

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 Employees
(
(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 to perform painting work of the Duluth and Two Harbors Ore Docks beginning in August 1988 (Claim No. 26-88).

(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 Mechanics on both the Missabe and Iron Range Divisions shall each be allowed an equal proportionate share of the total straight time and overtime hours worked by outside forces as well as the concomitant vacation and other rights based on said hours until the violation ceases."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

This matter is the third in a series of claims whereby the Organization challenged the propriety of contracting out three painting projects during the Summer and Fall of 1988. The first case, Third Division Award 29101, disputed the sandblasting and painting of five steel bridges. The second case, Third Division Award 29141, contested the sandblasting and painting of the "stacker," a large mobile machine used in the shipping of taconite pellets. This claim objects to the contracting of the cleaning, sandblasting and painting on the Carrier's Ore Docks located on Lake Superior in Duluth and Two Harbors, Minnesota.

The contentions and counter-contentions in this matter are substantially similar to those in the previous two cases. Indeed, both parties incorporated by reference their on-property correspondence from the previous cases into this record.

In 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 to bring it within the operation of Supplement No. 3. It says the Organization must do so by citing either particular Agreement language or by evidence demonstrating that the employees have, in the past, performed the disputed work to the exclusion of all others. Absent a reservation of work established by either of these evidentiary methods, Carrier says Supplement No. 3 does not apply to restrict its rights to contract out the work. Carrier says that no such Agreement language exists and that large scale painting projects, as this was, have been historically contracted to third parties. 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 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 reads, 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."

* * *

The threshold issue is whether the disputed work was "...maintenance work in the Maintenance of Way and Structures Department..." within the meaning of Supplement No. 3.

Our review of the Rules cited by the Organization persuades us to agree with the prior decisions of this Board involving these same parties. Rules 1, 2 and 26 have been found to be general provisions that do not grant reservation rights to specific types of work. See, for examples, Third Division Awards 18471, 19921, 19969, 27902, 28399 and 28747. This record provides no basis for departing from this precedent.

In the absence of Agreement provisions which reserve the work, the Organization has the burden of proving it has customarily, traditionally and historically performed it. The record in this matter suggests that the focus of the Organization's evidence was to oppose the bridge and stacker painting in the two previous cases. This record contains many assertions but only scant clear and unambiguous evidence of past painting work on the Ore Docks by the employees. The Company, on the other hand, has produced substantial evidence showing that large scale painting projects, predominately bridges, have been contracted out over the last forty or so years.

On this record, therefore, we must conclude that the Organization's evidence fails to establish the regularity, consistency and predominance in the performance of the disputed work to warrant a finding that the work is reserved to the employees. The Organization had the burden to prove otherwise, but we find it has not satisfied this burden. Accordingly, we cannot sustain the Claim.

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 28th day of February 1992.