

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 (Fitzpatrick - Murphy Contractors) to perform Maintenance of Way and Structures Department work (built an office and storage building) at Madison Yard, Madison, Illinois beginning June 1, 1993 and continuing (System File 1993-31/013-294-14).

(2) As a consequence of the violation referred to in Part (1) above, furloughed B&B employees A. Ramirez, J. King and Messrs. J. Roberds, A. Cracchiolo, S. Wolf, C. Carrico and A. Smoot shall each be allowed eight (8) hours' pay at their respective straight time rates for each day worked by the outside forces beginning June 1, 1993 and continuing until the violation ceased.

OPINION OF BOARD: On April 7, 1993, Carrier informed the General Chairman of its intent to subcontract the construction of an 11,952 sq. ft. office building and a smaller office/storage building, approximately 20 x 28 feet, at the NEEB, Madison Yard. Carrier further informed the General Chairman that "in order to meet the required city, county and state ordinances/permits", it intended to contract the "entire project as our forces are not equipped nor licensed to perform certain work."

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The General Chairman objected on grounds that Carrier B&B forces had frequently constructed such buildings in the past and requested a conference in accordance with Article IV of the May 17, 1968 Agreement. On April 19, 1993, the Parties met and conferred regarding the proposed subcontracting. Carrier reiterated its intention to subcontract the disputed work, maintaining that there was not adequate personnel to undertake the proposed project, and those employees who were available did not possess the licenses necessary to meet the required city, county and state ordinances/permits. Finally, Carrier noted that even if, *arguendo*, it did have appropriate personnel available, it no longer possessed the tools and equipment needed to complete the project.

By letter dated August 1, 1993, the Organization submitted claim on behalf of two (2) long-term laid off B&B employees of the B&B Department and five (5) additional employees who were then working full time. The claim was premised upon the following contentions:

1. The work accrues to the employees holding seniority within the Carrier's B&B Department.
2. The Carrier exhibited bad faith when it contracted with the outside concern without attempting to procure equipment which it alleged it did not possess.
3. The Carrier failed to show, much less prove, that plumbing, HVAC and electrical permits or licenses were an impediment to assigning the basic site preparation and building construction work to its B&B employees.
4. The Carrier had "purposely disabled itself" by divesting carpentry equipment and then claimed the lack thereof as a reason for contracting out the aforementioned work.

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5. The Carrier's allegation that it was not obligated to piecemeal this work has already been decided on this property and found that such is no reason to contract out work reserved to its employees.
6. The Claimants are entitled to the remedy requested for a lost work opportunity.

In its submission to the Board, Carrier asserts that because the General Chairman filed the Notice of Intent without first notifying Carrier that it rejected Carrier's final level decision of declination, this claim is barred from consideration of this Board by Article 42 (b) of the Schedule Agreement. For reasons explained fully in Award No. 1 of this Board, that argument is rejected as contrary to the express language of Article 42 (c). Regarding the notice and conference requirements, the time limits were met and we are not persuaded on this record that Carrier failed to comply with the good-faith mandates of Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Berg-Hopkins Letter. Thus, the case is joined on the issue of alleged violation of the general Scope Rule when Carrier contracted out the work of construction of these two buildings.

The Organization has shown by a preponderance of record evidence that the work at issue, construction of a one-story office building with a concrete floor and an adjoining smaller storage building, is indistinguishable from building construction projects previously performed by Carrier's Agreement-covered B&B employees, utilizing tools and equipment then owned by Carrier. The facts that Carrier chose to furlough B&B employees who were qualified to perform this work and to sell the construction tools and equipment used by them in the performance of such work cannot now be pleaded as a boot-strap defense to the *prima facie* claim that the contracting-out of this construction project violated the rights of those B&B employees to perform building construction

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work which they formerly performed by custom, practice and tradition under the Scope Rule. Finally, it is noted that this claim does not encompass the electrical, HVAC and plumbing work; which both Carrier in the past and the general contractor in this instance subcontracted to appropriately licensed subcontractors to comply with building code and inspection requirements. Accordingly, Carrier failed to demonstrate persuasively that such inspection and licensing requirements constituted *bona fide* impediments to assigning to Agreement-covered B&B employees the performance of so much of this building construction as they were entitled to perform by custom, practice and tradition under the Scope Rule.

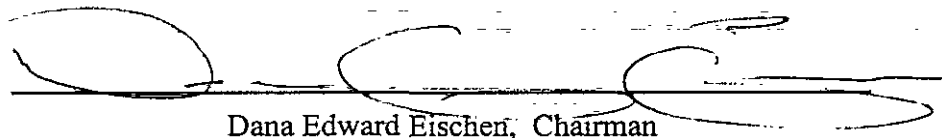
NRAB Third Division Awards 28998, 31756 and 32748, between these same Parties, are ample precedent for requiring Carrier to make the named B&B employee Claimants whole for the proven violation of their Scope Rule rights. There is a divergence of authority on this property concerning payment of monetary damages to "fully employed Claimants", but for reasons articulated by the Third Division in Award 31756, 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 carpentry, concrete and related building construction work traditionally performed by Carrier's B&B employees, not including the plumbing, HVAC and electrical work performed by licensed subcontractors or the backhoe work claimed by the Machine Operator employee of Carrier in companion Case No. 6 before this Board. Once the final determination is made as the number of such hours and damages have been calculated at the applicable B&B employee wage rates, we further order that the liquidated damages be divided equally among the B&B employees named as

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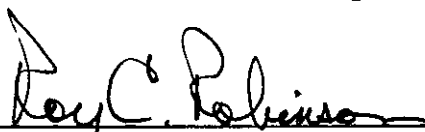
Claimants in the instant case, including A. Ramirez unless Carrier proves that he released or waived his claim.

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