Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30944
Docket No. MW-28234
95-3-87-3-819

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
((Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to operate a dozer and a motor grader to perform Maintenance-of-Way work at Dayton, Texas from November 6 through 14, 1986 (System File MW-86-156/459-64-A).

(2) As a consequence of the aforesaid violation, Machine Operators R. H. Lopez and J. L. Bush shall each be allowed fifty-six (56) hours of pay at their respective straight time 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 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 waived right of appearance at hearing thereon.

By letter dated September 19, 1986, the Carrier informed the Organization as follows:

"Please accept this as Carrier's Notice pursuant to Article 36 of the BMWE agreement of Carrier's intent to contract installation of building pad and parking lot at Dayton, Texas.

Necessary to contract this work as Carrier does not have the manpower or equipment available to perform this work. Railroad forces represented by the BMWE will assist in installation of culverts."

By letter dated October 2, 1986, the Organization confirmed the position it took in conference "that we have the equipment and employees to perform all Maintenance of Way work."

Claim was filed over the fact that from November 6 through 15, 1986, a contractor used two of its employees to operate a dozer and a motor grader in building a pad and parking lot at Dayton, Texas. On the property, the Carrier took the position that "[d]irt work of this nature has long been contracted to others, inasmuch as the carrier did not have necessary equipment to perform this work." The Carrier provided the Organization with a list of instances where work had been contracted out. However (according to the Organization) examination of that original list shows that of the 30 instances listed by the Carrier for Lafayette Division work, all but two of the notices were served prior to the December 11, 1981 Mediation Agreement. With respect to the instances on the Carrier's Lafayette Division list (and which our inspection confirms) five were related to parking lot work and those instances occurred during the period 1977-1979. The Organization further tendered letters from Machine Operators stating that they had been assigned to operate dirt moving equipment in the past and, in instances, on parking lot type work. The Carrier responded that the Organization did not demonstrate that the employees performed the work on an exclusive basis.

First, we agree with the Carrier that the evidence shows that it served notice on the Organization of its intent to contract out the work. The Carrier's notice of September 19, 1986 covers the work in dispute.

Second, the Carrier's argument that the Organization has not shown that the covered employees performed the work on an "exclusive" basis does not dispose of the matter. On its face, Article 36 does not specifically provide that the disputed work must be exclusively performed by the employees. Rather, Article 36 addresses "work within the scope of the applicable schedule agreement." Based upon the statements of the employees that they have performed this type work in the past, we are satisfied that the work at issue was "within the scope" of the Agreement. Third Division Award 29158.

Third, we find that 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 September 19, 1986 notice to the Organization the Carrier specifically stated that "Carrier does not have the manpower or equipment available to perform this work." But, aside from that broad assertion by the Carrier, there are no facts offered by the Carrier in this record to substantiate that position. Having raised the assertion that manpower and equipment were not available and further given the commitments made in the December 11, 1981 letter concerning the reduction of contracting out and the need to attempt to procure rental equipment, it is incumbent upon the Carrier to demonstrate why it "does not have the manpower or equipment available to perform this work." This is particularly so given that on the property the Organization contended that the equipment was available ("... it is our position that we have the equipment and employees to perform all Maintenance of Way work ... [and] we could not agree to the contractors performing this work due to the fact that the Carrier has machinery of this type that was needed to do this work ... [and] a pad and parking lot is work that has been performed by Maintenance of Way forces using Carrier owned ... equipment."). The Organization also asserted on the property that the Carrier "... can lease this equipment with very little effort ... [and t]he Carrier has been advised by the Organization where this type equipment can be leased or rented in the Houston, Texas area ... [and] this work was performed ... approximately 25 miles from the Houston area." The Organization further asserted on the property that "the Carrier has at least four heavy duty trucks assigned at Houston that could have transported the equipment." Those assertions were not refuted by the Carrier. See Award 29158, supra:

> "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, the 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."

With respect to a remedy, under the circumstances we find that affirmative monetary relief should be imposed in this case. Although working on the dates in question, as a result of the Carrier's failure to comply with its commitments in the December

11, 1981 letter, Claimants clearly lost a future work opportunity. Moreover, this is not a case where the Organization's inaction with respect to protesting past similar actions lulled the Carrier into a sense of security that it was permissible to contract out such work. As noted above, although the Carrier contracted out similar work in the past on five occasions, those five occasions occurred during the period 1977-1979. There is no showing of a post-December 11, 1981 pattern of contracting out this type of work without protest by the Organization which the Carrier could argue lulled it into a sense of security that the Organization did not object to its actions. Compare Award 29158, supra, where no affirmative monetary relief was granted because the record demonstrated that during the period January 1985 through September 1986 (i.e., after the December 11, 1981 letter) the Carrier contracted out the disputed work without protest by the Organization. Under the circumstances, the affected Claimants shall be made whole at their respective straight time rates.

AWARD

Claim sustained.

O R D E R

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 29th day of June 1995.