Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32187
Docket No. MW-31920
97-3-94-3-246

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (J.M.G. Construction) to perform Bridge and Building Subdepartment work (install a new steel angle-iron fence) on the Harrisburg Line at the 25th Street Viaduct, Philadelphia, Pennsylvania beginning September 4, 1992 and continuing (System Docket MW-2869).

(2) As a consequence of the violation referred to in Part (1) above, B&B Foreman D. J. Lauer, B&B Mechanics J. Griffin and C. L. Daub shall each be compensated at their appropriate rates of pay for the total number of man-hours expended by the outside forces performing 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.

The Organization received notice dated August 10, 1992 from the Carrier of its intent to contract out viaduct repair. That notice indicated that the work performed would be:

> "for removal of loose concrete and parapet wall sections, including replacement with 24 inch (16 gauge) corrugated steel fence..."

The Carrier alleged that the work it intended to contract out was emergency work "due to the dangerous condition of the viaduct." It noted that no B&B employees in the seniority district were furloughed.

This claim was pursued by the Organization because the work which began September 4, 1992 was Scope protected work. The Organization argued that repairing bridges and installing fences belonged to the employees and could not be contracted out without proper notice. In this case, there is dispute over notice and the alleged emergency. The Organization maintains that the employees lost work opportunity when the outside contractor performed the work without special equipment.

The Board notes many contentions in the on-property record that need not be addressed, such as pyramiding of claims. We also find material not a part of this dispute. The parties are well aware that only material discussed and presented while the dispute was on the property can be considered by this Board. De novo evidence may form no part of our conclusions.

Having carefully reviewed the record, the Board focuses upon Paragraph 2 of the Scope Rule which states in pertinent part:

> "In the event that the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman 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. 'Emergencies' applies to fires, floods, heavy snow and like circumstances."

The Board finds first that the record of evidence supports a notification within the provisions of the Agreement. Central thereto is the alleged "emergency nature due to the

dangerous condition of the viaduct." Our review of the record fails to find sufficient probative evidence to refute the Carrier's alleged emergency. The Organization points to a letter of October 24, 1991 about the viaduct. It argues that:

> "It was known to the Carrier at this time, some 11 months prior to the Senior Director's letter stating that this work was of an 'emergency nature,' that problems needed to be addressed with regard to the viaduct. The Carrier's willful failure to address the problems when they first became known to them, caused the alleged emergency condition."

The Board does not find probative evidence that seriously challenges the Carrier's position that the Agreement was not violated; in that this was an emergency. The Board finds no challenge to the Carrier's Exhibit, a newspaper article detailing the dangerous condition of the bridge, as chunks of the bridge fell off, shattering a windshield on a moving car. We have reviewed all of the Organization's evidence, including the October 24, 1991 letter. While many inferences may be drawn from this and other evidence, there is a lack of substantial probative evidence to find the Carrier's stated emergency as non-existent. The claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of August 1997.

LABOR MEMBER'S DISSENT
TO
AWARD 32187, DOCKET MW-31920
(Referee Zusman)

The Majority clearly erred when it rendered its decision in this case and a dissent is therefore required.

This docket involved the Carrier assigning outside forces to perform basic fundamental bridge repair work. The premise manufactured by the Carrier to support its allegation of emergency arose from the public outcry as reported in a newspaper article dated July 31, 1992 concerning the condition of the bridge. The General Chairman, however, presented a memorandum generated by the Carrier's Bridge and Building Department dated October 24, 1991, that clearly showed that the Carrier was well aware of the poor condition of the bridge in question more than nine (9) months before the newspaper article was penned. What was interesting to note from the Carrier's memorandum was the comment made by the B&B Supervisor, wherein he stated:

> "We could also solicit quotes from contractors to remove parapets, and to scale the spalling concrete, possibly using high pressure water blast. However, it is doubtful that we could obtain labor clearance to perform this work by contract."

The Carrier clearly knew that it would not have prevailed in a contracting claim unless it could show an exception to the Scope Rule. One exception is an alleged emergency. So the Carrier sat

back and waited for public outcry to arise and thereafter used such public outcry as a reason to contract out this work. As devious as this seems, putting the public at risk for eleven (11) months is something that the Carrier was willing to do to avoid assigning this work to its own employes. What is even worse is that this Board accepted the contrived emergency as license to contract out work that was clearly covered under the Scope of this Agreement.

This award is palpably erroneous and I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member

CARRIER MEMBERS' RESPONSE
TO LABOR MEMBER'S DISSENT
TO AWARD 32187 (Docket MW-31920)
(Referee Zusman)

On August 10, 1992, the Carrier gave the BMWE Notice that it was contracting out the removal of loose concrete and parapet wall sections of the 25th Street viaduct in Philadelphia, PA, and the replacement of a corrugated steel fence. Carrier's actions were dictated because of an emergency situation and the fact that there were no furloughed employees who could be promptly employed. This is all in accord with the existing Scope Rule.

The emergency was created when rock fell from this bridge onto an automobile window. According to the newspaper report the bridge was "structurally strong enough to support the trains" but it was the "stones and cement that made up the outside of the structure" that were crumbling and posed a hazard. The article also noted that repairs had been made "to the 25th Street bridge twice a year because of residents' complaints" (emphasis added). Thus, this was not a situation where the Carrier just "sat back and waited". Organization's inference of neglect is clearly rebutted in the on-property evidence that they, in their myopic perception, simply ignore - (don't confuse me with the facts).

Obviously, there was an emergency and under such conditions the Carrier properly responded. That response did not violate the contract, the Dissent notwithstanding.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik