

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36960  
Docket No. MW-36069  
04-3-00-3-227

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 to perform Bridge and Building (B&B) Subdepartment work (fabricate and replace concrete bridge pans/tubs) on Bridge A-49A (Holman Bridge) on the Missabe Division beginning October 5, 1998 and continuing (Claim No. 30-98).
- (2) As a consequence of the violation referred to in Part (1) above, the senior B&B foreman and the five (5) senior B&B composite mechanics on the Missabe Division shall now be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of said work.”

**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 were given due notice of hearing thereon.

By notice dated April 1, 1998, the Carrier informed the Organization:

"This is to advise you that an outside contractor will be hired to remove, fabricate and replace deck ballast pans, including walkway, for Bridge A-49-A (Holman Bridge) at Taconite. This span is 631 feet long and 63 feet high. The work would be beyond the ability of our own employees to complete in a reasonable time and at reasonable expense. DM&IR Employees will be involved in removal and replacement of track structure and ballast. If you desire to discuss this project, please advise."

Conference between the parties did not resolve the Organization's objection to the Carrier's use of an outside contractor to perform the work. The contractor performed the work. This claim followed.

On the property, the Carrier explained its reasons for using an outside contractor on this project:

"This project was of a nature such that the work had to be performed at a high rate of production, not only at the project site but also in the preparation of the materials for the job. Specifically, the concrete ballast pans were of sufficient quantity, over 420 cubic yards of concrete, that it was beyond our capabilities to produce them efficiently and therefore economically. DM&IR also does not possess the facilities to handle the fabrication of these concrete ballast pans. Because of the large quantities of the ballast pans, a location that would be capable of production during periods of inclement weather was needed, and that is something the DM&IR does not have. Also there is not a crane on the property that could be dedicated to this project, therefore necessitating the rental of a

crane to facilitate the handling of the cast ballast pans, and thereby creating an additional expense.

The height of the project, 63 feet above ground level, is a concern along with an appropriate amount of experience working with fall protection. Wearing safety harnesses and following proper fall protection procedures are only a component of this project, the workers needed to be able to apply fall protection procedures while maintaining high levels of production output. A person is not capable of working at a production rate just because a safety harness has been worn previously. Experience with fall protection is developed over a continuous period of time, not a few days here and a few days there. These two factors, production output and fall protection experience, needed to be combined on this project to ensure that the completion date was met in a safe and efficient manner.

All lifts, while on the bridge, whether placing or removing material, needed to be made such that the loads were in close proximity to workers in fall protection equipment at great heights. Workers had to be in these positions to make the connection and guide the material being lifted or lowered. This is not a position to have a worker gain on the job training, and it is again the combination of situations that present a hazard, working around suspended loads and wearing fall protection.

The project had time constraints placed on it, the track was removed from service for a total of 20 days. This allowed only a short period of time, 14 calendar days, for the removal and installation of the concrete ballast pans. These deadlines were necessary to ensure that the interruption of train traffic was minimized.

The DM&IR does not have the amount of working supervision that is required for a project of this magnitude, and complexity. The Contract supervision would have to ensure that the procedures of the project drawings and specifications are being met on a daily

basis. The working supervisor would also have to have alternative procedures at hand to handle unforeseen complications. Solutions to these unforeseen complications are derived from previous experiences of this nature to anticipate them and then respond accordingly. This projected required people with previous work experience of this nature and magnitude which the DM&IR does not posses in quantity."

The Organization attempted to counter the Carrier's assertions, maintaining that the Carrier owned a 50 ton Pettibone crane which was available and would have worked well in lifting the tubs; the tubs could have been poured in the car shop area, lifted onto flat cars by the crane and transported to the bridge; the job was performed when the weather could not have been considered inclement; spring and summer months would have been ideal for the pouring of the tubs by B&B employees; and the B&B employees worked at similar heights on a daily basis at the ore docks and used safety harnesses.

The Carrier responded that although it had a 60 ton Pettibone crane, that equipment was stationed for use at the Two Harbors Dock and was not available for the Holman Bridge project; given the projects underway at the time and the size of the Holman Bridge project, the entire B&B group would have had to work on the Holman Bridge project for about a three month period and no other work could have been accomplished; the time factor was important because the BNSF operates loaded taconite trains over the Holman Bridge on a daily basis and those trains had to be rerouted during the decking replacement and the contractor was under stringent time constraints to complete the work within a 14 day window.

Supplement No. 3, Paragraph (a) mandates that the Carrier "... will make every reasonable effort to perform all maintenance work in the Maintenance of Way and Structures Department with its own forces." Supplement No. 3, Paragraph (b) further states that "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."

In Third Division Award 30897, the Board addressed a similar dispute arising under Supplement No. 3 between the parties:

"This Board has no doubt (and the record supports the conclusion) that with respect to the individual components of the Phase II work on the BN-Saunders Bridge, the Carrier's employees possessed the skills, ability and knowledge necessary to accomplish those tasks and, on an individual basis, competently performed those tasks in the past.

But, the record shows that the Carrier had to undertake a very complex repair operation on the highly traveled and much in need of repair BN-Saunders Bridge. That high traffic bridge was in a state of disrepair which could not be prolonged. The record shows that repair of the bridge mandated an immense commitment of manpower, required the use of several items of equipment not owned by the Carrier (drilling machine, grout pump, demolition equipment, pile driver and crane), called for detailed coordination of traffic to permit the repairs to go forward expeditiously and involved limited areas for the staging of equipment and materials. The Organization has not sufficiently demonstrated that the Carrier has performed sufficiently similar complex jobs in the past with the use of Carrier forces. Due to the over-all magnitude and complexity of the job and the constraints involved, we are satisfied that using a contractor to perform the work was permissible under the circumstances and not prohibited by Supplement No. 3."

This case also arises under Supplement No. 3. Given the complexity and magnitude of the Holman Bridge project; the needed equipment and facilities that were not available to the Carrier; the short time constraints involved; and the consequences of having to shift such a substantial amount of the Carrier's manpower to perform that job to the detriment of other ongoing work, the reasoning in Third Division Award 30897 applies to his case.

The Organization has not carried its burden. The claim will be denied.

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**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 21st day of April 2004.**