Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35957
Docket No. MW-34774
02-3-98-3-486

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 (JB and Sons Roofing Company) to replace part of the roof on the Gibson Roadhouse on April 28, 29, 30, May 1, 2, 5, 6, 7 and 8, 1997 (Carrier's File MW-97-033).

(2) The Agreement was further violated when the Carrier failed to make a good faith effort to rent or lease the equipment it alleged was necessary to perform the work described in Part (1) pursuant to the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, '. . . B&B Foreman J. Young, B&B employees M. Infanta, R. Vizcarra, and the three (3) senior furloughed employees in the East District or if there are no furloughed employees the three senior trackmen in the East District . . . ' shall each be allowed, '. . . eight (8) hours per day, plus all credits and benefits denied, due to this violation, which created a loss of work opportunity.'"

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.

At the time of the incidents in question, Claimant J. Young held seniority as a B&B Foreman. Claimants M. Infanta and R. Vizcarra held seniority as B&B Carpenters (Mechanics). All three Claimants were regularly assigned to positions in their respective classes.

On April 28, 29, 30, May 1, 2, 5, 6, 7 and 8, 1997, the Carrier assigned outside forces (JB and Sons Roofing Company) to replace part of the roof on the Gibson Roundhouse. Six employees of JB and Sons Roofing Company performed this work. The Carrier notified the General Chairman in writing of its plans to contract out the work involved here. The Carrier alleged that it did not have the proper equipment to complete this job. These facts are not in dispute.

The Organization takes the position that the Carrier violated the Agreement. First, it claims that the subject work consisted of ordinary building maintenance work, i.e., repairing a steel roof. According to the Organization, the Carrier had customarily assigned work of this nature to be performed by the BMWE - represented employees. The Organization further claims that this work is consistent with the Scope Rule and Rule 1. The Carrier's employees were fully qualified and capable of performing the work. The Carrier made no attempt to rent or lease equipment for its forces to perform the work, though it had an obligation to make a good faith attempt to do so to allow bargaining unit employees to perform the work. The work done by JB and Sons Roofing Company is properly the regular work of the Organization and therefore, such work should have been completed by the Claimants. Because the Claimants were denied the right to complete the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that the work completed by the outside contractor required special equipment, which it did not possess, along with the training and expertise to safely complete the job. In addition, the Carrier recalled

five employees from furlough during the week of April 25, 1997 to work on this project. Further, each Claimant was working and was compensated a minimum of eight hours straight time for each of the dates claimed. The Carrier acted in compliance with the "Good Faith" letter of December 11, 1981. As to the compensation of the Claimants, the Carrier takes the position that there was no loss of work; therefore, no compensation should be awarded.

After a review of the evidence, the Board finds that the Organization has been able to sustain its burden of proof in this matter. We note that the work involved appears to have been within the jurisdiction of the Organization. Further, it is not in dispute that this work historically has been completed by the Organization. The only defense presented by the Carrier is that "due to the working height, the Carrier does not have the proper equipment, training or expertise to safely complete the job." However, there is no evidence in the instant record which indicates that the Carrier ever attempted to comply with the requirements of the "Good Faith" Letter of December 11, 1981 which stated:

> "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."

In this case, there is no evidence that any attempts were made to obtain the necessary equipment to have BMWE forces complete the work. Based on the submission by the Carrier, it appears that the only reason that an outside contractor was utilized was because of the height of the roof to be replaced and the lack of the proper equipment to reach that height.

In the instant case, we find that it appears to be clear that the work involved in this matter rightly belongs to the Organization. Further, we find that the Claimants could have operated the equipment used by the contractor, though there was not sufficient effort made by the Carrier to obtain this equipment. Based on these conclusions, we find that the disputed work was contracted in violation of the parties' Agreement.

Having determined that the Carrier violated the Agreement, an appropriate remedy must be fashioned. The record reflects that the employees of the contractor worked on the relevant project for a period of nine days, but does not specify how many hours were actually spent to complete this work. Although the Claimants were fully

employed at the time, the Organization points out that being fully employed does not preclude the Claimants from receiving compensation for the lost work opportunity.

As the Board indicated in Third Division Award 32699:

> "... The fact that Claimants were working during the time covered by the claim does not deprive them of a remedy in this case. As a result of the Carrier's demonstrated violation, Claimants lost work opportunities and shall be made whole."

Thus, we have determined that the Claimants should be made whole. However, as noted above, because it is unclear how many hours were spent by the contractor on this project, the Board is remanding the matter to the parties to determine the total number of hours worked by the contractor's employees so that the Claimants may be properly compensated for any hours of straight time and overtime to which they are entitled.

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 8th day of March, 2002.