AWARD NO. 2
CASE NO. 2

PUBLIC LAW BOARD NO. 6249

PARTIES TO DISPUTE) **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

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 Agreement was violated when the Carrier assigned an employee of an outside contractor (W. T. Byler, Inc.) to perform the duties of a Maintenance of Way machine operator with the use of a Link Belt Trackhoe, a Ray Go Rascal Roller, a John Deere 450G Dozer and a Cat Dozer at various locations between Mile Posts 25 and 29 at Red Bluff in LaPorte, Texas beginning February 15, 1994 and continuing (System File MW-94-192/BMW 94-400-SPE).

2. As a consequence of the violation referred to in Part (1) above, furloughed Machine Operators A. Flores, R. A. Morales, O. Gillum, A. Young, C. Wyatt and Foreman S. A. Deleon shall each be compensated at their respective straight time and time and one-half rates of pay for an equal proportionate share of the total number of man-hours expended by the outside contractor in the performance of the work in question beginning February 15, 1994 and continuing and they shall each be credited for the applicable vacation qualifying days.

OPINION OF BOARD

By notice dated January 28, 1994, the Carrier advised the Organization of its intent to contract out certain work:

> Please accept this as Carrier's Notification No. 2 pursuant to Article 36 of the current Agreement.
>
> It is the Company's intent to use an outside contractor's equipment and operators to perform grading for two (2) 9,000 foot support tracks at MP 26TGA, Strang, Texas.
>
> The Carrier does not have the qualified personnel, either active or furloughed nor the necessary equipment.
>
> Our forces will do all track work.
>
> If you desire a conference, please set one up within a fifteen (15) day period. If no conference is set within that period, this Carrier will take whatever action it deems appropriate with respect to contracting out this work.

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.

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.

The December 11, 1981 Letter of Understanding provides:

* * *

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

* * *

Contrary to the Carrier's position, a showing by the Organization that employees exclusively performed the work is not required in contracting disputes. *See Award 28* of this Board:

> "... [E]xclusivity is not a necessary element to be demonstrated by the Organization in contracting claims." *Third Division Award 32862* and awards cited therein.

See also, Third Division Award 30944 between the parties:

> ... [T]he Carrier's argument that the Organization has not shown that the covered employees performed the work on an "exclusive" basis does not dispose of the matter. On its face, Article 36 does not specifically provide that the disputed work must be exclusively performed by the employees. Rather, Article 36 addresses "work within the scope of the applicable schedule agreement". Based upon the statements of the employees that they have performed this type work in the past, we are satisfied that the work at issue was "within the scope" of the Agreement. Third Division Award 29158.

A review of the description of the contracted work and statements provided by the employees in this record show that the contracted work fell "... within the scope of the applicable schedule agreement ...."

These cases are decided on burdens met and rebutted. This is a contract dispute. Therefore "[t]he burden in this case is on the Organization to demonstrate a vio-

lation of the Agreement." *Third Division Award 34207.*

However, as discussed in *Third Division Award 30944, supra,* in these kinds of cases:

> Having raised the assertion that manpower and equipment were not available and further given the commitments made in the December 11, 1981 letter concerning the reduction of contracting out and the need to attempt to procure rental equipment, it is incumbent upon the Carrier to demonstrate why it "does not have the manpower or equipment available to perform this work."

In its January 28, 1994 notice, the Carrier asserted that it intended to utilize outside forces because "[t]he Carrier does not have the qualified personnel, either active or furloughed nor the necessary equipment." Therefore, because the Carrier has raised what amounts to an affirmative defense, in this case there is an obligation on the Carrier to demonstrate the lack of availability of manpower and equipment. The Carrier has not made that kind of showing.

With respect to equipment possessed by the Carrier to perform the work, the Organization contended in its February 9, 1994 letter that "... Southern Pacific has at this time dozers, motor graders and other equipment needed to do any and all grading involved in your notice ... the equipment is sitting up at Houston and is not being utilized at this time." However, as indicated by the Carrier in a March 2, 1994 memo from B. L. Reinhardt, the Carrier disputed "... the fact that the equipment is sitting up at Houston, as this is not true ... [w]e do not have any dirt equipment there." With respect to available equipment owned by the Carrier, although the record is somewhat sparse, we find that the Carrier's assertion that the equipment was not at Houston as the Organization contended is sufficient to defeat the Organization's assertion that the Carrier possessed equipment to perform the work.

However, with respect to the Carrier's assertion in its notice that "[t]he Carrier does not have the qualified personnel, either active or furloughed ..." to perform the work, the Carrier has not factually supported that position. In its February 9, 1994 letter, the Organization took exception to the Carrier's contention that the Carrier did not have qualified personnel. There is nothing in the record to support the Carrier's contention to show why Claimants were not qualified to perform the disputed work.

Further, with respect to the Carrier's ability to obtain rental equipment, in its February 9, 1994 letter, the Organization asserted that "... there are numerous lease/rental Companies in the area wherein any machine that maybe needed can be obtained without an operator." Further, in its May 30, 1995 letter, the Organization's General Chairman stated "I have also included several addresses and telephone numbers of rental agencies, such as Hertz and Lone Star, where equipment can be obtained locally, without operators if more equipment were needed." The December 11, 1981 Letter of Understanding requires the Carrier to make efforts for "... the procurement of rental equipment and operation thereof by carrier employees ...." The Carrier did not refute the Organization's assertion that rental equipment could be obtained. The Carrier also did not show that it made efforts to obtain rental equipment.

In the March 2, 1994 memo, B. L. Reinhardt asserts that the Carrier has "... been contracting out subgrade work since the late '70's." However, Reinhardt's statement concerning the prior contracting out of sub-grade work since the late 1970's does not change the result.

We recognize that Article 36 states that "[n]othing in this Article shall affect the existing rights of either party in connection with contracting out." The Carrier's obligation to make efforts for "... the procurement of rental equipment and operation thereof by carrier employees ...." as stated in the subsequent 1981 Letter of Understanding placed a simple burden on the Carrier to show that it at least made an effort to procure rental equipment. While the extent of the obligations of the 1981 letter have been the subject of much debate in this industry, a simple reading of that letter places at least a minimal burden on the Carrier in cases where it asserts that it does not have available equipment that it show what steps it took to at least try to obtain rental equipment or to show why rental equipment could not be obtained. The Carrier did not do so here.

What we are left with is the Carrier stating as a reason for its contracting out the work, that it did not have the equipment and, in response, the Organization told the Carrier where it could get rental equipment. The Carrier did not re-

spond to or refute the Organization's contention that rental equipment could be obtained. *Third Division Award 30944, supra,* requires that the Carrier make some kind of factual showing to support its affirmative defense. And, as we stated in *Award 5* of this Board,

> Given that the Organization called the rental of equipment issue into question, the Carrier was obligated to show *something* to demonstrate that it could not reasonably make arrangements to procure the necessary equipment. There is nothing in this record to show what, if any, efforts were made by the Carrier in that regard.

The Carrier did not do so in this case.

With respect to the remedy, Claimants (who, according to the claim, were furloughed) lost potential work opportunities. They must be made whole. *See e.g., Award 28* of this Board:

> With respect to the remedy, as a result of the demonstrated violation Claimants lost potential work opportunities. In such cases, make whole relief has been required, irrespective of whether the employees seeking relief were working. *[Third Division] Award 32862, supra:*
>
> > ... The record shows that Claimants worked at the site at the time the contractor's forces were present. The Carrier argues that granting relief to Claimants who were employed at the site is unfair. That argument is not persuasive so as to change the result. The remedy in this case seeks to restore lost work opportunities. It may well be that Claimants could have performed the contracted work (or the work they actually performed) on an overtime basis or could have resulted in more covered employees being called in to work on the project. ....

Claimants shall be made whole at the applicable Agreement rate based upon the number of hours worked by the contractor's forces.[1]

AWARD

Claim sustained.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 6-21-02

[1] In light of the result, the Organization's argument about the adequacy of the notice (which the Carrier asserts was not raised) is moot.