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Carpenters M. K. Arfsten, J. L. Skifstad, J. F. McGregor, Jr., S. M. Udenberg, J. J. Cardinal, P. C. Jacobson, G. A. Thompson and D. J. Garwood shall each be allowed eight (8) hours of pay at their respective rates."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

A Claim was filed by the Organization's General Chairman on grounds that the Carrier was in violation of the Agreement when a contractor was used to do some blacktopping at the Carrier's Car Shop in lieu of B&B Forces. In denying the Claim the Carrier's Engineer of Buildings and Bridges stated the following:

> "...the Bridge and Building Department does not possess any paving equipment suitable for a job of this size nor do we have people skilled to operate such equipment. We did perform such work in connection with the project as we were able. This included removal of the old surface, preparation of the subgrade and installation of flangeways."

On appeal the General Chairman states that there was "...no great need to get this work done this year" and that approximately ten years earlier he himself "ran the compactor and also helped lute the blacktop" and that the B&B forces had "worked with the contractor" in doing work of the kind in question.

At issue here, according to the Claim, is Agreement Supplement 3 which states the following:

> "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.
>
> (d) It is further understood and agreed that the Company can continue in accordance with past practice the contracting of right-of-way cutting, weed spraying, ditching and grading."

The second aspect of the Claim centers on the issue of notification. The General Chairman states that the Carrier was in violation of the Agreement when it failed to give notice of subcontracting out the work.

After reviewing the evidence the Board concludes that while the issue of blacktopping itself is not breached by the Scope Rule of the Agreement, there had been a practice on this property of using B&B Forces to do various kinds of blacktopping jobs. The Carrier readily admits that the craft had been used "since 1973" to do such jobs as blacktopping the:

"1. Mechanical Department access road.
2. Access road to Trimmer's House at Duluth Dock.
3. Dock access road by Elliot Plant.
4. Area around Buildings 146, 147, 148.
5. Car shop parking lot.
6. Turntable center.
7. Caboose service area...(and) the
8. Locomotive fast track."

These statements of fact are found in the Director of Personnel and Labor Relations' letter to the Organization's General Chairman. But did the B&B Forces ever blacktop anything as big as the work done by the Arrowhead Black Top Company at the Car Shop? The Organization never says that they did. The General Chairman only states that he had participated in such work done by an outside contractor a decade earlier. Did the company have equipment to do the job of the size in question? Nowhere does the Organization argue that it did. The statement by the Engineer of Bridges and Buildings, that "...the Bridge and Building Department does not possess any paving equipment suitable for a job of (the) size (in question) is never factually disputed by the Organization.

Supplement 3 clearly and unambiguously permits the company to go to an outside contractor if it does not own equipment to do a particular job, and if it does not have "...skills available in the Bridge and Building Department." Argument by the General Chairman of his own experience is insufficient to require the Carrier to mix the work. Nor can the Board find any other contract provision requiring the Carrier to follow such procedure when it subcontracts. Nowhere does the Carrier argue that this work was an emergency. On the other hand, no contractual provision is presented to the Board which barred the Carrier from doing the work during the time-frame which it considered to be consistent with reasonable operations. It is not germane whether the General Chairman thought there was "no great need to get the work done" when the Carrier did it. The privilege for such managerial decisions is not barred by any contract language presented to the Board.

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. In that case, involving these same parties, the Board concluded, on merits, that the work in question which was the fabrication of signs, was "...normally performed by the Organization." While the Board is unable to conclude likewise here with respect to the particular blacktopping job in question the Carrier was still required to give advance notice and it failed to do so. Supplement 3(c) uses broad language: it states that "...whenever work is to be contracted, the Carrier shall so notify the General Chairman...." On the other hand, it is also clear from the record on this case, as it was to the Board in Award 26832 that both parties only gave, at most, "...lip service" to the provisions which are found in Supplement 3 and that such indifference by the Organization, in demanding its privileges under this Supplement sent a signal to the Carrier whereby it began to interpret the requirements of Supplement 3 as forfeited by the Organization. The filing of this and a number of other Claims by the Organization with respect to subcontracting shows that the Organization no longer wishes to forfeit such rights. The "...mutual drift away from contract compliance" by both parties, as Award 26832 puts it, not only with respect to the merits of a particular subcontracting issue, but also on the question of notice, puts the Board in a position whereby it cannot here conclude that any monetary remedy is appropriate.

Claims filed under Third Division Award 26832 as well as the instant one and accompanying Third Division Award 28412, all show that the Organization is attempting to stop the "drift" away from non-compliance of Supplement 3. All three Claims were filed prior to the issuance of Third Division Award 26832 and this and accompanying Award 28412. The Awards issued on all three cases should, therefore, serve as notice to the parties involved that in the future the Board may well be disposed to conclude differently on the issue of relief.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 28411, DOCKET MW-26796
(Referee Suntrup)

The Majority in this Award has concluded that:

a) The work of blacktopping is not specifically reserved to the Organization by the Scope Rule.

b) While B&B forces have done small repair and patch jobs, large jobs such as this were always contracted out.

c) Carrier neither had the necessary equipment nor the skilled manpower to perform all aspects of the job.

d) Supplement No. 3 is an agreement provision that is substantially different from Article IV of the May 17, 1968 National Agreement and in fact pre-dates the National Rule provision by ten years (Third Division Award 11984).

e) Supplement No. 3 permits the Carrier to do exactly what it did in this case.

However, the Majority has also concluded that the provision of Supplement No. 3(c) requires the Carrier to give advance notice whenever "it intends to subcontract." This is an overbroad and misapplication of the notice requirement. The whole intent of Supplement No. 3 was to provide coverage for work performed "in the Maintenance of Way and Structures Department." The obvious reference to work in Supplement No. 3(c) was to the work within the Department. While what that work could be, might be a matter in dispute; in this case, that question has been resolved as NOT having been done by the Department. If the work is not Department work, the notice requirement does not apply. Further, reliance on Third Division Award 26832 does not support the conclusion reached in this case. In that Award, the Board found that the work was normally performed by the Organization. In

this case, the evidence does not support the conclusion that the Maintenance of Way ever performed such a massive undertaking. While the determination of coverage under Supplement No. 3 is an evidentiary one before this Board, it is clearly a drift in the wrong direction to require notice when the record substantiates that the work was not covered.

We Dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST