AWARD NO. 15
NMB CASE NO. MW-33526
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 (Annex Railroad Builders) to perform Maintenance of Way work (tie replacement) at several locations in East St. Louis, Illinois and in Madison Yards, Illinois beginning on October 2, 1995 and continuing (System File 1995-26/013-293-14).

(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 its 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, Messrs. W. M. Bailey, J. J. Wilson, D. S. Stogner, R. G. Gower, J. West, D. G. Matthes, C. L. Jefferson, O. Rodriguez, J. B. Fenton, T. F. Allen, C. Perkins, R. J. Stewart, R. McCranie and M. Hudson shall each be allowed eight (8) hours' pay at their respective straight time rate and two (2) hours' pay at their respective time and one-half rates for each day worked by the contracting forces beginning October 2, 1995 and continuing until the violation ceased.

OPINION OF BOARD: Pursuant to Article IV of the May 17, 1968 National Agreement, on April 6, 1995 Carrier's Chief Engineer informed the BMWE General Chairman of intent to contract out, to Annex Railroad Builders, Inc., the work of installing approximately 18,000 crossties at various locations on TRRA St. Louis property. Carrier further informed the General Chairman that Annex would also furnish a yard cleaner with crew which would work ahead of the T&S Gang. In connection with the aforementioned project, Carrier also apprized the Organization that Norfolk Southern employees would deliver approximately 15,000 tons of ballast, all of which was to be unloaded by TRRA forces. Carrier advised that the work was scheduled to commence in May 1995, and would be concluded approximately three (3) months later. Finally, Carrier advised the General Chairman that in addition to the above projects, it intended to contract the work of cropping and welding 5.9 miles of jointed rail, and installing 1,600 track feet of new 136lb. CWR rail and other track material at two (2) of its locations. According to Carrier, the work would also include ballasting, surfacing and dressing of the track. By letter dated April 12, 1995, the General Chairman responded, requesting a conference prior to the contracting out of this work.

The conference was held on April 13, 1995 and discussions continued throughout the Spring and Fall of 1995, but eventually Carrier contracted out the work in question over the Organization's strenuous objections. The outside forces began the disputed work on October 2, 1995. The BMWE struck Carrier over this matter on October 9, 1995. The strike was enjoined immediately by the U.S. District Court for the Eastern District of Missouri, which eventually granted TRRA's motion for summary judgement on January 8, 1997, on grounds that this was a "minor dispute" properly referable to arbitration under section 3, First (i) of the Railway Labor Act.

In the meantime, the Organization's General Chairman had filed the instant claim by letter of November 20, 1995. The Chief Engineer denied the claim on grounds that all Carrier equipment, manpower and employees were "committed to other projects during the year", TRRA track forces were "working with the contractor to some extent" and, "the installation of ties is no different than has been done on this property during each of the past six years." In addition, he took exception to the entitlement of several of the named claimants to any remedy.

The General Chairman made the following assertions of fact in his conference request of April 12, 1995, which we take to be factual since they were neither denied nor effectively rebutted by Carrier (Emphasis added):

> This work that you wish to contract is work that the track employees have performed in the past. Tie work of 18,000 ties, and the installing of only 1600 track feet of rail is not a large amount of work that could not be performed with our laid off employees, this identical work has been performed by our employees in the past from the Merchants Bridge on both main lines to the Merchants high line as well as other locations on the property consisting of several miles of Welded rail and Ties, we cannot imagine the carrier saying that this work is work that the carrier desires to be contracted in a timely manner with a company that specializes in this type of work.
>
> The true fact is that this is work that the track forces specializes in and this is work that could have been performed with the 30 employees that were laid off prior to your notice since December 1994.

In addition to this statement, which was never effectively countered by Carrier at any level of handling of this claim, in various stages of handling the General Chairman also made the following uncontradicted statements which we must take to be factual: 1) "This is work that our employees have performed throughout there (sic) employment on this railroad . . .This is classified work of the track department". (letter of August 14, 1995 confirming discussions in April 13, 1995 conference); 2) ". . .there are seven (7) employees that have been laid off for over two years that have performed this type of work in the past as is defined in Rule 1 Scope and Rule 2 Classification, Track Sub- Department (Track Laborer)" (letter of September 6, 1995 requesting recall of

furloughed employees to do this work); 3) "I have saw (sic) the equipment that this contractor is using for this tie project, it is similar to equipment that carrier has availability to from renting or it being supplied from the owner roads as it has been done in the past like extra tie handlers" (claim letter of November 20, 1995); 4) ". . . Mr. Trice understands and knows that we have rented any additional equipment that has ever been needed to perform this work in the past through the Owner Roads when extra equipment was needed, I have saw the work being performed with these contractors and it is work that we have always done in the past, this contractor had no equipment that our operators have not ran for the carrier in the past doing the same work. Mr. Trice is incorrect that this contracting was no different than contracting during the past six years, Mr. Trice fails to point out that this was no production gang, no time limitation was needed this was only maintenance work as is described in Rule 2. Mr. Trice is correct that the carrier has contracted work for over six years but failed to mention the carrier getting time claims for contracting work that should have been performed with our laid off employees who were laid off during contracting for the past several years prior to this contracting."(interim appeal letter of March 11, 1996).

The matter was further appealed and finally denied by the Director Labor Relations and Personnel by letter of June 27, 1996, as follows:

> 1. The Organization was properly notified in accordance with the contracting-out provisions of the current Agreement, Article IV, of the May 17, 1968 National Agreement.
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> 2. The work to be performed, considerable construction of new track and relaying of old track, is not work that cannot be subcontracted. (See NRAB Third Division Award 29014).
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> 3. All Claimants were fully employed and suffered no loss of wages. (See Third Division Awards 29018, 27634, 26642, 26378 and 26108).
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> 4. The disputed work was a 'Major renovation project' of a nature not customarily undertaken by Carrier forces. Carrier forces are not well-suited to handle projects of this magnitude.

5. The needed equipment at a capital investment of a considered amount for such a short duration usage is simply cost prohibited. (See Third Division Award No. 29014).

6. The disputed work is the type which had been customarily and historically contracted out.

7. The BMWE Scope Rule is a General Scope Rule and does not exclusively reserve the disputed work to BMWE-represented employees.

As this Board has explained in Awards 3,4,6,1,11,12,13,and 14, the Organization has the burden of going forward and making out a *prima facie* case of Scope Rule violation by a preponderance of record evidence showing consistent and regular performance of the claimed work under a "General" Scope Rule. But if the Organization makes that evidentiary showing, the burden of persuasion shifts and Carrier must sufficient evidence to rebut such a showing and/or to support its assertion of an affirmative defense under Article IV, *e.g.*, necessity for specialized equipment. In our considered judgement, on this record, the Organization carried its burden of proof by a preponderance of record evidence demonstrating that Carrier historically and traditionally assigned its Track Sub-Department employees, including Claimants, to perform tie replacement work indistinguishable from the work disputed in this case, at various locations throughout TRRA property. Carrier did not effectively rebut that evidence nor has Carrier persuasively supported with any evidence the mantra of counter assertions set forth in its final denial letter of June 27, 1996, *supra* .

NRAB Third Division Awards 28998,31756 and 32748, between these same Parties, constitute ample precedent for requiring Carrier to make the 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, from October 2, 1995 forward to completion, performing the work described in the notice letter of April 6, 1995, 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 appropriate offsets relative to Claimants T. F. Allen and O. Rodriquez, for the periods of illness cited in Carrier's denial letter of January 18, 1996 and conceded in the Organization's interim appeal letter of March 11, 1996).

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