

PUBLIC LAW BOARD NO. 6249

PARTIES) **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
TO)
DISPUTE) **UNION PACIFIC RAILROAD COMPANY (FORMER SOUTHERN**
 PACIFIC TRANSPORTATION COMPANY (EASTERN LINES))

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces (Keller Materials, Inc.) to perform Maintenance of Way work (hauling asphalt from 1920 S. E. Loop 410, San Antonio, Texas to various locations and road crossings) on September 19 and 21, 1994 (System File MW-94-415/BMW94-774 SPE).

2. The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intention to contract out the work in question in accordance with Article 36.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator A. Cooper shall be allowed sixteen (16) hours' pay at his straight time rate and four (4) hours' pay at his time and one-half rate.

OPINION OF BOARD

The Organization asserts that without prior notice as required by Article 36, the Carrier utilized a contractor to haul asphalt to various road crossings.¹ The Carrier

¹ Article 36 provides:

ARTICLE 36
CONTRACTING OUT

In the event this carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

[footnote continued]

contends that the asphalt was purchased "FOB" delivered; delivery was part of the purchase price; and, therefore, no contracting out occurred and no Article 36 notice was required.²

The burden is on the Organization to demonstrate a violation of the Agreement. Here, that burden has not been met.

"The Agreement does not apply and the rights of the workers do not attach until Carrier has gained possession of an item on the property." *Third Division Award 21824*. The Organization must therefore show that the Carrier owned the asphalt at the time it allegedly contracted out the hauling work. The Organization has not done so. The Carrier's contention that the asphalt was purchased FOB and that

the purchase price included the price of delivery with title passing at the point of delivery (i.e., the various crossings) has not been refuted by the Organization. Therefore, according to the record, title to the asphalt did not pass to the Carrier until the asphalt was delivered. It thus follows that the Organization has not shown that the work was contracted out.

The Organization's contention that Claimant was doing the work and was then pulled off so that the contractor could perform the work does not change the result. The Organization is still obligated to first show that the Carrier owned the asphalt prior to the deliveries at the crossings. The Organization has not made that crucial showing.

The claim shall be denied.

AWARD

Claim denied.

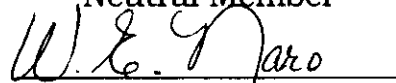
[continuation of footnote]

Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

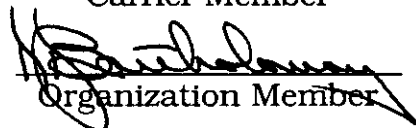
² "FOB" is a commercial term meaning "free on board" — i.e., that "the invoice price includes delivery at seller's expense" to a specified location and the "[t]itle to goods usually passes from seller to buyer at the FOB location." *Black's Law Dictionary* (5th ed.).



Edwin H. Benn
Neutral Member



Carrier Member



Organization Member

Dated: 6-21-02