Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27608
THIRD DIVISION Docket No. MW-26918
88-3-86-3-131

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
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(Terminal Railroad Association of St. Louis

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 tuck pointing and other masonry maintenance work on the Brooklyn Shops Building beginning October 30, 1984 (System File 1984-10 T.R.R.A./013-293-14).

(2) As a consequence of the aforesaid violation, Bridge and Building Department Employes K. Case, O. Guion, S. Wolf, K. Roberds, J. Conley, T. Killian, A. Hood, E. Harper, L. Gann and R. Harris shall each be allowed an equal proportionate share of the man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 dispute centers around the Carrier's utilization of the services of S. M. Wilson and Company who in turn utilized Bandy Construction Company to make certain building repairs to the Carrier's Brooklyn Shops. By letter dated October 18, 1984, the Carrier notified the Organization of its intent to contract out the work stating that:

"Pursuant to the provisions of Article IV of the May 17, 1968, BMWE Agreement, this will serve to advise that it is the Carrier's intention to contract out certain roofing repairs, massive tuckpointing and brick work at Terminal's Brooklyn Shops building at Brooklyn, Illinois, to a firm competently staffed and equipped to complete the necessary work safely, in a minimum time span and at the lowest possible cost."

Subsequent discussions between the parties in accord with Article IV of the 1968 Agreement failed to yield agreement on the Carrier's contracting out the work at issue. The work was performed by Bandy employees for a period of time commencing October 30, 1984.

By letter dated November 28, 1984, the Organization presented a continuing time claim on behalf of ten employees arguing that the Agreement had been violated in that tuckpointing was traditionally performed by B&B employees; the gang leader, L. Guion, was knowledgeable of that type of work; the contractor was using three employees to perform the work; the work was not so massive that the employees could not have performed the tuckpointing; there were competent employees and equipment to complete the necessary work in a safe manner in a minimum amount of time at the lower cost; the one machine utilized by the contractor could have been leased by the Carrier; if the Carrier would have performed maintenance on the building, there would have been no need to contract out the work and the three employees working with three of the contractor's employees could have performed the work. By letter dated January 25, 1985, the Carrier denied the claim stating that no B&B employees were furloughed and denied compensation as a result of the contracted work. By letter dated February 15, 1985, the Organization appealed arguing that the work fell under the classification definition in the Agreement. By letter dated April 11, 1985, the Carrier responded that more than tuckpointing was involved and the work consisted of tuckpointing and "major repair to brick arches, certain piers, walls, and coping" further noting that the contractor possessed certain equipment not owned by the Carrier. With respect to the ability of the employees to perform the work, the Carrier asserted that "None of the present bridge and building mechanics, other than Mr. Lloyd Gann, has done any such work while employed for Terminal, and Mr. Gann has done a very minimal amount of brick work of any kind while employed ...." Final appeal was taken by the Organization on May 21, 1985 with the arguments that the Carrier, while not owning a portable lift, could have rented that piece of equipment; the job was not complex and could have been performed by employee Gann with the assistance of other employees and the Agreement does not permit contracting out of work because all employees were working. The appeal was denied on the property by letter dated May 30, 1985 with the assertion that the Carrier complied with Article IV of the May 17, 1968 Agreement; there was no showing that the Carrier had the necessary equipment; no employees were deprived of compensation and the employees did not possess the necessary skills to perform the work.

With respect to the notification given to the Organization, in its submission, the Organization concedes that "the Carrier complied with Article IV of the May 17, 1968 National Agreement and notified the General Chairman of its plan to contract out the work in question...." However, the Organization argues that Rule 2 of the Agreement clearly places work concerning the maintenance of buildings, including roofing and brick portions of buildings, within the scope of the Agreement and the performance of the work at issue belonged to B&B carpenters and mason and concrete mechanics. The Organization thus concludes that "assignment of roofing and tuckpointing work to outside forces was clearly in violation of the Agreement" placing particular emphasis upon the argument that the Carrier's October 18, 1984 letter recognized that the work at issue was encompassed within the scope of the Agreement.

The Organization's arguments in this case fail for several reasons.

First, the Organization's arguments flow from its assumption that the work involved was limited to "minor roof repairs and tuckpointing work" which "has customarily and historically been performed by the Carrier's Bridge and Building Subdepartment employees...." However, the exchange of correspondence on the property detailed above reveals several unrefuted facts relevant to this matter, i.e., the work at issue involved much more than minor roof repairs and tuckpointing, but included "major repair to brick arches, certain piers, walls, and coping"; the Carrier did not possess all the necessary equipment to perform the work; all but one of the employees were unqualified to perform the work and the employee who arguably performed similar work in the past did not do so in any significant amount. In these types of cases, it is incumbent upon the Organization to demonstrate that "such work has historically and traditionally belonged to the complaining craft." Third Division Award 24033. Assuming for the sake of argument that "minor roof repairs and tuckpointing" belongs to the employees as argued by the Organization, there is no evidence in this record that allows us to conclude that the work commensurate with the major repairs undertaken by the Carrier beyond minor roof repairs and tuckpointing at the Brooklyn Shops similarly belongs to the employees.

Second, the fact that the Carrier gave notice to the Organization that it intended to contract out the work is not a fatal admission as the Organization argues and does not change the result. As stated in Third Division Award 20920:

> "Additionally, Petitioner contends that the giving of notice as to the contracting constituted an admission by Carrier that the disputed work was covered by the Scope Rule.
>
> We cannot agree. Such notice is required under the Agreement in the event Carrier plans to contract out work. The giving of such notice therefore, merely serves as formal compliance with the Agreement; it does not of itself establish exclusive Scope Rule coverage of the disputed work, negatively or affirmatively." [Emphasis in original].

See also Third Division Awards 24033, 21287. Thus, the Organization's burden remains to demonstrate that the particular work belongs to the employees and that burden goes beyond the showing of notice given in compliance with Article IV of the 1968 National Agreement. As noted above, that burden has not been satisfied in this case. Indeed, the failure by the Carrier to give notice of its intent to contract out the work in this case would have necessitated a finding that the notice provision of the Agreement was violated irrespective of the Carrier's argument that the particular work was not performed by the employees. See Third Division Award 23560.

Third, the Organization's argument that the Carrier did not make a good faith effort to procure the necessary equipment through rental or leasing arrangements as contemplated by the December 11, 1981 letter between the parties and the fact that such equipment may have been available for rental are not dispositive arguments. The facts concerning the availability of certain equipment first appear in the Organization's rebuttal and are facts that were not raised on the property. As such, we are unable to consider those factual assertions. See Third Division Award 20920. But even assuming that such equipment could have been rented, the burden nevertheless remains with the Organization to demonstrate the Carrier's lack of good faith. Considering the factors involved in this case, particularly the nature and extent of the work, the lack of qualified employees and the lack of a showing that the particular work belonged to the employees, we cannot say that burden has been met.

In light of the above, the remaining arguments made by the Carrier concerning the lack of damages need not be addressed.

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 23rd day of November 1988.