Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36900
Docket No. MW-36329
04-3-00-3-517

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
(
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Rite Roofing) to perform Maintenance of Way and Structures Department work (remove and replace shingles) on the Glen Ellyn Depot at Mile Post 22.4 on the Geneva Subdivision on May 10, 11, and 12, 1999 instead of Messrs. R. Wagner, E. M. Flemming, W. J. Borden, Jr., J. D. Slivka and P. P. Battaglia (System File 9KB-6530T/1197683 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Wagner, E. M. Fleming, W. J. Borden, Jr., J. D. Slivka and P. P. Battaglia shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid 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.

By letter dated May 24, 1999, the above stated claim was made on the property. It included the alleged violation of the Scope Rule of the Agreement when an outside contractor was brought onto the Carrier's property to remove and replace shingles on the Glen Ellyn, Illinois, Depot. That element became Part 1 of the above claim. Additionally, the Organization alleged that the Carrier failed to provide notification of its intent to contract out the work, as per Part 2 of the above claim and lastly, that as per Part 3 of the claim, the employees lost work opportunity and deserve compensation for their loss. The Carrier denied all elements of this claim during its progression on the property.

The Organization argued that BMWE-represented employees had "performed this type of work many times in the past," . . . "were qualified to perform this roofing," and that it was scope protected work "reserved for and historically performed" by BMWE-represented employees. The Scope Rule allegation was never refuted on the property by the Carrier. What developed is an argument over whether or not the Carrier owned the depot. The Carrier throughout most of this claim argued that the "work was not performed for the benefit of the Carrier since the Carrier does not own the property" and therefore "the work does not fall under the scope of your agreement." Ultimately, the Carrier learned that the depot was owned by the Carrier and turned its arguments to the notice and warranty provisions of the work.

The Carrier argues that the claim is procedurally defective in that Part 2 of the claim was modified. Initially, the Organization alleged that the notice was not

provided. However, when the Carrier denied that argument stating that it understood "that proper notice was given," the Organization discussed the "unspecified notice" and further argued that it had "no record that an understanding was reached," indicating it was therefore proper to file a claim. The parties' actual notice stated only that,

> "This notice regards the replacement of the roof at Glen Ellyn. This work also carries a guarantee on the workmanship and on the shingles being installed. Additionally, I am seeking information to determine if the Carrier even owns the building."

Further dispute indicated that the depot was "owned by Metra." And lastly, that while the dispute was on the property, the parties disputed whether the Carrier acted in good faith due to the fact that there was a BCC (blind carbon copy) notation:

> "Note: Please delay the start of this project for at least 15 days from the date of this notice in order that we comply with the terms of the Collective Bargaining Agreement."

The Carrier was able to prove that a notice was provided. Thereafter, the Organization argued on the property that the notice was defective or provided in bad faith, because "the Carrier had no intention of complying" with attempts to reach agreements with the Organization to reduce subcontracting. Given that the arguments on the property fully developed the notice issue and that the parties were fully aware of its progression, the claim at bar is not at variance with that handled on property. The Board does not agree that this claim is procedurally improper. We do find, however, that a proper notice was issued and discussed without resolution. The "BCC" notation, supra, does not prove bad faith and the provisions of the Agreement were met. Part 2 of the claim is denied.

On the merits, the record provides only one defense presented by the Carrier. It held throughout this dispute that its forces could not provide the "guarantees" given by the roofing company that performed the work. The Carrier pointed to the two-year guarantee on workmanship and the 30-year guarantee on materials. The Board finds such arguments lack merit. Material warranty exists regardless of who performs the work. Scope protected work may not be contracted out due to an outside contractor guaranteeing their own employees against defective work for two

years. Given the Scope Rule and the on-property record with no refutation that the work was protected by Agreement, we find that Part 1 of the Agreement was violated. The Carrier utilized outside contractors to perform Maintenance of Way B&B Subdepartment work.

The Carrier raised the issue of damages on the property, holding that the Claimants did not lose any work opportunity. They were fully employed, worked at the same rate as the contractor's forces and no overtime was performed by the contractor. We find no dispute on the property to these stated facts and, as we find no evidence of Carrier attempts to flaunt the Agreement, Part 3 of the claim for monetary damages must be denied. (See Third Division Awards 32865, 31284, 30263, 29431 and 29310.)

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 25th day of February 2004.