Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29225
THIRD DIVISION Docket No. MW-29058
92-3-89-3-491

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
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(Elgin, Joliet & Eastern 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 (Adler Roofing) to perform roofing work on the Joliet Storehouse on May 5, 1988 (System File BJ-13-88/UM-26-88).

(2) As a consequence of the aforesaid violation, Carpenter Foreman T. Legner, Carpenters J. Cheney, M. Clinton, B. Ruzich and J. Manstis shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work identified in Part (1) above."

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.

On February 24, 1988, Carrier issued written notice of its intent to contract out the application of roofing materials to the roof of the Storehouse at its Joliet, Illinois location. Whether the Organization requested a conference to discuss the contemplated contracting is a point of contention between the parties. Carrier proceeded to contract out the work. On May 5, 1988, the outside contractor performed the work with five workers. The Organization has named five Claimants to receive compensation for the time worked by outsiders.

The parties each raised a number of issues in support of their respective positions. Distilled to its essence, the Organization claim is that the disputed roofing work is reserved to the employees it represents both by specific provisions of the Agreement as well as by customary, historical and traditional performance of the work systemwide. The Organization also contends that no circumstances, in the nature of magnitude or intricacy, existed to warrant the use of an outside contractor to do the work. It says the Claimants were qualified and available to do the work and, therefore, should be compensated for the lost work opportunity occasioned by the Carrier's violation of the Agreement.

Carrier argues, procedurally, that the Organization waived its right to challenge the Carrier's actions when it did not request a meeting in response to the February 24, 1988 notice of the plan to contract the roof work. For its position on the merits, Carrier says the Agreement does not reserve the work in question nor have the employees customarily, historically and traditionally performed the work systemwide to the exclusion of all others. Carrier also contends that specific provisions of the Agreement recognize its right to contract out repair work, such as the disputed work. Finally, Carrier says Claimants were fully employed. It cites Rules of the Agreement which, it urges, bar Claimants from receiving compensation in the absence of actual pecuniary loss.

The Organization objected to portions of the Carrier's Submission on the basis that it contained new information and argument that was not raised on the property. We have reviewed the portions in question and agree with the Organization's contention. Accordingly, none of the objectionable material has been considered in arriving at our decision.

The Organization presented substantial evidence in support of its contention that the work in question was reserved to the employees by virtue of customary, historical and traditional performance systemwide. We do not address the waiver issue nor the issues of scope coverage and reservation of work, however, because the record establishes that the Claim must fail for another reason. Even if it is assumed that the work was otherwise reserved to the employees, the Carrier raised an affirmative defense based on an Agreement provision which Carrier says grants it the right to contract out repair work.

Rule 2(j) of the Agreement reads as follows:

> "(j) All work described under Rule 2 shall be performed by employes of the B&B sub-department, except as stated in paragraph (f) and as provided by agreement with shop crafts effective April 3, 1922 and Memorandum of Understanding (Supplement No. 1) dated November 8, 1939 (printed below for ready reference) ..."

The Memorandum of Understanding dated November 8, 1939, now found in the Agreement as Rule 6(a), says in pertinent part:

> "GENERAL
>
> It is understood where reference is made in this understanding to fabrication of parts of iron, tin, sheet metal or other material or metals, that no such reference shall in any way prohibit the Railway Company from purchasing such parts from outside manufacturers, and that the right of the company to have repair work performed by outside contractors, agencies, etc. is not disturbed."

Carrier raised the above provisions in defense of its actions and actually quoted the text of the 1939 Memorandum of Understanding in its correspondence exchanged on the property. The record establishes that the Organization did not refute this defense. Close scrutiny of the on-property correspondence reveals that the Organization did not address Carrier's claimed defense in any manner. Under the circumstances, we are compelled to accept the Carrier's defense as wholly unchallenged.

Carrier also cited prior precedent to show that the 1939 provision has a broader scope than might otherwise be suggested from its context. In Third Division Award 11103 the Board found that tuckpointing, sandblasting and cleaning the exterior of Carrier's main office and annex was repair work within the purview of the provision. In Third Division Award 11104, the same Board found that replacing a thermopane type window pane was covered repair work. In the absence of any opposition from the Organization, it follows that the roof work in question, as Carrier asserts, was repair work.

Given the nature of the record before us, we have no basis to find that Carrier violated the applicable Agreement. The Organization had the burden to prove otherwise, but we must find that it failed to satisfy that burden.

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 7th day of May 1992.