

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30914
Docket No. MW-30240
95-3-91-3-696

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Company (former
(Detroit and Toledo Shore Line Railroad
(Company)

STATEMENT OF CLAIM: "Claim of the System Committee of
the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned employes covered by the Grand Trunk Western Agreement instead of employes covered by the Detroit and Toledo Shore Line Agreement to remove and install crossties at Lang Yards, Toledo, Ohio and at Mile Post 31.2, Industrial Track at Trenton, Michigan beginning May 31 through June 29, 1990 (Carrier's File 8365-1-325 DTS).

(2) As a consequence of the aforesaid violation, the Detroit and Toledo Shore Line employes listed below* shall each be allowed pay for an equal proportionate share for all straight time and overtime hours worked by the Grand Trunk Western employes beginning May 31, through June 29, 1990.

* E. D. Merrell	T. D. LaPlant
L. J. Cunningham	K. E. Jackson
F. Hammac	K. A. Reed
D. E. Perkins	P. J. Sykes
T. J. Neagley	D. J. Thomas
R. R. Parades	R. C. Beavers
R. M. Rose	K. W. Spry
S. R. Yearly	R. L. Kirkendall
J. D. Watson	J. Comage
M. J. Stamm	W. E. Long
D. G. Webster	T. L. Konowalski"
B. K. Elmer	

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 employee 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 Carrier consists of three former separate carriers; the Grand Trunk Western (GTW); the Detroit, Toledo and Ironton; (DT&I) and the Detroit & Toledo Shore Line (D&TSL). The Organization retains separate collective bargaining Agreements for each of the former carriers, and in the case of the D&TSL, this consists of a single seniority district.

In this dispute, the Carrier assigned a GTW Tie Gang, consisting of 25 employees, to install yard track ties in a location within the D&TSL seniority district between May 31 and June 29, 1990. The Organization protests the assignment of the GTW employees to work which otherwise would be assigned to D&TSL employees. Claims virtually identical to this were reviewed and denied in Third Division Awards 29685 and 29723.

Award 29723 concerned brush cutting, but a summary therein serves as an apt description of the dispute here under review:

"What is involved here is the conflict of two separate theories of the dispute. The Organization relies on the well established position that work belonging to employees under one seniority roster or district may not generally be assigned to employees in another seniority roster or district. . . .

The difficulty here is that, while the employees utilized for the brush cutting were in the Carrier's employment, the Organization takes pains to point out the Maintenance of Way forces of the three previously separate Carriers each retain their own Agreements with the Carrier. As a result, the use of Grand Trunk employes on D&TSL work is technically the use of 'outside' forces, not simply employees of another seniority district under the same Agreement.

On the other hand, the Carrier argues that the work assignment here is covered under Article 52 (m), covering contracting and reading as follows:

'(m) Although it is not the intention of the company to contract construction or maintenance work when company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. When such circumstances arise, the Chief Engineer and the General Chairman will confer and reach an understanding. . . .

The company will contract for construction and maintenance work for which company forces and equipment are neither adequate nor available, but shall in each instance give the General Chairman advance notice of the specific work to be thus performed, and on request will confer with the General Chairman in respect thereto.'

The Carrier argues that D&TSL employees were 'neither adequate nor available' for the brush cutting work, since all employees were fully assigned to other work. The Carrier contends that it complied with Article 51 (m), second paragraph, by notifying the General Chairman that it would 'contract' the work to Grand Trunk employees.

Before examining whether a Carrier can 'contract' to its own employees, discussion is required as to the meaning of 'available' and 'adequate'. Awards generally have found that, in instances where contracting is being considered, a Carrier cannot support the view that employees are not 'available' simply because they are fully engaged in other work. The theory here is that the Carrier has it within its power to assign employees and to make them available as required. 'Adequate', however, is a term used here and not in general application elsewhere. It must be given some meaning distinct from 'available', else it would not have been included in the provision."

The Carrier argues that its D&TSL Maintenance of Way forces were fully occupied with other assignments; there were no furloughed employees; and it was necessary to accomplish the task promptly.

Again, to quote from Award 29723 and equally applicable here:

"This is clearly not 'contracting' in the usually accepted sense. However, Rule 52 (m) provides that, in instances where forces are not 'adequate', contracting is permitted. If such is the case (that is, the Carrier could have gone to totally outside forces), how can it be found to be improper to use its own forces outside the D&TSL Agreement?"

Here, as in other instances, the Organization argues that the Carrier's reliance on Rule 52 (m) could be used to diminish the D&TSL workforce by simply saying it is not "adequate" and utilizing GTW employees instead. The Board recognizes this possibility. However, the use of non-D&TSL employees for a single project lasting for a brief period does not prove that this is what is happening.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of June 1995.