

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 Norfolk and Southern tie gang forces to perform track maintenance work (replacing ties) at various locations on the Carrier's property beginning October 4, 1993 and continuing (System File 1993-39/013-293-14).

(2) As a consequence of the violations referred to in Part (1) above, furloughed track employees A. Ramirez, W. Wiley, J. King and Messrs. R. Gartner, J. Derochie, W. Green, J. Wilson, J. Pfeiffer, R. Gray, D. Stogner, R. Gower, R. Glenn, J. West, W. Bailey, L. Crouch, D. Matthes, O. Rodriguez, C. Jefferson, J. Headrick, P. Poss, R. Brown, C. Laden, S. Gray, L. Gates, W. Edwards, R. White, Sr., E. Schuessler, J. Fenton, T. Allen, C. Perkins, R. Stewart, R. McCranie, M. Hudson, E. Myers, C. Perry, A. McCarter, J. Mason, T. Harris, C. Owens, C. Wicks, R. Kurtz, T. Reed, M. McCann, D. Schindler, J. Gatlin, M. Kayser and M. Mitchell shall each be allowed eight (8) hours' pay at their respective straight time rates and two (2) hours' pay at their respective time and one-half rates for each day of their regularly scheduled five (5) day work week (Monday through Friday) the Norfolk and Southern forces performed the work in question and ten (10) hours' pay at their respective time and one-half rates for each day work was performed on their scheduled rest days (Saturday and Sunday) beginning October 4, 1993 and continuing until the violation ceased.

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OPINION OF BOARD: On September 10, 1993, Carrier advised the Organization of its intent to contract out the work of installing crossties on its St. Louis property. Specifically, Carrier informed the General Chairman that the work, contracted out to Norfolk Southern Railway tie and surface (T&S) gang, would entail installing approximately 15,000 crossties over 16.5 miles of track at various locations. Carrier further advised that "Norfolk Southern will also furnish a yard cleaner with crew for use in Madison Yard area as needed ahead of the T&S gang. Norfolk Southern will also deliver approximately 15,000 tons of ballast to be unloaded by TRRA forces. Commencement of work is anticipated in mid-October 1993 and should be completed in three weeks." As explanation for the proposed contracting-out of this project, Carrier asserted that it was "not well equipped to perform a project of this magnitude. Due to all the other work on the property that our Maintenance of Way employees and equipment are already committed to, Carrier desires to utilize the resources of one of our owners (Norfolk Southern) to perform this work in timely manner with a system rail gang that specializes in this type of work."

The General Chairman requested a conference which was held on September 21, 1993. As a result of that conference, Carrier stipulated that TRRA Maintenance of Way employees would be used ahead of and alongside the NS gang to perform the following work:

1. TRRA will furnish and distribute the crossties adjacent to the track.
2. TRRA will distribute and furnish track spikes and anchor spikes for ties installed.
3. TRRA will furnish material and perform any necessary road crossing work ahead of the NS.
4. TRRA will furnish and install any switch ties needed.

5. TRRA will perform all needed gauging.
6. TRRA will unload ballast ahead of the NS on the shoulder.
7. TRRA will perform necessary cleanup after.

The project commenced on October 4, 1993 and the NS gang apparently completed its work some three weeks later. On October 17, 1993 the General Chairman presented the instant claim on behalf of three track employees who had been on furlough for several months prior to October 4, 1993, as well as other named Claimants who had worked on the disputed project with the NS gang and/or had been otherwise occupied performing work for Carrier on claim dates. In the course of appealing this claim, the General Chairman also added as Claimants those TRRA employees whose positions were abolished by Bulletin No. 34, December 6, 1993.

The claim alleges that Carrier 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. Carrier denied the claim maintaining at the outset, that the Organization was served proper notice regarding the contracting at issue. Carrier further maintained that the disputed work was a "major project" not customarily undertaken by Carrier forces. Finally, Carrier contended that work of the magnitude of installing approximately 15,000 crossties is work which can be subcontracted, and pointed to Third Division Award No. 29014 in support of its position.

At the outset, it is necessary to clear away some red herrings to reach the heart of this case. Carrier's motion to dismiss the claim for alleged violation of Rule 42 (b) in the filing of the Notice of Intent is denied, for reasons explained in Award No. 2 of this Board. Similarly, Carrier's objection that an obvious typographical error in a date in one of the Organization's appeal letters

was a fatal defect is dismissed as unfounded. On the other hand, Carrier lodged a valid and timely objection to inclusion by the Organization of *de novo* evidence in its submission to the Board, and the belatedly submitted written statements of employees cannot properly be considered at the appellate level.

So far as the record shows, Carrier complied with the requirements of Article IV of the May 17, 1968 Agreement and the Berg-Hopkins letter with timely and appropriate notice and conference, during which arrangements were made for TRRA employees to work on the project with the NS gang. Aside from bare assertions, the Organization failed to produce probative evidence that Carrier acted in bad faith in this particular matter. The Organization also failed to persuasively demonstrate its theory of a causal nexus between the contracting-out of the work in this particular case and the furloughs of TRRA employees two months after the three-week period of time when the disputed work was performed by the NS gang. Finally, in order to put Carrier to its proof that a contracting-out transaction was justified under one of the recognized exceptions, the Organization must make out a *prima facie* case that the work in dispute, in this case a major track renovation project of the magnitude involving replacing some 15,000 ties on 16.5 miles of track, has been performed customarily and consistently by Agreement-covered employees in the past. As explained more fully in Award No. 10 of this Board, 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. Contrary to Carrier's position in these cases, it is not necessary that the Organization to prove "exclusivity" but the Organization must persuasively demonstrate regular, consistent and primary performance of the disputed work on more

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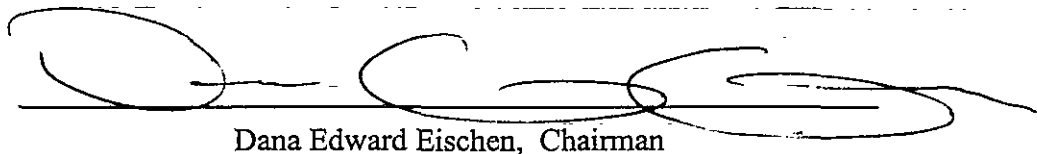
than a "mixed practice" basis.

In this case, bare generic assertions by the General Chairman that TRRA employees have replaced ties in the past are refuted by Carrier's counter assertions that tie replacement projects "of this magnitude" have been subcontracted and the Carrier's objections to belatedly proffered statements from employees are well-placed. The record in this particular case is in a state of conflict on that material factual point. On balance, we conclude that the Organization failed to carry its requisite burden of proof on this particular record. On the evidentiary record before us in this case, NRAB Third Division Awards 29938, 30828, 30829 and 31348 provide precedent for denying this claim due to failure of proof.

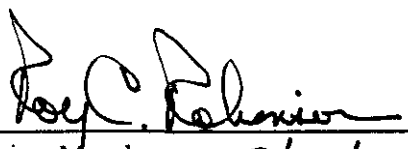
AWARD

Claim denied.

Signed at Spencer, NY on August 26, 2000



Dana Edward Eischen, Chairman



Union Member 8/31/00

Company Member