Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28711
Docket No. MW-27422
91-3-86-3-668

The Third Division consisted of the regular members and in addition Referee Rodney E. Dennis 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 to dismantle the Green Building (Building No. 2398) at the Duluth Ore Docks (System File J51-85).

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

(3) As a consequence of the aforesaid violations, an equal number of senior furloughed B&B carpenters shall each be allowed pay at the carpenter's straight time rate for all time expended by an equal number of contractor employes in the performance of the work referred to in Part (1) hereof."

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.

Carrier contracted out the demolition of Building 2398 (also known as the "Green Building"). This building was located at the Duluth Ore Docks and had been declared useless by Carrier.

Carrier contends that once a building has lost its usefulness and is no longer essential to the railroad's operation, it can be disposed of in any way Carrier deems appropriate. Its disposition at this point is not covered by the Labor Agreement.

The Organization contends that Carrier violated the Agreement when it failed to notify the General Chairman of its intent to contract out the demolition of the Green Building, and when it allowed an outside contractor to perform the work. The Organization argues that the language of Rule 26 of the Agreement and the language of Supplement 3 support its position.

Both parties have presented prior Awards of this Division and Public Law Boards to support their respective positions. The Board has reviewed the record and those prior Awards and has concluded that, based on the facts of this case, Carrier violated the Agreement when it failed to notify the General Chairman of its intent to subcontract the demolition of the building.

This Board has also concluded that dismantling, demolition, demolishing, etc. are all synonymous and that the work in question should have been done by Carrier's B&B forces, as authorized under Rule 26 of the Agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 28711, DOCKET MW-27422
(Referee Dennis)

Supplement No. 3, argued by the Organization and relied upon by the Majority, does not comprehend the demolition of non-railroad used property. Supplement No. 3, which is significantly different from the National Maintenance of Way contracting out provisions, simply provides that the Carrier, "will make every reasonable effort to perform maintenance..." and, "...to hold to a minimum the amount of new construction work contracted...." This case did not involve maintenance or new construction and is NOT covered by the language of Supplement No. 3. The Organization's assertion on the property that demolition is the equivalent of maintenance was rejected as illogical on the property and absent any evidentiary rebuttal such disposition should have been followed here.

The Majority also relies on Rule 26 to support its disposition. However, this Board has often ruled on this property that Rule 26 is a general Classification of Work rule; it does not reserve work. See Third Division Awards 18471, 19921, 26831, 27571, 27697, 27806, 27902, 27904, 28294, 28399, and 28709, 28747 adopted at the same time as Award 28711. For this Majority to conclude "that dismantling, demolition and demolishing, etc. are all synonymous..." it has rewritten the language of the parties agreement to include provisions that the parties never agreed to include. Lacking contract support, this decision must be seen as an attempt to dispense perceived equity, not CONTRACT interpretation.

Finally, the Majority has concluded that, "Carrier violated the Agreement when it failed to notify the General Chairman of its intent...." As noted above, the disputed work in this case was not listed in Supplement No. 3 and as such, the requirement under Supplement No. 3(c) for notice concerning "work...to be contracted" refers specifically to that identified in paragraphs (a) and (b) of Supplement No. 3. To require notice for work not covered by Supplement No. 3, again imposes a burden on the Carrier not found in the contract.

We Dissent.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 28711, DOCKET MW-27422
(Referee Dennis)

According to the Carrier Members' Dissent, the Majority apparently misunderstood the meaning of words such as advance notice, contracting, dismantling and the associated work spelled out in the Agreement. The Majority easily saw through the circuitous arguments presented on the property and repeated before the Board, and correctly ruled as it did. This decision is supported by Award 54 of Public Law Board No. 1844 which held:

> "At bottom line the answer to the central question turns upon whether the words '...all work in connection with the...dismantling of...structures' encompasses the tearing down and hauling away of the old round house. Giving those words of description their plain and ordinary meaning, we must conclude that they do clearly and unambiguously cover the work in dispute. Reinforcement for this conclusion is found in the clear language of Rule 3 Classification
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> * * *
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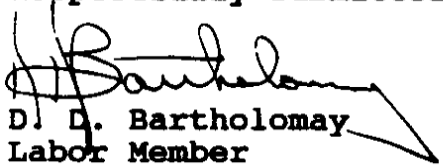
> Carrier argues that this project involved demolition of the structure with a wrecking ball and therefore cannot be considered dismantling. But the Rule does not address methods and 'demolition' is defined as 'to pull or tear down (a building, etc.)'. Webster's New World Dictionary of the English Language, 1968. We cannot avoid the conclusion that in the context of this case 'dismantling' is synonomous (sic) with 'demolishing'. Since the work is covered expressly by the clear contract language we have no recourse to past practice regarding subcontracting of such work. See Award 3-18064." (Underscoring in original)

The Dissent also perceives this decision as equity. Perhaps its true statement is that if the Carrier violates the Agreement, it should not be punished. Since the Carrier was unable to place plain and ordinary meanings on the Agreement language and follow same, the Board properly sustained the claim in its entirety.

Respectfully submitted,



D. D. Bartholomay
Labor Member