Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37599
Docket No. MW-36529
05-3-01-3-20

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way Bridge and Building Subdepartment work (manual paving work) at the Midway Road crossing on October 14, 1999 (Claim No. 55-99).

(2) The Carrier further violated the Agreement when it failed to timely and properly notify and confer with the General Chairman concerning its intent to contract out the above-referenced work as required by Supplement No. 3.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the senior foreman and the three (3) senior mechanics in the Missabe Division Bridge and Building Department shall now each be compensated for eight (8) hours pay at their respective straight time rates of pay."

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.

On October 14, 1999, the Carrier used Mesabi Bituminous, Inc. to apply blacktop to the Midway Road crossing near the intersection of Highway 2. According to the October 19, 1999 claim filed by the General Chairman, "The contractor used manual labor raking and shoveling and then rolled/tamped the blacktop without a paving machine." The General Chairman further asserted that, "In the past, if a paving machine was not needed, the Bridge and Building Department would perform the work. Once the carrier knew they would not need a paving machine, they should have cancelled the contractor." The manual paving work described above violated Rules 2 and 26 as well as the April 26, 1996 Letter of Agreement, the General Chairman emphasized.

The Organization contends that B&B forces have "customarily, historically and traditionally done blacktop work at grade crossings when no paving machines were used." It further stresses that, pursuant to Supplement No. 3 of the Agreement, the Carrier did not give the General Chairman any advance written notice of its intent to contract out the above work, nor did the Carrier offer any opportunity to discuss the matter in conference.

The Organization emphasizes that the April 26, 1996 Letter of Agreement allows the Carrier to subcontract blacktopping work at grade crossings "if a paving machine is necessary." It also stresses, however, that the Letter of Agreement does not contain any provision that relieves the Carrier of its duty to provide prior notice under Supplement No. 3. Furthermore, in this specific case, the Organization again argues that it was not accorded any opportunity to meet and discuss the proposed subcontracting with the Carrier, a further requirement of Supplement No. 3, the Organization also points out.

The Carrier contends that it was incumbent upon the Organization to establish as a prima facie matter, that the disputed work accrues to BMWE-represented employees as a matter of contract or past practice. According to the Carrier, the General Chairman was notified on July 23, 1999, and included in the

notice was "reference to our past practice by which blacktop work with a paving machine will be assigned to a contractor."

Admittedly, the contractor did not use a paving machine when the blacktop was initially applied on October 14 and 15, 1999; however, on October 28, 1999, its employees operated a paving machine in order to "feather" the blacktop and thereby properly complete the job, the Carrier further asserted. It also averred that, "the Organization, by claiming only one of the three days the contractor worked on the crossing, is hoping to break the project into pieces in hopes of demonstrating a violation of the April 26, 1996 Letter Agreement."

The Carrier urges the Board to deny the claim because the contractor utilized a paving machine during the project, albeit not on the first or second date and because, in its view, it is undisputed that the Carrier contracted out blacktopping with paving machines in the past. According to the B&B Engineer's claim denial:

> ". . . The contractor attempted to use his workers skill and experience to produce the required driving surface on Thursday, October 14, 1999. The contractor had to return to the site on Friday, October 15, 1999 to make corrections to the asphalt that was laid the previous night. The contractor even returned to the site the following week on October 28, 1999, with a paving machine to make final corrections and adjustments. It was the contractors (sic) choice to attempt the crossing without a paving machine, and in his experienced opinion the ultimate fix for the work his skilled workers did was to bring in a paving machine to feather it out properly. . . ."

The Board carefully reviewed the on-property record before us. We find that, under the particular factual circumstances, the Carrier was required by Supplement No. 3(c) to give the Organization prior notice of its intention to use the paving contractor, and to allow the Organization an opportunity to discuss the matter with the Carrier before the Carrier's undertaking the subcontracting work. Rules 2 and 26 do not, per se, entitle the Claimants to the manual blacktopping work claimed herein. However, Item 8 – Blacktopping of the April 26, 1996 Letter of Agreement states, "Blacktopping at grade crossings may be contracted if a paving machine is necessary."

The instant situation was not an "emergency case where the need for prompt action precludes following such procedure," as stated in Supplement No. 3(c), we note. Thus, given the particular facts, the clear language of Supplement No. 3(c), and the language of Item 8, above, which arguably reserves manual blacktopping work to the employees, we rule that notice should have been served. See on-property Third Division Awards 26832, 28411 (involving blacktopping), 28711, 28883, 30943, 32861, 37352 and 37471, recently issued by the Board.

The Carrier's position that it "provided written notice of intent to hire a paving contractor by letter dated July 23, 1999" is not supported by the record, we further find. From our careful review of that document, it appears that the July 23, 1999 letter was a follow-up to a notice purportedly received by the General Chairman on July 20, 1999, "regarding contracting the work of blacktop paving of two at-grade crossings, CSAH #25 and CO 452, with paving machines. . . ."

However, the record before us does not contain a copy of any such letter supposedly received by the General Chairman, nor is there any correspondence in the record which confirms that the parties engaged in a discussion concerning the paving of the Midway Road crossing by a contractor. In fact, the Organization strongly denies having received a notice, stating, "if notice was served, the Carrier should have had in its possession a copy of said notice."

The record also contains no documentary evidence from the Carrier as to proof of mailing and/or the Organization's receipt of a notice to support its affirmative defense that the required notice was actually sent. Under these circumstances, the Board must accept the Organization's contention otherwise as factual, and rule that the Carrier's affirmative defense was not substantially proven. See Third Division Award 24621, which sustained a claim on the rationale that "[Carrier's] failure to introduce such vital evidence into the proceedings when it either had the records in its possession or could easily have obtained them invites the conclusion that the evidence was unfavorable."

Therefore, for the foregoing reasons, the claim must be sustained as a result of the Carrier's apparent failure to provide the required notice, we rule. Furthermore, we find from the record that the Organization did establish a prima facie case that the Claimants arguably possessed a claim to the manual paving work. The Board also holds that the Carrier's breach of the notification requirement set forth in Supplement No. 3(c) essentially moots the Carrier's "piecemeal defense."

Such subject would have been a proper topic for discussion during the pre-contracting conference, we note.

The Carrier's failure to give advance notice as required by Supplement No. 3(c) of the Agreement regarding the blacktopping work at issue here resulted in a lost work opportunity, we also conclude. As a result, the Claimants are entitled to the compensation requested, we specifically rule. See Third Division Awards 28711, 30943, 37352 and 37471. The four identified but unnamed Claimants shall thus each be paid eight hours at their respective straight time rates of pay.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 2005.