Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29158
Docket No. MW-28125
92-3-87-3-701

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
(
(Southern Pacific Transportation Company (Western Lines)

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 roofing work on the Roundhouse, Store Department Office and Locker Room area located in Eugene Yard, Eugene, Oregon beginning January 2, 1986 (System File 152-1043).

(2) As a consequence of the aforesaid violation, furloughed B&B Foreman C. L. Bowman and furloughed B&B Carpenters F. A. Schmitter, J. A. Dingrando, C. L. Duwell, V. A. Kivett, G. R. Szekely, R. J. Kohansby and G. V. Duwell shall each be allowed one hundred seventy (170) hours of pay at their respective straight time rates and forty (40) hours of pay at their respective time and one-half rates."

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.

By Notice dated November 5, 1985 ("Notification No. 69"), the Carrier advised the Organization that:

> "It is our intention to contract out for partial replacement of roof at Eugene, Oregon, Locomotive Maintenance Plant.
>
> Company forces do not possess the equipment or expertise for this type of work.
>
> Our right to contract this work out without first obtaining the consent of the Brotherhood of Maintenance of Way Employes is clearly established."

By letter of November 13, 1985, the Organization requested a meeting for clarification and further stated that the covered employees were fully qualified to perform the work. That meeting did not resolve the dispute to the Organization's satisfaction. Acme Roofing Company performed the repairs during the period January 2, 1986 through January 25, 1986. This claim followed on February 24, 1986. The Organization asserts that during this period Acme used one foreman, seven roofers and worked 10 hours per day for 21 days for a total of 1,680 hours.

During the handling of the claim on the property in its letter of February 24, 1986, the Organization cited other instances where B&B employees performed re-roofing work. With respect to the Carrier's assertion in its original notice that the Carrier did not possess the equipment for this work, the Organization pointed out that:

"* * *

> Even though the Mgt. or B&B no longer has the equipment for roofing, it can be rented, we are talking of Hot-Tar Rentals - 4340 Franklin Blvd. Eugene, Oregon 97403 (Tel. No. 726-6517) has just such equipment. Tar Kettle's [sic] rent for $30.00 per day, the propane comes at extra cost.
>
> Mr. Young with so many of our B&B Carpenter's, and Welder's [sic] on furloughed status, I can not sit by and watch this situation go unchecked.

* * *"

In response, the Carrier asserted by letter of March 19, 1985:

"* * *

> Notification #69 was issued to the Organization on November 8, 1985 of Carriers intent to contract out for partial replacement of roof at Locomotive Maintenance Plant, Eugene, Oregon, as the Company does not possess the equipment or expertise for this type of work.
>
> Our right to contract this work out without first obtaining the consent of the BofMofWE is clearly established."

In its letter of December 19, 1986, the Carrier maintained that the Scope Rule was general and throughout the life of the Agreement and for many years before, outside contractors have performed similar work. The Carrier

further cited five instances during the period January 9, 1985 through September 8, 1986 wherein outside contractors performed roofing work without objection by the Organization and further asserted many other instances existed. The Organization responded by letter of August 26, 1987 referencing statements from employees asserting that they performed re-roofing work in the past.

Article IV of the 1968 Agreement provides:

"ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at anytime within 90 days after the date of this agreement."

The December 11, 1981 Letter of Agreement states, in relevant part:

"During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carrier's forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

* * *

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

* * *"

After review of the record, we find that the Organization has demonstrated a violation of the Agreement. However, under the circumstances, no affirmative relief will be required.

First, the mere fact that the Carrier gave advance notice to the Organization of its intent to contract out the disputed work is not an admission of a violation of the contracting out provisions. See Third Division Award 27608 ("the fact that the Carrier gave notice to the Organization that it intended to contract out the work is not a fatal admission..."). The merits of the Organization's claim must rise and fall upon the strength of the facts and the language of the Agreement concerning when the Carrier can contract out work.

Second, the Carrier's argument that the Organization has not shown that the covered employees performed re-roofing work on an "exclusive" basis does not dispose of the matter. On its face, Article IV does not specifically provide that the disputed work must be exclusively performed by the employees. Rather, Article IV addresses "work within the scope of the applicable schedule agreement" and does not refer to work that is "exclusively" performed by the covered employees. Based upon our reading of the Scope Rule and the statements of the employees that they have in the past performed this type work, we are satisfied that the re-roofing work at issue was "within the scope" of the Agreement.

Third, but Article IV also states that "Nothing in this Article IV shall effect the existing rights of either party in connection with contracting out" and the Carrier has referred us to Awards on the property holding that the Organization is obligated to demonstrate exclusivity. See e.g., Third Division Awards 25370, 23303. However, we are also not satisfied that those Awards dispose of the matter. A reading of those Awards show that the incidents giving rise to the claims in those cases occurred prior to the December 11, 1981 Letter of Agreement which provides that the Carrier "will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of [its] maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." The dispute in Award 25370 arose during the period November 10, 1980 through January 9, 1981 and the dispute in Award 23303 covered the period April 21, 1978 through May 11, 1978. Given the parties' further agreement set forth in their December 11, 1981 letter, we cannot find under the circumstances of this case that the cited Awards are dispositive.

Fourth, the record sufficiently establishes that the Carrier did not adhere to the commitments contained in the December 11, 1981 letter to "reduce the incidence of subcontracting" and to attempt "procurement of rental equipment and operation thereof by carrier employees." In its notice to the Organization dated November 5, 1985, the Carrier specifically stated that "Company forces do not possess the equipment or expertise for this type of work." That position was reiterated by the Carrier in its March 19, 1985 letter. With respect to the "expertise" for the re-roofing work, the statements of the employees sufficiently demonstrate that they had the capability to perform the type of work at issue. With respect to the lack of equipment, the Organization pointed out that the necessary equipment could have reasonably been

rented locally. The Carrier did not refute those assertions. Having raised the lack of expertise and lack of equipment questions and given the showings by the Organization to counter those assertions, their burden shifted to the Carrier to refute the Organization's contentions that the employees were capable of performing the work and that rental equipment could reasonably be obtained. The Carrier did not do so. We therefore find that based on this record, the Carrier did not adhere to the commitments of the December 11, 1981 letter to reduce contracting out and to attempt to procure rental equipment. Inasmuch as that letter is explanatory of Article IV, given the facts presented in this case, we therefore find that the Carrier violated Article IV.

Fifth, with respect to the remedy, the Carrier has pointed to five specific instances during the period January 9, 1985 through September 8, 1986, wherein the Carrier has contracted out this type of work. This record shows that those instances of contracting out were not objected to by the Organization. See the Carrier's letter of December 18, 1986 where, after listing the instances of contracting out (three prior to filing of this claim and two subsequent to the filing of the claim) the Carrier asserts "At no time during the past several years has any objection been raised by the Organization concerning the above-listed contracting out repairs." By failing to protest the Carrier's similar past actions which the Organization now asserts in this instance was violative of the Agreement, the Organization effectively lulled the Carrier into believing that it could continue to contract out the disputed work without objection. Under the circumstances, although the Organization has demonstrated a violation of the Agreement, no affirmative relief will be required.

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 3rd day of April 1992.