

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28758
Docket No. MW-28123
91-3-87-3-706

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Duluth, Missabe & 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 operate a crane in connection with roofing work on Building Nos. 145 and 147 beginning April 21, 1986 (Claim No. 43A-86).

(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, furloughed Crane Operator D. Dean shall be allowed thirty-two (32) hours of pay at the crane operator's straight time rate, two (2) hours and forty (40) minutes at the 'call' rate and he shall be made whole for any vacation credit or benefit loss suffered."

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.

The instant dispute was precipitated during the week of April 21, 1986, when Carrier contracted with an outside concern, Lakeside Contractor, to provide a Pettibone Hydraulic Crane to move materials and equipment onto the roofs of Building Nos. 145 and 147 in Proctor, Minnesota. According to the Carrier, its own cranes were not available for the type of work performed, thereby necessitating the rental of Lakeside Contractor's equipment. Carrier further states that the contractor required the use of its own operator on the crane. The total time expended was 36 hours.

The Claim before us was filed on behalf of a furloughed Track Department Crane Operator. The Organization alleges that Rules 2 and 26 of the Agreement have been violated. These rules state as follows:

"RULE 2

Seniority

- (a) Except as otherwise provided in these rules, seniority starts at the time the employe last entered the continuous service of the Company in any group in any subdepartment.
- (b) Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company as hereinafter provided.
- (c) Seniority rights of all employes are limited to the subdepartment in which employed. Subdepartments and groups are listed as follows:

I--Track Subdepartment

* * * *

Group (A-1) - Classification

- 1. Crane Operators
- 2. Assistant Crane Operators

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RULE 26

Classification of Work

* * * *

- (f) An employe assigned to the operation of roadway machines shall constitute a Roadway Machine Operator. B&B employes performing B&B work at the ore docks will operate machines used in the performance of B&B work, except crane work performed by Track Department employes at the ore docks."

Carrier acknowledges that the work complained of herein belongs to the Organization. It argues, however, that Supplement Rule No. 3 of the Agreement permits the use of sub-contractors to perform work within the scope of the Agreement where, as here, Carrier does not have adequate equipment to perform the work itself. Supplement No. 3 states 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 procedures, 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 therefore, 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.

* * * *

It is Carrier's position that, pursuant to the foregoing rule, it is permitted to subcontract under Section (b) if the equipment owned by the Carrier is not sufficient or appropriate for the work in question. We agree that there was unrefuted evidence that such was the case here. Based on our review of the record and the correspondence between the parties during the handling of this dispute on the property, Carrier advised the General Chairman that suitable DM&IR cranes were not available to perform the work. The Organization's response was as follows:

"Mr. Harrison states that the DM&IR cranes were not available to the type of work performed, so they leased one. It is the understanding of this Brotherhood, that when a crane is leased along with an operator, the company has paid a furloughed track employee the amount of time worked. This has been a long standing practice.

I ask that you overturn Mr. Harrison's denial of claim No. 43-86, and compensate Mr. Dennis Dean the 32 hours he is entitled to along with a call time of 2 hrs. and 40 minutes."

Thus, while the disputed work may properly accrue to employees in the Track Subdepartment, the Carrier has affirmatively established that one of the exceptional circumstances in which subcontracting is permitted is applicable in this case. Since the Organization never refuted the Carrier's asserted lack of equipment availability, we must conclude that there has been no violation of the Agreement.

As a final matter, we take note of the Organization's contention that Carrier failed to give the General Chairman notice of its intent to utilize an outside contractor for the work involved. However, this issue was never raised during the handling of the case and comes now before the Board for the first time. It is well-established that the issue cannot properly be resolved by this Board as it is now deemed waived.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1991.