**Form 1** **NATIONAL RAILROAD ADJUSTMENT BOARD**
**THIRD DIVISION**

**Award No. 42767**
**Docket No. MW-42752**
**17-3-NRAB-00003-140450**

**The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division –**
**( IBT Rail Conference**
**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 outside forces to perform roof repair work (re-roof and repair) to the roof on the Round House at Gibson beginning on July 11, 2013 and continuing.**

**(2) The Agreement was further violated when the Carrier failed to properly notify the General Chairman of its intent to contract out the above-referenced work and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 1 and the December 11, 1981 National Letter of Agreement.**

**(3) Also as a consequence of the violations referred to in Parts (1) and/or (2) above, Furloughed Claimants J. Agripino, G. Brown, J. Chatman, D. Dalumpines, M. Moreno, D. Pleasant, J. Thurston and J. Walker shall each be compensated for '… all straight time and overtime hours worked by the roofing contractors beginning on July 11, 2013 at the appropriate B&B Mechanic straight time and overtime rates of pay.***'"**

**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 notice dated January 24, 2013, the Carrier advised the Organization of its intent to contract out the removal and replacement of the roof over the diesel shop on Gibson Engine House. The notice was conferenced on February 14, 2013, and the Organization objected to the contracting by letter dated February 25, 2013, noting that this was scope-covered work and no specialized equipment was shown to be needed. By letter dated March 27, 2013, the Carrier notified the Organization that the project was no longer scheduled to be completed in 2013, and that the Organization would be advised when it was rescheduled. The letter also states that subjecting employees to the work would be unsafe as the roof contains asbestos.**

**By notice dated July 1, 2013, the Carrier advised the General Chairman that, due to the June 27, 2013 storm which blew off the roof over the diesel shop, which was tarped off by employees immediately, it was seeking bids to do the roof repair, since it did not possess the specialized equipment needed to complete the work safely and expeditiously. It noted the potential safety hazard due to the 30 foot height of the building, and stated that employees would work with the contractor doing tuck-pointing of the building and installing storm water drains.**

**The matter was discussed in conference on July 15 and the Organization filed a written objection to the contracting on July 31, 2013, noting that the Carrier could have done the work earlier in the year but abandoned the project due to budgetary constraints (choosing instead to move forward with extensive layoffs), there were 31 furloughed employees at the time, and no specialized equipment was necessary. The work began on July 11, 2013.**

**The instant claim was filed on August 19, 2013 on behalf of the named furloughed Claimants. In it the Organization asserts that the work cannot be considered an emergency due to the Carrier's willful neglect despite knowing that the roof was in disrepair. In its September 27 response to the Organization's objection letter, as well as its November 6 claim denial, the Carrier asserted that the significant rain storm of June 27 was an Act of God that created an emergency situation (citing Third Division Award 26482; SBA 1110, Award 8; PLB 7100, Award 7) and that notice, which was not required, was given merely as a courtesy. It notes that the City of Hammond Municipal Code requires that all commercial roof repairs be performed by a licensed contractor, and that the roofing manufacturer required certified installers to warrant the product. The Carrier also asserts that it had employees working alongside contractors as much as possible, and that it could not have done the work expeditiously with furloughed employees, who are allowed 14 days to return to work. It points out that, due to the storm, it had no choice but to replace the roof quickly.**

**The Organization's appeals note that this work was not an emergency, as evidenced by the giving of notice on July 1, and was the subject of the prior January notice, and that there was no valid reason to contract it out as it is covered by the Scope rule and specifically reserved to employees, who are qualified to do it and have performed the work in the past. The Organization asserts that there was no specialized equipment used or needed, and, if the Aluminum Brake needed to be rented, the Carrier failed to make any effort to do so, as it had in the past, undermining the validity of the contracting, relying on Third Division Awards 35771, 35936, 35957 and 36016, . The Organization also notes that the Code does not prohibit employees from doing the work with a licensed contractor overseeing the project.**

**The main area of dispute in this case is whether the circumstances surrounding the contracting of the roof repair work constitute an emergency, which permits the Carrier leeway in accomplishing what otherwise would be work reserved to employees under the Scope Rule of the Agreement. As noted in Third Division Awards 35957 and 36016, this type of roof repair has been held to be within the jurisdiction of the Organization and historically performed by employees on this property. The Carrier's July 1 notice mentions the storm and its effect, but does not raise an emergency defense, and relies upon the lack of specialized equipment and**

**the potential safety hazard posed to employees by the height of the building as the basis for contracting.**

**A careful review of the record convinces the Board that the Organization met its burden of proving that the roofing work contracted by the Carrier in this case is work that is covered by the Scope Rule of the Agreement, and has been historically performed by employees. See, Third Division Awards 35957 and 36016. Thus, the burden shifts to the Carrier to prove its affirmative defenses. With respect to its emergency defense, while there is no doubt that the strength of the June 27 storm and its resulting roof damage may have been unexpected, the record shows that the Carrier dealt with the emergency of an exposed diesel shop by having employees immediately tarp in the area. Thereafter, on July 1, it served notice on the Organization of its intent to contract out the work, and proceeded to seek bids from contractors and obtain the necessary funding for the project. While the storm is mentioned in that notice, there is no mention of an emergency situation. A period of 14 days elapsed between the storm and when the work began on July 11 (within the 15 day period reserved in the Scope Rule for conferencing the work).**

**The Scope Rule defines Emergency to include "fires, floods, heavy snow and like circumstances." The Board has held that an emergency is an unforeseen combination of circumstances which calls for immediate action. See, e.g. PLB 7100, Award 7. This situation does not meet such definition. Without addressing the fact that the Carrier served a notice (later said to be given as a courtesy), and that the Gibson Round House roof repair was the subject of a prior notice, a project which was ultimately not funded, the Carrier took the time to seek bids, ultimately waiting 14 days from the time of the storm to commence the roof repair. Not only does this time delay undermine the emergency argument, it also negates the Carrier's position that furloughed employees could not have been recalled to perform this work in an expeditious manner, since they had 14 days to return from furlough under the Agreement.**

**With respect to the Carrier's stated reason for contracting in the July 1 notice - that it does not possess the required specialized equipment to complete the work safely and expeditiously - as well as the height of the building, these same defenses were asserted and rejected by the Board in Third Division Awards 35957 and 36016. Both of those cases relied upon the fact that the Carrier made no attempt to lease the equipment, which is part of its obligation to make good faith efforts to reduce the incidence of contracting contained in the December 11, 1981 Letter of**

**Agreement. Additionally, Third Division Award 36016 noted that the Carrier furnished no proof that the work was dangerous for employees due to the height of the roof. The same is true on both accounts in this case.**

**The notice also did not mention the fact that the City of Hammond Municipal Code required licensed contractors or that certified installers were needed to obtain the product warranty. Neither of these contentions were proven by the Carrier. The Municipal Code section included with the Carrier's submission does not prohibit it from obtaining a temporary license for its employees to perform the work. Since the work is reserved to employees under the Scope Rule, there can be no question of Claimants' qualification to perform it.**

**Since the Carrier was unable to prove its affirmative defenses for contracting the work without furnishing the required minimum 15 day advance notice, the Board finds that it violated the Agreement by contracting the roofing work in this case. Claimants are furloughed employees who were available and qualified to perform the work, and they are entitled to be made whole for the lost work opportunity represented by this roofing contract. The Claimants shall be compensated at the appropriate contract rate based upon the number of hours the contractor's employees performed the work. The dispute is remanded to the parties to determine those hours.**

## 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 September 2017.**