Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29068
THIRD DIVISION Docket No. CL-29067
91-3-89-3-505

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Organization (GL-10400) that:

1. Carrier violated the effective agreement when it contracted with outsiders for the performance of work reserved to employes covered by said agreement.

2. Carrier shall now compensate Clerk A. A. Tomko forty (40) hours' pay at the time and one-half rate of the position of Head Duplicating Machine Operator for the period from March 21, 1988, through May 19, 1988."

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.

In Carrier's General Office there is an Office Services Bureau with two clerical employees: a Head Duplicating Machine Operator and a Senior Office Machine Operator. The Claimant herein was the incumbent of the Senior Office Machine position. In essence, the Department is the printing and duplicating arm of Carrier.

In early March of 1988, the Head Duplicating Machine Operator became ill and it became apparent that he would be out for an extended period of time. Carrier informed the Organization that it did not feel that any of the current employees was capable of filling the temporary vacancy. Carrier suggested posting a new junior position to help out as well as contracting out certain of the printing activities. The Organization did not concur in the

contracting out of the work. Nevertheless, Carrier contracted out certain printing and duplicating work which had previously been performed in the department, triggering the dispute herein. It is also noted that a companion Claim was progressed dealing with fitness and ability of the same Claimant to fill the senior position. It is also undenied in the record that the parties had discussed, at an earlier time, the apparent need for training employees in the skills needed in just such a contingency, but no program was initiated.

The Scope Rule of the Agreement herein, provides in relevant part as follows:

> "(d). Positions or work coming within the scope of this agreement belong to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, except by agreement between the parties signatory hereto; except that management, appointive or excepted positions, or other provisions not covered by this agreement may be assigned to perform any work which is incident to their regular duties."

The Organization asserts that Carrier's action of contracting the printing work to an outside source was a direct violation of the Scope Rule. Further it is argued that Carrier's position that neither Claimant here nor any other employee was qualified to perform the work is erroneous since Carrier is obligated to have an adequate work force to perform the work covered by the Agreement. It is further noted by the Organization that Carrier was placed in the current posture by its failure to train employees in the past and thus was "hoist by its own petard". The Organization argues in addition, that the Claim herein is unrelated to the fitness and ability dispute and represents a loss of work opportunity for Claimant and should be compensated at the punitive rate since overtime would have been involved.

As a principal argument Carrier states that since no one was available and qualified to perform the work contracting out was the only option available to it and did not constitute a violation of the Agreement. Carrier also asserts that Claimant was not qualified to perform the needed functions and could not have performed, even if assigned the various tasks. It is also argued that Claimant was fully employed during the Claim period and any payment to her would constitute a "windfall." It is stated further that the long-standing practice on this property is to pay claims such as this on a straight time basis.

The Board must note that Carrier had the obligation to prepare for contingencies such as that which occurred here. To ignore that obligation could well result in Carrier taking the position that it could contract out virtually all covered work on the thesis that there were no qualified employees available. This issue has been dealt with in a number of earlier Awards by this Board. In Third Division Award 12374 we said:

> "While Carrier alone has the right to determine the size of the work force in any craft, it has a duty and obligation to keep available an adequate number of employes so that the terms of the Agreement are not breached. Carrier is obligated to have a sufficient number of signalmen on its roster for its needs. If it fails to do so, it may not complain when a penalty is assessed for a contract violation."

We have held similarly in Third Division Award 18331. It is our view in this dispute that Carrier contracted out work coming under the scope of the Agreement without the concurrence of the Organization. The lack of qualified employees to fulfill the task required is not an emergency justifying diversion of work to an outside contractor. While Claimant should be compensated for loss of work opportunity, Carrier is correct in that that payment must be at straight time rates only.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1991.