Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31798
Docket No. MW-31330
96-3-93-3-252

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier assigned outside forces (Randall O'Reilly Inc.) to perform Bridge and Building Subdepartment work (removing existing gravel, building forms and pouring concrete) at Fisher Road Material Yard in Columbus, Ohio on August 14, 15, 16, 19, 20, 21, 22 and 23, 1991 (System Docket MW-2415).

(2) As a consequence of the violation referred to in Part (1) above, Claimants R. L. Ritterbeck, C. T. Julian, L. J. Sacher and D. D. Philbin shall each be allowed sixty-two (62) hours' pay, at their respective rates, for the two hundred and forty-eight (248) man-hours expended by the outside forces in the performance of said work."

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 were given due notice of hearing thereon.

On July 5, 1991, the Carrier served the following notice:

"This is to advise that we intend to contract for the installation of a 10,000 square foot concrete pad at the Columbus MW Material Yard. The project will include the clearing and removal of an existing 10" stone base and redistributing it prior to laying the concrete pad.

The pad will be used to support exterior pallet racks for C&S and surplus MW material and must be completed quickly (on or about July 22, 1991) for the anticipated inbound shipments of material.

This work must be done quickly and our B&B employees are actively involved in other work. Our estimates indicate, if our employees were available, the completion of the project would be extended by eight days. Further, the total cost of the project would be increased by $7,497 which represents a net difference of 28% based on the following:

1.	Estimate the use of 3 operators for 3-1/2 days to do excavation and set up forms.		$ 2,345
2.	4 men for 10 days to do concrete work		9,382
3.	Material costs: 320 yards of concrete	$17,360	
	reinforcing	4,800	
	form material	300	22,460
	Total		$34,187
	Contractor's bid -		$26,690"

After the conference, the Carrier contracted to have the work done. The contractor expended 248 man-hours over eight days, commencing August 14, 1991, and completed the work on August 23, 1991.

The Organization filed claim contending that the Carrier was in violation of the Scope of the Agreement, as well as Rule 1.

The Carrier's defense is as follows:

"Our investigation has determined that we provided you with notice of our intent to contract this work on July 5, 1991. We explained that said work had to be completed quickly and that all B&B employees were fully occupied in the performance of other work. We also pointed out that this use of the contractor would save the Carrier approximately $7500.

It must be also noted that while each of the Claimants were fully employed during the claim period, three of the Claimants were also observing vacation during a portion of the claim period and thus cannot be considered available on those dates.

Based on the foregoing, this claim is devoid of merit, and is denied."

As is evident, the Carrier's defense is:

1 - savings to Carrier by using an outside force;

2 - unavailability of Claimants as they were fully occupied; and

3 - expediency in completing the project.

Regarding the need for expediency, a review of the record finds that although there may have been a need to complete the project quickly, the actual facts do not bear this out. The July 10 suggested conference date did not materialize as the Organization's request for a conference was not received until July 11, and was not held until July 31. The project started on August 14, and was completed on August 23. It may have been a good faith argument by the Carrier, but unfortunately the actual events do not support the claim of expediency.

The cost factor argument, although not contained in the Scope as a sufficient reason to contract, has been upheld in Third Division Award 28999. An analysis of that Award, however, finds that it is not on all fours with this situation. In that Award, the Carrier stated that the contractor would do the work "for $3000 less than the Carrier would expend to rent the specialized equipment needed for performing just the leveling work, a small part of the project."

Third Division Award 31388 is more in line with this dispute regarding the cost factor:

> "...the Carrier also mentions that it could have the work done by a contractor at less expense than would be entailed in using its own forces. This appears to admit that Carrier forces were capable of performing the work, no doubt through previous experience therein. Beyond this, however, the Board must be concerned with the Agreement as written by the parties and not with whether compliance is more or less costly than non-compliance."

The cost factor argument in this dispute is not persuasive.

Regarding the unavailability of the Claimants because they were already engaged in other projects, thus the necessity to contract is an argument that has not been accepted and is not considered in this case.

Based solely upon that which the parties stated in various exchanges in the on-property handling, the claim will be sustained. As to damages, the Carrier argues, as it has in other cases, that the Claimants suffered no lost earnings as each received compensation on each of the claim dates. This is an issue that has been argued in numerous other disputes, but on this Carrier it has not been too successful. See Awards 24 and 41 of Special Board of Adjustment No. 1016, Award 7 of Public Law Board No. 3781 and Third Division Award 30181.

One other factor regarding the compensation due issue is that Carrier pointed out that three of the Claimants were, at various times that coincided with dates the contractor performed this work, off on paid vacation. If the Claimants would have been assigned to do this work, there is nothing to indicate that each would have postponed their vacation to another time, thus Carrier may deduct from the hours claimed, the hours each was on vacation.

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 26th day of December 1996.