AWARD NO. 2
NMB CASE NO. MW-32066
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 or otherwise allowed Union Pacific Railroad Company forces to perform Maintenance of Way work in connection with laying 133 pound rail across the MacArthur Bridge from the A&S Connection at 20th Street, East St. Louis, Illinois to Gratiot Tower near 7th Street, St. Louis, Missouri beginning June 1, 1993 and continuing (System File 1993-28/013-293-14).

(2) As a consequence of the violation referred to in Part (1) above, furloughed Track Subdepartment employes A. Ramirez, J. King and W. Wiley shall each be recalled to service and they and Track Foremen R. Gartner, J. T. Derochie, Machine Operators R. Gray, D. Stogner, R. Gower, R. Glenn, J. West, L. Crouch, W. Bailey, Truck Operators O. Rodriquez, J. Wilson, J. Pfeiffer, Track Laborers W. Edwards, R. White, E. Schuessler, J. Fenton, T. Allen, C. Perkins, L. Gates, R. Stewart, J. Headrick, D. Matthes, R. McCranie, M. Hudson, E. Myers, P. Poss, C. Perry, A. McCarter, C. Jefferson, J. Mason, C. Owens, C. Wicks, R. Brown, W. Green, C. Laden, R. Kurtz, T. Reed, T. Harris, M. McCann, D. Schindler, J. Gatlin, S. Gray, M. Kayser, Bridge and Building Gangleaders L. Gann, J. Roberds, A. Cracchiolo, B&B Mechanics S. Wolf, C. Lovett, C. Carrico and A. Smoot shall each be allowed eight (8) hours' pay per day at their respective straight time or time and one-half rates for each day Union Pacific forces were allowed to perform the work in question beginning June 1, 1993 and continuing.

OPINION OF BOARD: By letter dated April 28, 1993, Carrier advised the General Chairman of its intention to contract out, to the Union Pacific (hereinafter referred to as "UP"), the work of laying approximately seven (7) miles of new rail. Specifically, the work to be subcontracted involved laying new 133 pound continuous welded rail across the MacArthur Bridge from the A&S Connection at 20th Street, East St. Louis, Illinois, to Gratiot Tower near 7th Street, St. Louis, Missouri, on both main tracks. Carrier postulated that it was contracting out this particular work because its own forces were "not well suited for a project of this magnitude." Chief Engineer Trice also noted that "Carrier forces and equipment were already committed to perform other work during the time period allotted to the subject project". He concluded the correspondence by informing the General Chairman that if a conference was desired regarding the proposed subcontracting, he would make himself available at the General Chairman's convenience.

In his written response of May 6, 1993 to the above notice, the General Chairman asserted that Carrier track forces had performed "identical" work of the "same magnitude" in the past and that track force numbers were adequate to do the job but for Carrier layoffs of its track forces. Further, the General Chairman maintained that the project in dispute had been "in the making for a few years" which constituted a "clear violation" of contracting prior to conferencing the issue. Finally, the General Chairman asked for a conference which was held on May 18, 1993. During the mutually agreed upon conference to discuss the subject matter, each party reiterated their position with regard to the proposed subcontracting.

Shortly thereafter, on July 19, 1993, the Organization initiated the claim noted *supra*, on behalf of three laid-off Track and B&B employees, as well as other employees, alleging that, in

accordance with Rules 1, 2, 5 and 6 as well as by a "customary, tradition and historical past practice", the work of rail laying on the Carrier's tracks is reserved to its M of W forces. As a preliminary matter, the General Chairman pointed out that although Carrier provided advance written notice of its intent to contract out the disputed work, UP forces were permitted to commence work on the project on May 17, 1993, prior to Carrier scheduling and holding a conference as required by Article IV of the May 17, 1968 National Agreement. Regarding Carrier's contention that its forces and equipment were already committed to perform other work and that Carrier lacked machinery, manpower and skills to do such a "large scale job in such a short span of time", the General Chairman maintained that laying seven (7) miles of relaying rail and two (2) switches is not a "large-scale" job in the rail industry nor a time-consuming job for the number of Claimants at the location involved.

In its denial, Carrier did not refute the fact that Agreement-covered employees had performed such work but reiterated its position, labeling the project "major" and of the "magnitude and nature" not customarily undertaken by its forces. In that connection, Carrier noted that the Scope and Classification of Work Rule is general in nature, and does not convey to BMWE-represented employees exclusive rights to the disputed work. Finally, Carrier asserted that:

> "The work in question was prompted by the fact that U.P.'s track requirements are different than Terminal's, therefore, it was necessary to upgrade the Bridge with 133 pound rail. The Carrier would not have initiated the work in question for its own benefit if the U.P. was not using the MacArthur Bridge about 70% of the time. Even if the Scope Rule did grant the employees exclusive right to the subject, which it fails to do, it has long been held by the Third Division of the NRAB that where work is not for the exclusive benefit of a Carrier and not within a Carrier's control, it may be contracted out without violation of the Scope Rule."

It is noted particularly that Carrier never contested the fact that the UP forces began the work at issue on May 17, 1993, the day before the Article IV/Berg-Hopkins conference of May 18, 1993.

This claim remained unresolved until appeal to the NRAB Third Division, from whence it was removed along with 14 other similar claims and placed before this Board, in accordance with Award No. 1 of PLB 6086 (Procedural). At the outset, Carrier moves that the instant claim be dismissed, without any expression of opinion by this Board concerning its merits, because of alleged fatal procedural error by the General Chairman in filing the appeal to the NRAB Third Division. Specifically, Carrier asserts that the General Chairman filed the Notice of Intent to the NRAB without complying with the requirement of Rule 42 (b) of the Schedule Agreement. That contract language, taken from the National Agreement dated August 21, 1954, reads, in pertinent part, as follows (Emphasis added):

> If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with the provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

The final claims conference was held on the property on March 8, 1994, followed by the final denial letter of April 11, 1994 from Director Labor Relations & Personnel Matthewson to General Chairman Roberds, followed a few month's later by filing of the Organization's Notice of Intent to submit the dispute to the NRAB. Carrier argues before this Board, but not in handling on the property, that the General Chairman thus failed to follow the mandate of the first sentence of Rule 42 (b); thereby activating the self-enforcing language of the second sentence of Rule 42 (b), citing precedent set by NRAB Third Division Award 10793. The Organization counters with two arguments: 1) Decisions 5, 10, 17 and 22 of the National Disputes Committee, unanimously

construed the controlling provisions of Article V of the August 24, 1954 National Agreement to bar Carrier from raising such procedural allegations *de novo* at the Board level and 2) *Arguendo*, Article 42 (c) governs this situation.

The Organization is correct that Article 42 (c) governs rather than Article 42 (b), but Decisions 5, 10, 17 and 22 of the National Disputes Committee do not require us to dismiss Carrier's argument simply because it was not raised until after the Organization filed its Notice of Intent with the NRAB. Carrier could not have raised that particular procedural objection in handling on the property since it is that very filing of the Notice of Intent which Carrier challenges under Article 42 (b). We do hold, however, that Carrier's Article 42 (b) argument is not well-placed because it runs contrary to the express language of Rule 42 (c):

> (c) The requirements outline in Paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly-authorized representative before the appropriate Division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been ag reed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act.

Moreover, a review of the Award cited by the Carrier, NRAB Third Division Award 10793, reveals that the procedural argument raised by the Carrier in that Award was that the Organization failed to list the case with the NRAB within the required 9 month time limit. Hence, that Award is of no probative value to the Carrier in this dispute.

Turning to the merits, this is a dual-violation claim, *i.e.*, the Organization claims not only a Scope Rule violation but also a violation of the notice and conference requirements of Article IV of the May 17, 1968 Agreement and the December 11, 1981 Berg-Hopkins Letter. That the work of

installing continuous welded rail and switches was performed in the past by Agreement-covered employees of this Carrier is not disputed but rather Carrier urges several reasons why the subcontracting in this case was justified. We do not delve further into those aspects of the case, however, because the unrefuted record before us supports the Organization's claim that, by prearrangement with Carrier, the UP gang began performing the subcontracted work at issue before Carrier even met with the General Chairman to discuss matters relating to the subcontracting.

This is hardly in keeping with the "good faith" obligations imposed upon Carrier by the literal language of the second paragraph of Article IV of the May 17, 1968 Agreement, which was jointly reaffirmed in the December 11, 1981 Berg-Hopkins Letter. It is well-recognized that merely cosmetic compliance with the notice and/or "good-faith discussions" mandates in a *fait accompli* contracting-out situation is contrary to the mutual intent set forth in Article IV of the May 17, 1968 Agreement and the December 11, 1981 Berg-Hopkins Letter. *See* Third Division Awards 31867, 31599, 30976, 30977, 27614 and 26593. On the basis of Carrier's proven failure to comply with those critical contractual commitments prior to performance of the disputed work by the outside forces, we shall sustain Part 1 of this claim. In doing so, we do not grant the requested remedy of recall to service but we do award monetary damages to the named Claimants, (but not including Claimant Poss whom Carrier asserted was medically disqualified and unable to work since April 1993, which the Organization did not refute). Such damages are to be calculated and apportioned in accordance with the precedent set in NRAB Third Division Award 23928 between these same Parties. *See also* Awards 32748 and 31756 involving these same parties.

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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