Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35842
Docket No. MW-33879
01-3-97-3-391

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company) (former Monon Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Midwest Mole, Inc.) to perform Maintenance of Way work [install eighty (80) feet of steel culvert pipe] at Mile Post LQ 30.4 near Dyer, Indiana on February 5, 1996 and continuing [System File 962903.BM/12 (96-851) MNN).

2. As a consequence of the aforesaid violation, Messrs. R. E. White, L. L. Phillips and F. J. Shirley shall each be allowed two hundred thirty-six (236) hours' pay at their respective straight time rates and ten (10) 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.

By letter dated December 1, 1995, the Carrier advised the Organization that it intended to contract out installation of 80 feet of 66 inch diameter steel culvert pipe by the jack and bore method at Mile Post LQ 30.4 on the Monon Subdivision at Dyer, Indiana. The Carrier further notified the Organization that the reason it was contracting out the work was:

> "Carrier does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done. The project requires utilization of a jack and boring rig, which the Carrier does not possess. Also, there are no employees furloughed in the Bridge and Building Subdivision."

The parties held a conference on December 11, 1995 concerning the Carrier's notification. The Carrier then advised the Organization by letter dated December 12, 1995 that it would continue with the contracting out and further advised the Organization:

> ". . . [T]here are no furloughed employees in the Bridge and Building Subdivision and they are currently involved in projects of equal importance. . . ."

With respect to the Carrier's position that it did not possess the jack and boring rig for the work, by letter dated December 18, 1995, the Organization stated that " . . . this type of equipment could be rented."

In response to the Organization's December 18, 1995 assertion that the jack and boring equipment could be rented, by letter dated January 2, 1996, the Carrier asserted that "'Carrier is not precluded from letting a contract which requires equipment it does not have,' " citing Third Division Award 31084.

By letter dated January 6, 1996, the Organization took the position that "[y]ou have the obligation to try and rent equipment for your employes to do their work under the agreement."

The contracted work began February 5, 1996. This claim followed.

In the handling of the claim on the property, the Organization repeatedly took the position that the Carrier had the obligation to try and rent the equipment. The Organization also referred the Carrier to American Rental in Chicago for leasing the equipment. During the handling of the claim, the Carrier maintained its position that it was not obligated to rent the equipment ("Carrier is not precluded from letting a contract which requires equipment it does not have.").

There is no real dispute that the work in question was fundamental scope covered work and that the Claimants were capable of performing that work. The issue here is the Carrier's assertion that "Carrier is not precluded from letting a contract which requires equipment it does not have." The Organization repeatedly advised the Carrier - both before and after the contracted work was performed - that the jack and boring equipment could be rented and that the Carrier was obligated to attempt to do so. In response, the Carrier did not take the position that it could not rent the equipment (i.e., that the equipment was not available for leasing, was not adequate, or, as so often has been the case in other matters, could not be rented without the contractor's employees). Instead, the Carrier took the position that it was not obligated to even attempt to rent the equipment.

The Carrier's position that it did not have to attempt to rent the equipment is at odds with the December 11, 1981 Berge/Hopkins Letter of Understanding:

> "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." (Emphasis added)

To the extent that the Carrier relies upon Third Division Award 31084, that Award did not specifically address the obligations set forth in the December 11, 1981 letter, i.e., the Carrier's obligations "including the procurement of rental equipment and operation thereof by carrier employees." More on point is Third Division Award 29158:

> ". . . [T]he 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.'

* * *

> 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 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 . . . 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. . . ."

See also, Third Division Award 26072 (" . . . the Carrier put forth no effort to rent equipment which was shown to be standard operating equipment.").

With respect to the remedy, the Claimants shall be made whole for lost work opportunities even though they were working when the contracted work was performed. See Third Division Award 35837 between the parties:

> ". . . the Claimants improperly lost work opportunities because the work was not assigned to them. The Claimants shall therefore be made whole.
>
> * * *
>
> See Third Division Awards 31594 (' . . . the fact that Claimants were 'fully employed' . . . does not negate liability for the proven violation. . . .') and 32435 (' . . . monetary damages are in order to compensate Claimants for the lost work opportunity and to stimulate compliance with the subcontracting notification and Scope provisions of the Agreement'). Under the circumstances of this case, and given our discretion to formulate remedies, we believe that make whole relief is appropriate."

Based on the above, the Claimants shall be compensated at the appropriate contract rate for the number of hours of work performed by the contractor.

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 18th day of December, 2001.