Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29101
Docket No. MW-29046
92-3-89-3-482

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 Agreement was violated when the Carrier assigned outside forces, Johnson Brothers (painting contractor), to perform painting work on bridges IT-22A, IT-18A, SL-10B, SL-10A and IR-28A (Claim No. 25-88).

(2) The Carrier also violated the Agreement when it failed to timely and properly comply with the advance notice and conference requirements of Supplement No. 3.

(3) As a consequence of the violations referred to Parts (1) and/or (2) above, furloughed B&B Structures Department employes shall be allowed an equal proportionate share of the total straight time and overtime hours worked by employes of Johnson Brothers (painting contractor) as well as the concomitant vacation and other rights based on said hours."

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 basic facts are not in dispute. Carrier served written notice on July 20, 1988, declaring its intention to contract the surface preparation and painting of five steel bridges. A conference was held on July 29, 1988, wherein the General Chairman voiced his objection to the Carrier's plans. Carrier issued the contractor its purchase order dated August 18, 1988, and work commenced shortly thereafter. The Claim followed on September 7, 1988.

The parties' Submissions each raise a number of competing contentions while accusing the other of including new evidence and argument. We have carefully reviewed the extensive and complex record in this matter and have confined our consideration, as we must, to the evidence and argument that was exchanged on the property. In addition, the parties cite many prior Awards of this Board in support of their respective contentions. The Board notes that, with few exceptions, the Awards cited by the Carrier involve the instant parties while those cited by the Organization do not.

The Claim specifically alleges violations of Rules 1, 2, 26, Supplement No. 3, the December 11, 1981 Letter of Agreement, and a September 24, 1958 letter of abeyance. This latter document is the source of the text of Supplement No. 3, which states 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 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.

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

Distilled to its essence, the Organization position is that the work in dispute is reserved to its members and that Carrier has neither complied with the notice and conference requirements of Supplement No. 3 nor satisfied its reasonableness test in contracting out the work.

Carrier, to the contrary, says the Organization must prove that the disputed work is reserved to the bargaining unit either by particular Agreement language or by evidence demonstrating past performance of the work to the exclusion of all others. Carrier contends that no Agreement language reserves the work to the Organization's members and that large scale bridge painting projects, as here, have been historically contracted. Absent exclusive performance rights proven by the Organization, Carrier says Supplement No. 3 does not apply to restrict its rights to contract out the disputed work. Notwithstanding, and without conceding the applicability of Supplement No. 3, Carrier says the disputed work was properly contracted out and all notice and conference requirements were satisfied.

The applicability of Supplement No. 3 to the instant dispute was not, in our view, a well developed issue on the property. Carrier said in its February 3, 1989 response that Supplement No. 3 applies only to the contracting out of work that exclusively belongs to the Organization. Contrary to the position taken by this unsupported assertion, the Carrier did not challenge the applicability of Supplement No. 3 in its initial reply to the instant Claim dated September 23, 1988. Instead it said, "The Carrier is in compliance with Supplement No. 3, Contracting of Work. . . . Supplement No. 3 is the dominant rule for this issue." Moreover, the Organization's evidence shows that the B&B Department has performed some bridge painting in the past, and the Carrier concedes it has done so, albeit to a limited extent. We find, therefore, that Supplement No. 3 applies to the dispute at hand. Because of the manner in which the issue was postured, however, we believe the precedent value of our finding should be confined to the unique record before us.

The Organization alleges improper compliance with the advance notice and conference requirements of Supplement No. 3. It says that Carrier contracted out the work before it met with the General Chairman. In support of this contention, the Organization notes that Carrier's purchase order to the contractor is dated August 18, 1988 and references a contractor's bid proposal dated August 1, 1988. In the Organization's view, this shows that Carrier was impermissibly making arrangements for the contracting before conferring with the General Chairman. Carrier says its actions did not violate the notice and conference requirements.

It is undisputed that Carrier gave written notice of its intention to contract on July 20, 1988 and met with the Organization on July 29, 1988. It did not issue its purchase order until August 18, 1988, some nineteen days later. While it is undoubtedly true that, prior to meeting with the Organization, Carrier engaged in activities preliminary to actually contracting for

the work, we do not find that Carrier violated the requirements of Supplement No. 3. The provision calls for, among other things, a listing of Carrier's reasons for contracting the work. In our view, having to list reasons requires, of necessity, that Carrier do some advance work to properly determine whether it is more reasonable, under all of the circumstances, to contract the work or perform it with its own forces. On the record before us, we do not find that Carrier contracted the work prior to meeting with the General Chairman.

It remains to assess whether Carrier satisfied the reasonableness test of Supplement No. 3. Carrier says that it did not own the necessary equipment to properly perform the work with its own forces nor did its people possess the requisite skills and ability. Moreover, Carrier asserted that the necessary equipment was not available by rental. The Organization contends that Carrier did own the necessary equipment and had available to it sufficiently skilled forces on furlough. The Organization also contended that equipment was available for rental with proper advance planning, although it recognized that such equipment was not available during the timeframe that the disputed work was performed.

We are persuaded by this record that the job required equipment which was not owned by the Carrier. Whether Supplement No. 3 also required Carrier to attempt to obtain such equipment by rental is an issue we do not reach because the record establishes that such equipment was not reasonably available on that basis. On these facts, therefore, we find that Carrier reasonably concluded that timely accomplishment of the work required the use of an outside contractor.

The parties raised additional arguments on the property. We have not specifically addressed these contentions because they either lacked merit or would not have produced a different result.

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 23rd day of January 1992.