

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32294
Docket No. MW-31104
97-3-93-3-134**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Elgin, Joliet and Eastern Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside concern to perform Bridge and Building Subdepartment work (repair roof) on the Gary Division, Kirk Yard Roundhouse beginning on July 29, 1991 and continuing (System File BG-636-91/TM-27-91).**
- (2) As a consequence of the violation referred to in Part (1) above, B&B Carpenter Foreman A. Pace and B&B Carpenters R. Olivencia, D. Cassidy, G. Pluta and A. Pluta shall each be allowed compensation at their respective and applicable rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the Bridge and Building Subdepartment 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.

This dispute involves two pertinent rules, each of which is unique to this property. Rule 58, states:

"Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation."

Rule 6, "CONTRACTING OUT OF WORK", first adopted in April, 1992, provides in pertinent part:

- (a) "Memorandum of Understanding (Supplement No. 1) with the shop crafts dated November 8, 1939:

GENERAL

It is understood where reference is made in this understanding to fabrication of parts of iron, tin, sheet metal or other material or metals, that no such reference shall in any way prohibit the Railway company from purchasing such parts from outside manufacturers, and that the right of the company to have repair work performed by outside contractors, agencies, etc., is not disturbed."

Claimants are employed by Carrier as Bridge & Building carpenters. At the time of this incident, they were regularly assigned as such on the Gary Division.

There is no dispute that beginning in the early 1980's, Carrier "downsizing" required considerable reorganization, repair and modification to the facilities which it retained. As part of the reorganization program, Carrier instituted a multi-year project of repairing and/or spray foam coating all roofs of the retained buildings. At issue in this case, the Kirk Yard Roundhouse-Truck Garage complex was one of the facilities designated for spray foam coating.

The roof repair to this complex was engineered to be installed in five (5) annual phases, 1988-92, by an outside contractor. Commencing in 1988, the first phase over roundhouse stalls 31-40 was completed. The second phase scheduled roof repairs for the other end of the complex, which were completed in 1989. Phase three, (3), which was completed in 1990, returned the scheduled repairs to the second segment of the roundhouse roof. Phases four and five (4&5) were scheduled to be completed in 1991 and 1992.

On May 31, 1991, Carrier notified the Organization of its intent to contract out the Phase 4 roofing repairs at the Kirk Yard Roundhouse, and on July 15, 1991, Carrier signed a contract for labor and material to apply the urethane roofing system to the remaining areas designated to be completed in Phases 4 & 5. On July 9, 1991, Spray Foam Systems, Inc. commenced applying the roof coating, ultimately working a total of 142 hours, utilizing 3-5 men per day. The work was completed on August 2, 1991.

On September 16, the Organization submitted a claim regarding the Phase 4 work, maintaining that:

"Starting on or about July 29, 1991, the Carrier has called in and used an outside contractor to spray foam the roof of the Gary Division Kirk Yard Roundhouse.

The repair work of replacing and or repairing roof materials is the work of the Bridge and Building carpenters on the Elgin, Joliet & Eastern Railway Company and has been for the length of the Railroad's existence.

The Carrier has violated the Agreement by not contacting the General Chairman and have not tried to bargain in good faith in conference. Also, the Carrier violated Rules 2, 6, 16, 17 and 41 of the controlling agreement.

This outside contractor used 5 men on this job, and spent some 6 days. Therefore, the Organization is requesting that the Carrier pay an equal proportional share of man hours spent by this outside contractor doing the work belonging to

the carpenters on the Elgin, Joliet and Eastern Railway Company."

Carrier denied the claim, asserting that it was "untimely presented" in that it protested only one of the last phases of an ongoing project. Carrier further asserted that the claim "failed to identify what person or persons you are making the claim for," and asserting that "all carpenters were compensated for time worked on claim date at their respective rates of pay." Finally, Carrier stated that:

"The outside contractor, Spray Foam, had four (4) senior sprayers who have between 11 and 13 years' experience. It takes approximately 2 years of on-the-job training which includes the menial tasks associated with the job, i.e., hauling of materials, making sure hoses are kept out of the way, etc., including observing the mixing of the product and the spraying before an employee would be allowed to help the sprayer, and only then in a large, flat area. It is the sprayer's responsibility not only to make sure the mix is properly proportioned, but to know it is coming out of the hoses correctly and that no product crossover has occurred between the hoses.

The warranty from both the manufacturer and the applicator, who must be approved by the manufacturer, insures no additional cost to the railroad."

Finally, Carrier asserted that: "Third Division awards on this property have affirmed the Carrier's right to contract out repair work."

Carrier commenced the five (5) phase project in 1988 and three (3) of the five (5) phases were completed before the Organization requested that a conference be held regarding jurisdiction of said work. During the conference, the Organization maintained that B&B carpenters had "customarily" performed the duties, and that no expertise or special equipment was necessary to apply the spray foam coating. However, Carrier was able to successfully demonstrate that in accordance with its "unique" contractual right, e.g., Rule 6 of the controlling Agreement, it had historically contracted out the repair and maintenance work at issue in this dispute. Further, we

deem it significant that this claim was not raised until the final two (2) annual phases of a five (5) year annually phased project. The Organization explained its delay in claiming the work on a theory of forbearance to allow its members to learn by observation the specialized spray-foam technology utilized by the subcontractor. That argument appears to be an admission against interest that the work in dispute has historically and traditionally been contracted out by Carrier. Moreover, the claim is defeated by the clear and concise language set forth in Rule 6 of the Agreement.

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 November 1997.