AWARD NO. 1
CASE NO. 1

PUBLIC LAW BOARD NO. 5652

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**
	)	
	)	**UNION PACIFIC RAILROAD COMPANY (FORMER MISSOURI PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces (Straight Contracting) to haul Company material, i.e., ballast, ties, crossing planks, biddum, drain pipes, spikes and other crossing renewal material, as well as, removing used material from various locations between Mile Post 415 and Mile Post 371 on the Central Division near Roper and Dixon, Kansas from July 9 through August 23, 1990 (Carrier's File 910018 MPR).

2. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General chairman with advance written notice of its intention to contract out said work.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman T. Banks and Trackmen H. D. Brooks, D. T. Westerman and J. A. Reed shall each be allowed eight (8) hours' pay per day at the straight time rate and any overtime performed by the contractor's employes for July 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, August 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22 and 23, 1990.

OPINION OF BOARD

This is one of many similar disputes between the parties stemming from the Carrier's contracting out work performed by employees covered by the Agreement.[1]

In this case, without prior notice to the Organization, for the dates set forth in the claim, the Carrier contracted with Straight Contracting for the purpose of hauling ballast, ties, crossing planks, biddum, drain pipes, spikes, and other crossing renewal material to various locations between MP 415 and MP 371 in the vicinity of Roper and Dixon Kansas on the Central

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[1] The Organization's September 24, 1991 letter (Employes' Exh. A-6 at sheet 4 of 4) states that "[p]resently, there are approximately five hundred and sixty five (565) contracting claims at Board level ...."

Division. The record shows that this type of work has, in the past, been performed by the Carrier's forces. The record also shows that in the past the Carrier has contracted out this type of work.[2]

Third Division Award 30162 addressed the types of contracting claims arising between the parties:

> The number of claims progressed to this Board from this property on alleged contracting out violations is enormous. As usual, the parties' differences stem from the governing language of the Agreement concerning when the Carrier can contract out work and the Carrier's obligation to give prior notice of its intent to do so. But on this property, the parties differences have intensified due to the Organization's present attempts to enforce the relevant language after many years of allowing the Carrier's contracting out to go essentially unchallenged. The difficulty the Organization presently faces on this property is that when it now seeks to enforce the relevant language after not having previously done so, it faces a body of substantial past practices of contracting out for the various kinds of work that the Organization now claims were improperly removed from the employees. The Organization's difficulties in its attempts to enforce the language become compounded as awards issue from this Board relying upon the past practices for the various areas of work that have been subcontracted. A substantial body of precedent awards therefore has been evolving on this property concerning the relevant language which then requires this Board, for purposes of stability, to give due deference to the prior decisions whereas under the same language on another property, the result might be quite different.

Article IV of the Agreement states:

> In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event no less than 15 days prior thereto.
>
> * * *

Given the extent that employees have performed this work in the past and given the nature of the work performed, this work fell "within the scope of the applicable schedule agreement" as stated in Article IV of the Agreement. The type of work involved in this case is similar to that described in *Third Division Awards 31042, 31037 and 31280* which rejected the Carrier's basic argument that the work is not scope covered and therefore not subject to the requirements of the contracting language.

No notice was given to the Organization by the Carrier of the Carrier's intent to contract out this work. Because the work fell within

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[2] *See* the Carrier's letter of February 5, 1991 (Employes' Exh. A-4 at sheet 4 of 6 ("It is apparent that the Carrier has used both Company forces, as well as Contractor forces in performing the type of work described and neither has exclusive rights to this work.").

the scope of Article IV, the Carrier's failure to give the Organization notice of its intent to contract out the work establishes a violation of the notice requirements. *See Third Division Award 31280, supra:*

> The function of the notice is to allow the Organization the opportunity to convince the Carrier to not contract out the work. Therefore, that opportunity to convince the Carrier to not contract out the work was prevented by the Carrier's failure to give notice. The claim will be sustained, but only for those Claimants in furlough status at the time the contractor performed the work.

See also, Third Division Awards 31042 and 31037, supra finding the same type of violation and providing for the same remedy.

As discussed in *Award 30162, supra,* a substantial body of precedent has developed between the parties in contracting out disputes. The remedy for these kinds of cases is part of that body of precedent. Those cited awards are not palpably in error. Stability therefore dictates that those awards be followed. For similar reasons, then, this claim will be sustained due to the Carrier's failure to give the Organization prior notice of its intent to contract out the scope covered work. Make whole relief shall be awarded, but only to those Claimants on furlough, if any, during the time the contractor performed the work in dispute. The matter is remanded to the parties for a joint check of the Carrier's records to determine which Claimants, if any, were on furlough during the time the contractor performed the work.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

P. Waldmann
Carrier Member

R. C. Robinson
Organization Member

Chicago, Illinois

Dated: July 12, 1996