

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37397
Docket No. MW-37173
05-3-02-3-151

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 (Waldholm Excavating and Flint Masonry) to perform Bridge and Building Subdepartment work (excavating, forming and pouring concrete and related work) at Proctor, MN on October 26, 27, 30 and 31, 2000, instead of R. Lambert, D. Signoralli, J. Skifstad and R. Headrick (Claim No. 38-00).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Lambert, D. Signoralli, J. Skifstad and R. Headrick shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid 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.

Contracting of work on this property is governed by Supplement No. 3 to the parties' Agreement. It reads 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 therefor, 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, weed spraying, ditching and grading."

Paragraphs (a) and (b) of Supplement No. 3 recognize that even new construction work that is reserved to BMW-represented employees can still be properly contracted out if the Carrier has made every reasonable effort to have it performed with Carrier forces. While there was some early skirmishing over scope coverage of the work in dispute, due to the general nature of the applicable Scope Rule, the Organization asserted that BMW-represented employees had historically and traditionally performed the work in dispute as part of its March 22, 2001 appeal on the property. This assertion was not refuted by the Carrier. Indeed, the Carrier conceded that its forces would have been used on the project in question had they not been fully employed elsewhere, and that time was of the essence. Thus, the record establishes scope coverage of the disputed work.

Regarding the Carrier's reasons for contracting the work, it is unrefuted in the record that the concrete work needed to be completed before freeze-up to allow track forces to replace and tamp nearby track. Concerns about freeze-up in the Duluth, Minnesota, area after late October are not unfounded or unreasonable. Moreover, it is undisputed that all Carrier forces were fully employed on other work at the time the Carrier saw the need for contracting the work and while the disputed work was performed. Finally, it is unrefuted that BMW-represented employees have historically refused to use Carrier-owned steel concrete forms and instead preferred to construct wooden forms, which would have taken longer to erect. The General Chairman's only proffered plan for using Carrier forces to do the work was to delay other on-going projects via the diversion of personnel.

Whether the Carrier has exhausted every reasonable effort to hold the contracting of new construction work to a minimum is a question of fact to be determined upon consideration of all relevant circumstances. Thus, the analysis must be conducted on a case-by-case basis. On the record before us, we find the Carrier's reasons for contracting the work were reasonable. Accordingly, no violation of the Agreement has been proven.

AWARD

Claim denied.

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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 24th day of February 2005.