

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35771
Docket No. MW-34378
01-3-98-3-4**

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 Employees
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside contractor (E&L Construction Company) to excavate, fill, grade and place sub-ballast on Tracks 13, 14 and 15 at Gibson Relay Yard on September 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28 and 30, 1996 (Carrier's File MW-97-014).**
- (2) The Agreement was further violated when the Carrier assigned an outside contractor (E&L Construction Company) to excavate, fill, grade and place sub-ballast on Tracks 13, 14, and 15 at Gibson Relay Yard on October 1, 2, 3, 4, 7, 8, 9, 10, 11, 14 and 15, 1996 (Carrier's File MW-97-010).**
- (3) The Agreement was also violated when the Carrier failed to make a good-faith effort to rent or lease the equipment necessary to perform the work described in Parts (1) and (2) pursuant to the December 11, 1981 Letter of Agreement.**
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Machine Operators A. V. Valdivia, J. Diaz, H. Covington, K. R. Seitzinger and Vehicle Operators H. Gomez, J. L. Mireles and D. E. Robinson shall each be allowed two hundred eight (208) hours' pay at their respective straight time rates and eight (8) hours' pay at their respective time and one-half 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 were given due notice of hearing thereon.

This docket consolidates two separate claims, without objection, due to the commonality of facts and issues.

By letter dated February 26, 1996, the Carrier informed the General Chairman of its intent to contract the following work:

"Excavation, fill, grading and sub-ballast placement for yard expansion at Gibson Relay Yard and Blue Island Yard."

The sole reason stated for the contracting plan was that the Carrier did not have the equipment to do the work. The notice also said work was expected to begin on March 18, 1996.

The parties met in conference on March 11, 1996 to discuss the plan. While the record does not provide specific detail about the discussion that transpired, the Organization disputed the plans and no Agreement was reached.

The work actually began on Tracks 13, 14, and 15 at Gibson Yard on September 10, 1996 and continued through October 15. Each claim covers roughly one-half of the days worked by the contractor.

On the property, the Carrier did not contend that the track work involved was outside the scope of the Agreement; nor did the Carrier make any assertions or provide any specific information to the effect that the magnitude of the project was so large that it exceeded the capabilities of the employees. The new information on these points that was presented for the first time in its Submission is too late to be properly considered. Its sole defenses on the merits were the general assertions that the Carrier did not have the equipment or the qualified operators to perform the work.

In addition to the foregoing, the Carrier let stand unrefuted four significant Organization assertions. First, that leased equipment was available from a number of vendors (the Organization named one vendor located within five miles of the job site); second, that the Carrier made no effort to address the leased equipment issue; third, that the Carrier forces had done the exact type of work several times in the past three years. And finally, that the Carrier had failed to comply with its good faith efforts obligation under the December 11, 1981 Berge-Hopkins Letter of Agreement. By long established precedent, these unrefuted assertions of material fact must be accepted as matters successfully proven.

In light of the foregoing, we are compelled to find that the disputed work was contracted in violation of the parties' Agreement.

Regarding the remedy, the Carrier did not refute the Organization's assertion that numerous employees had been furloughed for several months and thus members of the Organization were deprived of extended employment. The Carrier noted only that the Claimants were fully employed during the claim dates or were either on rests days or otherwise experiencing certain sporadic unavailability.

On this record, we are persuaded the Claimants did suffer lost work opportunities. Therefore, the Carrier's full employment defense pertaining to the claim dates does not bar the award of a monetary remedy.

On this record, there is no proper basis for concluding that the Claimants could not have performed the disputed work had the Carrier undertaken good faith efforts to obtain necessary equipment and schedule its own employees accordingly. Accordingly, we remand this claim to the property to ascertain the actual number of hours worked by the contractor. The Claimants shall be compensated for the appropriate number of hours at their respective straight time rates of pay.

Because we have determined the disputed work was contracted to outsiders in violation of the Agreement, the Carrier funds paid to the contractor must be excluded from the ratio calculation pertaining to the 1992-1996 five-year period as provided in Article X Section 1 of the parties' Agreement.

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 24th day of October, 2001.