AWARD NO. 13
NMB CASE NO. MW-32588
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 Agreement was violated when the Carrier assigned outside forces (Osmose Wood Preserving, Inc.) to perform Maintenance of Way and Structures Department work (steel repairs) on the Merchants Bridge beginning August 29, 1994 and continuing (System File 1994-39/013-293-14).

(2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of their Maintenance of Way forces as required by the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Bridge and Building Sub-Department employes S. Millard, A. Ramirez, J. King, furloughed Track Sub-Department employes D. Bean, W. Wiley, R. Hoffman, J. Gatlin, M. Mitchell, M. Kayser, Bridge and Building Sub-Department employes S. Wolf, C. Lovett, A. Cracchiolo, W. Vickers, C. Carrico, A. Smoot, N. Libell and R. Pruitt shall each be allowed pay, at their respective rates, for eight (8) hours per day at the applicable straight time rate and any overtime performed by the contractor's forces beginning August 29, 1994 and continuing until the violation ceased

OPINION OF BOARD: By letter of June 10, 1994, Carrier informed the General Chairman of its intent to contract out, to Osmose Wood Preserving, Inc., work on the Merchants Bridge. According to Carrier, the work described as "general steel repairs on the entire bridge and floorbeam repairs/strengthening of the main river truss spans", was due to commence around July 1, 199. In his letter requesting a conference to discuss the proposed contracting project, the General Chairman pointed out and Carrier never denied that "B&B employees had performed steel work on Merchants Bridge for years." The requested conference was held on June 29, 1994, during which the Organization reiterated its objections to the proposed contracting of work previously performed by Agreement-covered employees.

Notwithstanding, Carrier subcontracted the project and the Organization submitted a claim dated September 13, 1994, on behalf of the individuals noted *supra*, alleging that Carrier had violated Rules 1, 2, 3, 5, 6 and 8 of the Agreement, in addition to the 1968 National Agreement and the 1981 Letter of Understanding when it contracted out work "identical" to work performed by B&B employees in the past on this very bridge. At various stages of handling on the property, the General Chairman also pointed out that 1) "these B&B employees have performed steel work for the carrier on this bridge for years"(June 10, 1994 letter requesting conference); 2) "our Supervisor now Mr. Morton, Foremans (sic) Simms and Cracchiolo, as well as several other employees of the B&B has (sic) performed this identical work in the past, as you are well aware" (claim letter of September 13, 1994); 3) "Mr. Trice understands and knows that we have rented any additional equipment that has ever been needed to perform this work in the past at Hertzs rental in St. Louis when extra equipment was needed, I have saw (sic) the work being performed with these contractors

and it is work that we have always done in the past, prior to my injury I personal (sic) performed this work with the men in the B&B department, I see no equipment that they are using that we have not in the past, I have been advised and have seen these contractors using some of our own equipment."

At no point in the handling of this claim on the property did Carrier ever contest, let alone, effectively dispute, the fact that B&B employees had previously performed steel bridge work on the Merchants Bridge identical to that which is the subject matter of the instant case. A belated, generic and unsupported assertion in the final denial letter that "the disputed work is of a character customarily and historically contracted out" does not suffice to rebut the Organization's specific claim to prior performance of identical work. In that connection, Carrier merely denied the claim at all levels of handling by reasserting various grounds set forth in Chief Engineer Trice's initial denial of November 10, 1994, as follows:

> As I explained during our initial conference on this work on June 29, 1994, Carrier's supervisors, employees and equipment were already committed to the other projects for the remainder of the year. Therefore, Carrier was not well equipped to perform a project of this magnitude. Transferring employees between the Track and B&B departments would only create shortages on other projects and would still not solve the problems of equipment and supervisory shortages.
>
> You state that this contracting is work loss since claimants have been furloughed several months over the past few years. These furloughs you refer to are merely a seasonal adjustment of work force levels due to the unpredictable winter here in St. Louis. Productivity and efficiency are greatly reduced during the winter and safe working conditions are sometimes difficult, if not impossible, to maintain.
>
> Concerning the claimants, I must take exception to several as follows:
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> Furloughed Bridge Employees: S. Millard, A. Ramirez and John King:
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> 1) S. Millard has been working in the Track Department all this season.
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> 2) A. Ramirez is estopped from being a claimant account of current FELA litigation.
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> 3) John King is not a rostered employee in either the Track or the B&B Departments and therefore an improper claimant.

Furloughed Track Employees: D. Bean, W. Wiley, R. Hoffman, J. Gatlin, M. Mitchell, M. Kayser:

1) None of these employees hold seniority in the B&B Department, nor are they qualified to perform any of the disputed steel repair work.

2) R. Hoffman is not a rostered employee in either the Track or B&B Departments and therefore an improper claimant.

You also claim for eight (8) additional B&B employees that have all been working during this contract work. Mr. S. Wolf even worked during January, February and March, and was not included in the seasonal furlough with the other men, contrary to your claim.

In total, you are seeking compensation for seventeen (17) claimants while stating that Osmose was working only fourteen (14) employees. Our records indicate that the contractor typically worked only ten (10) employees. Thus, any compensation would be limited accordingly.

As you well know, seasonal layoffs and decreasing employees in the work force is nothing new to this railroad, other railroads or other industries. Changes in rail traffic patterns, reduced trackage and related facilities and improvements in mechanization and other technologies have all impacted the employment levels of labor and management.

Accordingly, this claim has no merit and is respectfully denied.

In our considered judgement, the Organization has made out on this record a *prima facie* case that the work on the Merchants Bridge which Carrier contracted out to Osmose Wood Preserving, Inc., pursuant to its Article IV letter of June 10, 1994, was identical to work regularly and consistently performed in the past by Agreement-covered employees. *See* NRAB Third Division Awards 32748 and 29007. Carrier did not effectively dispute that fact on this record and offered no reason recognizable under the controlling contract language as justification for unilaterally outsourcing this particular work without the concurrence of the Organization. *See* Third Division Award 28998.

In handling on the property, the Organization concurred with Carrier's challenge to Mr. Hoffman as a viable Claimant and withdrew his name from the claim. As this Board held in Awards 3, 6, 11 and 12, citing NRAB Third Division Awards 28998,31756 and 32748, between these same

Parties, there is ample precedent for requiring Carrier to make the other named Claimants whole for the proven violation of the Scope Rule in this case. There is a divergence of authority on this property concerning payment of monetary damages to "fully employed Claimants", but for reasons articulated by the Third Division in Awards 31756 and 32748, we find such damages appropriate in this case. *Cf.*, Third Division Awards 29938 and 30829. As in Third Division Award 31756, we will remand the matter to the property for the Parties to determine the number of hours outside contractor forces spent performing the work of "general steel repairs on the entire bridge and floorbeam repairs/strengthening of the main river truss spans" on the Merchants Bridge beginning August 29, 1994 until completion of that work which is the subject matter of this claim. Once the final determination is made as the number of such hours and damages have been calculated at the applicable wage rates, we further order that the liquidated damages be divided equally among the employees named as Claimants in the instant case,(with the exception of R. Hoffman but including A. Ramirez, unless carrier can show that he released or waived this claim).

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AWARD

1) Claim sustained to the extent indicated in the Opinion.

2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

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

Union Member 8/31/00

Company Member