AWARD NO. 5
CASE NO. 5

PUBLIC LAW BOARD NO. 6249

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
	)	
	)	**UNION PACIFIC RAILROAD COMPANY (FORMER ST. LOUIS SOUTHWESTERN RAILWAY COMPANY)**

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Clarkson Construction) to perform Maintenance of Way work (culvert and concrete box extension, installation of corrugated metal pipe and associated work) at Mile Post 171.4 in the Herington, Kansas Yard on May 30, 1995 and continuing (System File MW-95-51-CB/BMW 95-488).

2. As a consequence of the violation referred to in Part (1) above, Messers. B. P. Kulas, A. B. Jones, S. E. Torres, L. R. Colon Vasquez and R. E. Shoemaker shall each be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours worked by the contractor's forces beginning May 30, 1995 and continuing until the violation ceased.

OPINION OF BOARD

By notice dated March 17, 1995, the Carrier advised the Organization of its intent to contract out certain work at Herington Yard:

* * *

> In order to alleviate congestion and operating problems on the SSW, the Company has determined to make major improvements to the Yard at Herington, Kansas. In that connection, it is the Company's intention to utilize an outside contractor to perform the following major repairs and/or improvements to the Herington Yard:
>
> 1. perform grading work involving the movement of approximately 280,000 cubic yards of cut and fill material, which must be performed utilizing specialized earth-moving equipment;
>
> 2. culvert extension work consisting of: 6'x8'x200 lineal foot concrete box extension, installation of corrugated metal pipe drain including excavation; 400 lineal foot extension of 24" corrugated metal pipe, including excavation, installation and backfill; 300 lineal foot extension of 78" corrugated metal pipe drain including excavation, installation and back-fill.

3. engineering and installation of approximately 62'x142' prefabricate "turn-key" yard office building including mechanical department locker room;

4. engineering and installation of approximately 100'x 150' prefabricated canopy structure in Rip Track area;

5. relocation of approximately 1000 lineal foot barbed wire perimeter fence.

The Company will utilize Utility Department forces to make necessary sewer, water, air and electrical connections as required. The Company will utilize Maintenance of Way forces to perform all track construction and related work. However, the Contractor may be required as needed to utilize their equipment to assist Maintenance of Way forces in making required track shifts.

B&B forces are fully employed in other projects. The expanse of grading work requires the utilization of specialized earth-moving equipment, which the Company does not have and for which Company forces are not qualified. The above work must be performed in a time sensitive manner to minimize disruption of the existing Herington yard operation and to assure the timely completion of the improvements. Due to the required phasing, use of specialized equipment, complexity and size of this project, we plan on utilizing a contractor to perform the work.

Conference was held without resolution. The Carrier then utilized outside forces to perform the work.

Article 33 provides:

ARTICLE 33

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 assertion, 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 (with this neutral member sitting as the neutral in that case):

> ... [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 ...."[1]

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 violation 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."

The Carrier asserts that it utilized outside forces because it did not have the manpower or equipment available for this time sensitive project. 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.

First, in its March 17, 1995 notice, the Carrier asserts that "... [t]he expanse of grading work requires the utilization of specialized earth-moving equipment, which the Company does not have and for

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[1] *Compare Award 13* of this Board where the work was found not to be scope covered.

which Company forces are not qualified." What kind of "specialized earth-moving equipment" was necessary for the work covered by the claim? The record in this case does not reveal an answer from the Carrier. Further, in its April 4, 1995 letter, the Organization stated that the Carrier had equipment "... including a mobile crane, now idled, that can do the excavation for the pipe [and t]here is also front end loaders and backhoes in the area, operated by Carrier BMWE employees that can do the digging, assist with installation, and do the back fill [and t]hey can, and normally do the track shifting also." That assertion has not been sufficiently refuted by the Carrier. Indeed, the Organization inquired of the Carrier in that letter to "[p]lease advise us what special equipment will be used." There was no response to that inquiry.

Second, 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 Organization states in its April 4, 1995 letter that aside from the equipment it specified the Carrier had to do the work, "[i]f more equipment were to be needed however, it can be obtained locally, without operators." That assertion was also not refuted by the Carrier. 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.

Third, the with respect to the Carrier's assertion in the March 17, 1995 notice that "... Company forces are not qualified" to operate the "specialized earth-moving equipment", what kind of qualifications are necessary that the covered employees did not have? Again, the record does not reveal an answer from the Carrier. Instead, the work involved appears to be classic maintenance of way work and the statements of the employees indicate that this is precisely the kind of work they have previously performed.

Fourth, the fact that Claimants may have been fully employed does not affect the *merits* of this dispute. This was not an emergency project. Claimants' working status is properly considered a part of the discus-

sion concerning the remedy (*see* below).

This record thus shows that the Carrier asserted it did not have specialized equipment and sufficient manpower and that the covered employees did not have sufficient skills to perform the work. That was the Carrier's affirmative defense. That defense has not been sufficiently demonstrated. The claim therefore has merit.

The difficult issue is the remedy.

Although not an emergency, the record shows that the project had to be performed in a time-sensitive manner. The Carrier's assertion that the repairs at Herington Yard covered by this claim had to be performed on a expeditious basis so as to minimize disruption to operations in that yard has not been refuted by the Organization. The record further shows that Claimants were fully employed and may even have worked on the project in dispute along with the contractor's forces.

In a typical contracting out case, the better reasoned view for remedying a demonstrated violation is that the fact that the employees were working (or even working at the site where the contractor performed services) does not defeat their entitlement to a remedy. That view is taken because the demonstrated violation deprived the employees of work opportunities — often overtime — and to not construct a remedy effectively rewards the violation of the Agreement. *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. ....

But, in formulating remedies, we have substantial discretion.[2] This

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[2] *Eastern Associated Coal Corp. v. United Mine Workers of America*, ___ U.S. ___, 121 S.Ct. 462, 466, 469 (2000) [citations omitted]:

> ... [C]ourts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. ....
>
> * * *

[footnote continued]

is such a case where we believe that discretion must be exercised.

Claimants lost work opportunities and they must be compensated for those losses. On the other hand, although not an emergency, the record shows that this project had to be completed in an expeditious manner so as to minimize disruption of operations in the yard. In this case, we believe those two considerations must be balanced.

From what is before us, we cannot determine how to precisely structure a monetary award to Claimants taking into account their entitlement to compensation for the demonstrated violation and lost work opportunities but further considering that the Carrier had to complete this project on as expeditious a basis as possible. We shall therefore remand the remedy portion of this case to the parties to attempt to reach agreement on the amount of compensation for Claimants and we shall retain jurisdiction in the event the parties are unable to do so. We recognize that it may be difficult for the parties to come up with an agreeable monetary resolution. To spur the parties to be reasonable (and hopefully to reach an amicable resolution on the remedy), should this matter be returned to us, we will require the parties to submit their last best offers on the remedy and we shall select the offer we feel is the most reasonable. This approach will discourage the taking of an unreasonable position on the remedy.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 6-21-02

[continuation of footnote]

> ... [B]oth employer and union have agreed to entrust this remedial decision to an arbitrator. ....

See also, Steelworkers v. Enterprise Wheel, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960):

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.