Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31346
Docket No. MW-30950
96-3-92-3-864

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 Maintenance of Way and Structures Department work (concrete repairs) to the MacArthur Bridge beginning December 5, 1991 and continuing (System File 1991-19/013-30C).

(2) The Agreement was further violated when the Carrier committed itself to use outside forces prior to scheduling and holding a conference with the General Chairman as required by Article IV of the 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B employes L. Gann, C. Carrico, W. Vickers, N. Libell, A. Smoot, R. Pruitt, S. Millard, A. Ramirez and J. King shall each be allowed eight (8) hours' pay at their respective straight time rates and two (2) hours' pay at their respective time and one-half rates for each day worked by the outside forces beginning December 5, 1991 and continuing until the violation ceased."

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.

At the outset, the Organization protests new evidence and arguments offered by the Carrier in its submission to the Board. No material not considered by the Parties on the property will be considered in the Board's deliberations.

By letter of October 17, 1991, Carrier notified the Organization that it intended to contract out repair work on Carrier's newly-acquired MacArthur Bridge in St. Louis, Missouri. In its letter, Carrier stated that it did not have the necessary equipment for making the repairs, and that the state of the bridge was sufficiently hazardous to constitute an emergency. Carrier requested a waiver of the required fifteen day advanced notification. By letter of October 22, 1991, the Organization denied Carrier's request for the waiver and requested a conference on the matter. On November 4, 1991, having received no response from the Carrier, the Organization contacted Carrier to ascertain the status of the work on MacArthur Bridge. The Parties ultimately held a conference on the matter on November 22, 1991. The contracting work began on December 5, 1991.

In a letter dated December 11, 1991, the Organization filed a claim on requesting payment for eight hours straight time and two hours overtime for each day the outside contractor worked on the bridge repairs. Carrier denied the claim, and it was subsequently progressed in the usual manner including conference on the property, after which it remained unresolved.

At issue in this case is application of Article IV-Contracting Out of the Agreement of May 17, 1968, to which each Party is signatory. Article IV reads in pertinent part as follows:

> "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 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...."

It is the position of the Organization that Carrier violated the Agreement when it failed to allow Bridge and Building employees to perform the work at issue. Moreover, while there were no furloughed employees at the time the Carrier committed to the outside contractor, all claimants except one were furloughed prior to the actual commencement of the work. In addition, the Organization disputes the Carrier's characterization of the situation as an emergency, and suggests that Carrier did not fulfill its obligation under Article IV to make a "good faith" attempt to reach an understanding with the Organization. Finally, the Organization asserts that the work in question is work reserved to Bridge and Building employees and, therefore, Carrier was obliged to use covered employees to perform the bridge work.

Carrier maintains that it complied in full with Article IV. Further it disputes the Organization's position that the work at issue was reserved to B&B employees. Finally, Carrier reiterates that the situation involved constituted an emergency.

In light of the fact that work on the bridge actually began more than a month and one-half after the initial letter from Carrier to the General Chairman, this Board does not find credible Carrier's protest that the situation in question constituted an "emergency". Accordingly, it was obliged to comply in good faith with the provisions of Article IV. Carrier relies on the fact that the work in question was not begun until December 5, 1991, as evidence that it complied in good faith with Article IV.

However, the record indicates that Carrier did not confer with the Organization until after it had contracted with outside forces to perform the bridgework, and the contractor's equipment was already on Carrier property. By no stretch of the imagination can such actions be considered as proceeding "in good faith." Accordingly, the Board finds that Carrier did violate Article IV of the May 17, 1968 Agreement.

Carrier's position that no BMWE employees were furloughed at the time the outside contract was signed is without merit. There is unrefuted evidence on this record that, once the work was actually begun on December 5, 1991, all of the Claimants except one had, in fact, been furloughed.

With respect to the remainder of the claim, except for assertions, the Organization has presented no evidence to contradict Carrier's statement that it did not have the equipment to perform the work at issue. However, nowhere has the Carrier refuted the Organization's assertion in its letter of October 22, 1991, that but for operation of the "special" equipment, B&B employees are entitled to the work being performed under Rule 2 of the Agreement. Rule 2 specifically describes the work of the various job titles listed. (See, for example, Third Division Award 29007. It clearly defines a B&B Mason and Concrete Mechanic as "... an employe assigned in connection with construction, maintenance and dismantling of concrete, brick and stone portions of bridges.") Moreover, in Carrier's initial letter to the General Chairman, it proposed absence of furloughed B&B employees as part of its rationale for contracting out the work in the first place. While the work was actually being performed, however, B&B employees were furloughed. Further, at no time during the processing of this claim on the property did Carrier refute the Organization's position that the work was reserved to B&B employees.

Carrier is correct, however, that the Organization has not made a showing that all nine Claimants listed would, or could have worked on the job in question. Accordingly, the amount of compensation must be limited to the number of Claimants equal to the number of contractor employees actually doing B&B work. Payment shall be made only to those claimants who, but for Carrier's violation, would have been called to work on the days in question, and only for the number of hours worked by the contractor's employees.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 25th day of January 1996.