PUBLIC LAW BOARD NO. 5567

AWARD NO. 1
NMB CASE NO. 1
UNION CASE NO.
COMPANY CASE NO. 900277 MPR

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

- and -

UNION PACIFIC RAILROAD COMPANY
(former Missouri Pacific 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 (Milam Construction Company) to perform track work (tie removal) at the North Little Rock Terminal beginning March 5, 1990 and continuing.

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract our said work as required by the May 17, 1968 National Agreement.

(3) As a consequence of the violations in Parts (1) and/or (2) above, Machine Operators V. D. Randolph and C. H. Burrows shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the total number of straight time and overtime man-hours expended by the outside forces performing the work in Part (1) above."

OPINION OF BOARD:

V. D. Randolph and C. H. Burrows (Claimants) have established and hold seniority as Machine Operators and also as Trackmen, under the terms of a "dual seniority" Memorandum of Understanding dated June 3, 1982. Due to force reductions, Claimants had been assigned to "lower rated" Trackmen positions on the Arkansas Division when this dispute arose.

In early March 1990, Carrier began a tie renewal project in the 400 Yard at the North Little Rock Terminal. At various times throughout the project, without notifying the BMWE General Chairman, Carrier employed an outside contractor (Milam Construction Company) to assist the MofW forces. Milam used its own backhoe to remove and install switch ties, and a front end loader to unload and haul ties to the project area and remove old ties. Two Milam employees operated the equipment.

On March 23, 1990, the Assistant General Chairman submitted a claim on behalf of Messrs. Randolph and Burrows which stated:

> "It is our contention that certain rules of the current Working Agreement have been violated, especially Scope, Seniority Datum Rule (1), Seniority Rights Rule (2), Bulletin Rule (11), Work Week Rule (14) and Article IV of the May 17, 1968 National Agreement in that carrier failed to notify the General Chairman of their intent to subcontract out said MofW work, and the December 11, 1981 'Good Faith' letter to reduce incidents of subcontracting out MofW work.
>
> Therefore, time is being claimed by and in

behalf of each Claimant for payment of all wage loss suffered (straight time, overtime and holidays), at the Machine Operator rate, from March 5, 1990, continuing, for being denied said 'work opportunity' to outside concerns."

Carrier denied the claim asserting that:

"At the outset, based on the evidence presented, it is apparent the Organization has failed to research the validity of its claim since you have failed to supply the dates, number of employees or number of hours allegedly worked each day. You have simply made a blanket request for all hours worked by contractor employees, (straight time, overtime and holidays) and expect the Carrier to supply you with the information to support your allegations.

Investigation into the circumstances surrounding your allegation reveals that Milam did not have two employees on the property at all times, nor were these employees working 8 hours each day.It is evident that you have mistakenly advanced this claim on a continuous basis. It must be pointed out that Milam was not working each and every day and therefore, this does not constitute a continuing claim as you have implied."

Finally, with regard to allegations of a Scope Rule violation, Carrier submitted that "Union Pacific has used contractor service for this type of work traditionally and it has created no loss of work opportunity for the MofW employees"; n support of that position, Carrier attached a lengthy list of previous occasions in which it had entered into similar subcontracts without notice.

In this case, as well as some half-dozen other "Scope and Notice" subcontracting disputes removed from the NRAB to this Board, the Parties respectively urge me to blaze new trails and depart from principles developed in a plethora of Third Division decisions involving the same Parties, identical issues and identical contract language.

The Scope Rule of the BMWE/MOPAC Proper (now Union Pacific) Agreement here under construction has been in effect without significant change since 1938. In more than a hundred jurisdiction of work disputes, its job classification language has been construed as "general" in nature by two generations of NRAB Referees. In this case, however, BMWE urges me to revert to dicta in Award 3-747 (Swacker), a 1938 remand decision which off-handedly referred to the Scope Rule as "specific". For its part, Carrier argues that the generality of the Scope Rule obviates the notice and consultation requirements of Article IV in the May 17, 1868 National Agreement and the good faith effort requirements of the December 11, 1981 Letter of Agreement, unless the Organization first demonstrates a past practice of exclusive system-wide performance. In short, Carrier urges that it may ignore with impunity those notice and consultation obligations in "mixed practice" situations.

This Board rejects each Party's respective overture to abandon sound principles developed by the NRAB to govern such matters. The Chairman reiterates his holdings in prior Third

Division decisions to the effect that: 1) the Scope Rule here under construction is "general" in nature since it does not reserve specifically described work to listed job classifications; 2) reservation of work to Agreement-covered employees must be demonstrated by evidence of a custom, practice or tradition of work performance to the practical exclusion of others; 3) prior performance of the work by Agreement-covered employees under a "mixed practice" obligates Carrier to provide Article IV notice and opportunity to confer and to make good faith efforts in accordance with the December 11, 1981 Letter of Agreement to keep the work "in-house"; 4) Carrier is on notice by Award 3-28849, issued June 25, 1991, that unmitigated failure to abide by the notice requirements of Article IV or the good faith effort commitments of the December 11, 1981 letter in such "mixed practice" situations might well warrant an award of monetary damages, irrespective of whether the underlying Scope Rule claim is sustained; 5) for "mixed practice" disputes arising prior to the issuance of Award 3-28849 on June 25, 1991, a proven history of Organization acquiescence to Carrier's subcontracting certain kinds of work without notice, mitigates against an award of monetary damages. **See** Award 3-29792 and awards cited therein.

Application of these principles to the proven facts of record leads to a conclusion that Carrier's admitted failure to give notice or to explore means of assigning Agreement-covered

employees to this "mixed practice" work constituted plain violations of Article IV of the May 17, 1968 National Agreement, as reinforced by the December 11, 1981 Letter of Agreement. Claimants were capable of performing the backhoe and front-end loader work on claim dates as Machine Operators and would have been available to do so if Carrier had not utilized them as lower-paid Trackmen. Their demonstrated monetary damage is the difference between what each earned as Trackman and what he would have earned as Machine Operator had he, rather than a subcontractor employee, operated the machine.

Compensatory damages clearly would be awarded if this claim had arisen after the date of June 25, 1991, when NRAB Award 3-28849 was issued. However, this violation occurred in March 1990 and the record persuasively shows a history of acquiescence or condonation of such notice and consultation violations in connection with subcontracting of this particular type of work. For reasons set forth in Award 3-28849, therefor, no damages are awarded in this particular case. **See also** Awards 3-29021 and 3-29792. No matter how appealing the urge to dispense his own brand of justice, the Chairman is convinced that the disruptive effect of disregarding established precedents between the same Parties on the same issues under the same contract language must militate against an award of money damages for Claimants.

AWARD

For reasons set forth in the Opinion, the claim is sustained in part and denied in part, as follows:

1) Part 1 of the claim is not proven.

2) Part 2 of the claim is sustained.

3) Part 3 of the claim is denied.

Dana Edward Eischen, Chairman

Dated at Ithaca, New York on October 14, 1996

Union Member

Dated at Chicago, IL
on October 21, 1996

Company Member

Dated at Omaha Nebraska
on October 21, 1996