AWARD NO. 10
NMB CASE NO. MW-32430
UNION CASE NO.
COMPANY CASE NO.

PUBLIC LAW BOARD NO. 6086

PARTIES TO THE DISPUTE:

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

STATEMENT OF CLAIM:

(1) The Carrier violated the Agreement when it assigned outside forces (Osmose Wood Preserving, Inc.) to perform Maintenance of Way and Structures Department work (steel repairs) on the MacArthur Bridge beginning April 18, 1994 and continuing (System File 1994-26/013-293-14).

(2) As a consequence of the violation referred to in Part (1) above, furloughed B&B employes S. Millard, A. Rameriz, J. King and Messrs. S. Wolf, C. Lovett, A. Cracchiolo, W. Vickers, C. Carrico, A. Smoot, N. Libell and R. Pruitt shall each be allowed ten (10) hours' pay at their appropriate straight time and overtime rates for each regularly assigned workday and rest day the outside forces performed the work in question beginning April 18, 1994 and continuing until the violation ceases.

OPINION OF BOARD: Of note, this case is a companion claim to PLB 6086 Case No. 8 (Third Division Dkt. No MW-32154), which was dismissed due to procedural irregularity in the on-property appeal. No such procedural defect taints the present claim. Carrier sent the General Chairman a separate Article IV letter in March 1994, concerning the work at issue in this claim. Although both parties make occasional references to the ongoing nature of this project, they have

mutually have treated this Spring 1994 claim filed as a separate and distinct matter from that which we dismissed in Award No. 8.

On March 11, 1994, Carrier informed the Organization of its intent to contract out to Osmose Wood Preserving, the work of certain steel repairs to the MacArthur Bridge. The following day, March 12, 1994, the General Chairman replied to Carrier's notification, asserting that Carrier had both the equipment and manpower to perform the "steel repair work"and that Carrier "has not maintained, hired or tried to reduce any contracting". The General Chairman concluded his letter by requesting that the proposed locations of work and a copy of the contract which Carrier entered into with Osmose be provided to him prior to their scheduled conference date of March 24, 1994.

In reply to the General Chairman's letter, Carrier responded with the following:

1. Osmose is continuing steel repairs started last year which were not completed prior to Carrier's seasonal winter reduction of forces and Carrier's notice to Osmose to also discontinue work for the season. Contracting notice was served for this work on September 10, 1993 and is currently in the claims process. Contractor will be completing some repairs from last year as well as starting additional repairs for this year. The steel left on the bridge was for the work not done and was paid for last year.

2. The locations of the work to be performed are spread all throughout the massive MacArthur Bridge and approaches, and will not be itemized in this letter. The work involved consist of fabrication, cleaning, painting, erection and repairs of various structural steel members and components.

3. You state that Carrier did not include the fact that this work to be performed is 'maintenance work'. Whether or not this work is maintenance work is irrelevant to Carrier's letter of notification and Carrier's right to contract out certain work.

4. Regardless of whether or not our employees are capable of performing this work, there exists too much short-term work to be performed by Carrier's own forces that necessitates contracting out.

5. Because of other projects scheduled for this year, the Carrier's Maintenance of Way employees and equipment are already committed.

6. You have requested a copy of the contract with Osmose for this work, but I must deny this request as there are no agreement provisions or requirements governing disclosure of same.

The conference was held as scheduled during which the General Chairman offered the following options regarding the proposed contracting out:

1. Carrier could transfer some track employees to the bridge and building department.

2. TRRA BMWE employees could work alongside the contractor forces.

3. Some of the work, such as steel fabrication, could be done by TRRA forces during the winter furlough.

Carrier rejected each of those proposals and contracted out the work in dispute and by claim letter dated May 23, 1994, the General Chairman initiated this dual-basis claim.

There is no evidence on this record that Carrier failed to comply with the good-faith notice and conference requirements of Article IV and the December 11, 1981 Borg-Hopkins Letter. Thus, the case is joined on the merits of the Organization's claim that the contacting out of this particular work, described as "fabrication, cleaning, painting, erection and repairs of various structural steel members and components" was reserved to Agreement-covered employees by custom, practice and tradition of performance under the Scope Rule of the Schedule Agreement.

Rule 2, "Classification", Rule 3 "Seniority", Rule 5 "Consideration"Rule 6 "Department Limits" and Rule 8 "Assignments" do not expressly reserve work and Rule 1 "Scope" is general rather than specific in its wording. Carrier argues that the claim must fail if the Organization does not prove that it has "exclusively" performed the claimed work in the past. However, authoritative precedent involving these same parties establishes that the Organization can prevail in a contracting-

out case under the "general" Scope Rule even if it cannot prove 'exclusivity". *See* NRAB Third Division Award 32748.

In subcontracting or out-sourcing claims under a general Scope Rule, the Organization makes out a *prima facie* case by proving a custom, practice and tradition of regularly and consistently performing the claimed work on more than a "mixed practice" basis. The rational for that holding is well-described in Third Division Award 29007, involving the same contract language but different parties, as follows:

> Our review of the Agreement suggests that the Exclusivity Doctrine is not an appropriate test for Scope coverage vis-a-vis employees and outside contractors. The language of Article IV of the parties' Agreement clearly demonstrates, to us, an intent to establish an environment whereby the Organization should, under appropriate circumstances, be able to agree to the contracting out of bargaining unit work without suffering permanent erosion of the protected work. Such a cooperative environment is also consistent with the provisions of the December 11, 1981 National Letter of, Agreement. Yet such cooperative agreements would be incompatible with an exclusivity requirement. After work had been performed by an outside contractor, albeit by agreement, the Organization would no longer be able to prove exclusive performance by the employees- Such a result is not logically consistent with the cooperation terms of Article IV of the Agreement or the December 11, 1981 National Letter of Agreement. We conclude, therefore, that evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope coverage. . . . [However] the Organization has the burden of proving by a preponderance of evidence that the disputed work is of a character customarily and historically performed by the employees it represents.

In order to put Carrier to its proof that one of the contracting out exceptions applies, the Organization must first make out a *prima facie* showing of such work reservation by practice under the general Scope Rule. Careful analysis of the record evidence shows that in this particular case the Organization has not carried its burden of persuasion on that critical point. Disputed bare general assertions by the General Chairman and statements written by B&B employees in 1990, describing their experience in pouring and finishing concrete, do not suffice as proof that Agreement-covered employees regularly and consistently performed the work of steel bridge structural fabrication and renovation which is the subject of this May 1994 claim. While, as described earlier, this evidentiary

burden does not to require a showing of exclusive performance, it does require proof of more than a shared or mixed practice.

On this record, we find that the Organization's evidence falls short of demonstrating such regularity, consistency and predominance in the performance of the disputed work of "fabrication, cleaning, painting, erection and repairs of various structural steel members and components" to warrant a finding that it has customarily and historically performed that work. In this particular case, the Organization has not satisfied its initial burden of proving that the disputed work is reserved to the Agreement-covered employees by regular and , consistent performance under the general Scope Rule in the Schedule Agreement.

AWARD

Claim denied.

Dana Edward Eischen, Chairman
Signed at Spencer, NY on August 26, 2000

Union Member 8/31/00

Company Member