AWARD NO. 9
CASE NO. 9

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 outside forces (Pat Baker Contracting Company) to construct two (2) 5,000 foot support tracks perform off-track pile driving and excavate 6,520 cubic yards to be used as fill and another 6,049 cubic yards to be hauled, graded and compacted at Kirby, Texas beginning March 18, 1996 and continuing (System File MW-96-73/BMW 96-151 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 and when it failed to make a good-faith effort to assign its Maintenance of Way forces in accordance with the December 11, 1981 Letter of Agreement.

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, the Claimants listed below shall be allowed one hundred sixty eight hours each at their respective straight time rate of pay, and 42 hours of overtime each or for all hours of overtime worked by the contractor, or for an equal portion share of total man hours worked by contractors on claim dates account the Carrier used contractor forces to perform Maintenance of Way duties on the Carrier's property on March 18-22, 25-29, April 1-5, 8-12, and 15, 1996 and on a continuing basis.

L. E. Ritchie	J. B. Causey
F. A. Hasty	J. F. Juarez
J. E. Hasty, Jr.	A. V. Lopez
R. Mendiola	F. C. Martinez
J. R. Rodriguez	R. O. Garcia
A. A. Esparza	F. V. Lopez
R. R. Luna	L. M. Munoz
A. Cordero	R. R. Chafin
R. B. Gutierrez, Jr.	

OPINION OF BOARD

By notice dated February 5, 1996, the Carrier advised the Organization

of its intent to contract out certain work:

* * *

> As a result of trackage right granted to the Carrier between Topeka and Kansas City due to the BN/Sante Fe merger, the Carrier plans to utilize a contractor to construct a siding at M. P. 91 RIT. The contractor shall perform the grading, culvert, and fence work. The grading will consist of stripping and disposal of any vegetation and debris within the construction limits, excavation of 2,300 cubic yards to either be disposed of or used as fill, and import, grade, and compact 12,650 tons of aggregate base. Any track construction and removal in connection with the 7,650 ft. siding, planned cross-overs, and road crossings will be performed by Company forces.
>
> At Kirby Yard, Texas, M. P. 202.2 THE, and also in connection with the BN/Sante Fe merger, the Carrier plans to utilize a contractor to construct two (2) 5,000 ft. support tracks. In addition to performing the same duties as the contractor indicated above, this contractor shall also perform off-track pile driving. Approximately 6,250 cubic yards of excavation will be used as fill. Another 6,049 cubic yards of select fill will be imported, graded, and compacted. Also included in this project will be 10,528 cubic yards of aggregate base material. Removal and construction of tracks, timber road crossings, and the installation of two (2) 60 foot railroad bridges, along with related utility work ,will be performed by Company forces.

* * *

Conference was held on February 14, 1996 with the Organization objecting, without success, to the subcontracting of the work.

By letter dated February 22, 1996, the Organization stated that the Carrier long knew that the work was going to be performed and had not maintained a sufficient number of forces to perform the work; covered employees were on furlough; covered employees performed the grading, etc., and normally and historically performed culvert and fence work covered by the notice; the Carrier had several pile drivers with operators; and, if needed, extra equipment could have been locally obtained.

The Carrier proceeded with the contracting. This claim followed.

The Carrier denied the claim by letter dated May 23, 1996, stating that notice was sent on February 5, 1996, conference was held on February 14, 1996, the contract was executed on March 13, 1996 and the work commenced in mid-April.

In its October 16, 1996 denial, the Carrier objected to the remedy sought in the claim as excessive and disputed the assertion that the claim was a continuing one; denied that it had an obligation to make a joint review of its records; and noted that Claimants had worked on various dates covered by the claim and provided records. The Carrier also

attached a May 9, 1996 memo from Director of Construction B. Guins pointing out when the work had begun and further questioning whether the Carrier's on-track pile drivers could safely reach the distance away from the track to perform the necessary work.

By letter dated March 3, 1997, the Organization again stated that there were employees on furlough, and the Carrier had the required equipment and employees to perform the 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 Carrier met its notice and conference obligations under Article 36. The Carrier gave notice to the Organization on February 5, 1996 of its intent to contract out the work and conference was held on February 14, 1996.

However, for reasons discussed in *Award 11*, we shall sustain the claim.

With respect to the Carrier's exclusivity argument, in *Award 11* we stated the following:

> The Carrier argues that the Organization has not shown that covered employees performed the disputed work on an exclusive basis. But, as we have held before, lack of exclusive performance of the work by covered employees is not a defense to subcontracting claims. See *Award 13* of this Board:
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> > A showing by the Organization that employees exclusively performed the work is not required as a condition requiring the Carrier to give advance notice of contracting out work. As we stated in *Award 28* of this Board, under Article 36:
> >
> > "... [E]xclusivity is not a necessary element to be demonstrated by the Organization in contracting claims." *Third*

> *Division Award 32862* and awards cited therein.
>
> The question is whether "[t]he work in dispute is '... work within the scope of the applicable schedule agreement ....'"? *Award 31* of this Board [quoting Article 36].

As in *Award 11*, here can be little real dispute that the contracted work was work "within the scope" of the Agreement. The disputed work — construction of a siding and support tracks — is classic maintenance of way work which falls "... within the scope of the applicable schedule agreement ...." Lack of exclusive performance of the work is therefore not a defense the Carrier can rely upon for us to deny this claim.

Similar to *Award 11*, close examination of the record developed on the property shows the following correspondence from the Carrier:

1. The Carrier's February 5, 1996, notice.

2. The Carrier's May 23, 1996 denial of the claim stating "... there was no agreement violation by carrier ...."

3. The Carrier's October 16, 1996 letter asserting that the remedy sought in the claim was excessive and objecting to the allegation that the claim was a continuing one; disputing an obligation to make a joint review of its records; and noting that Claimants had worked on various dates covered by the claim and provided records. The Carrier also attached a May 9, 1996 memo from Director of Construction B. Guins pointing out when the work had begun and further questioning whether the Carrier's on-track pile drivers safely reach the distance away from the track to perform the necessary work.

That is all we have to work with from the Carrier. That is not enough. As we stated in *Award 11*:

> The Carrier's obligations do not just flow from Article 36. While subject to much debate concerning the extent of what is required by it, there is a further obligation found in the December 11, 1981 letter:
>
> * * *
>
> 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.
>
> * * *
>
> We can only decide these cases on the record developed by the parties. Here, for all purposes, we have a record from the Carrier consisting of a notice of subcontracting; a general denial of the claim, objections to the scope of the relief; and a defense which states that notice was given and conference was held.
>
> Where the Organization challenges the basis for the subcontracting and, as here, shows that there were employees and equipment available for the performance of the work, the Carrier cannot successfully defend against a claim by not rebutting those assertions. Stated differently, to successfully defend a claim like this, the Carrier's obligations extend

> beyond merely stating that it gave notice and held a conference and the relief sought is improper. Here, given the nature of the Organization's challenge, in the development of the record on the property the Carrier must show some reason why it nevertheless continued with the subcontracting. The extent of the Carrier's obligations in these cases is often open to debate. But here, in face of the Organization's assertions that employees and equipment were available, the Carrier must do more in the development of the record than it did. *On that basis, the claim must* be found to have merit.

This case requires the same result. If all that is necessary for the Carrier to defend a subcontracting claim is to tell the Organization that notice was given, conference was held and that the relief the Organization requests is excessive, then the contracting out provisions in Article 36 and the December 11, 1981 obligations would be rendered completely meaningless. Why couldn't the Carrier rent equipment or use its forces, whether active or on furlough?[1] What was it about the project that caused the Carrier to use outside forces rather than its employees?[2] What has the Carrier done in the past in similar contracting circumstances?[3] This record fails to give us even a clue.

Make whole relief shall be required. As we stated in *Award 11*:

> With respect to the remedy, as a result of the demonstrated violation Claimants lost potential work opportunities. In such cases, we have fashioned make whole relief, irrespective of whether the employees were working during some or all of the period covered by the claim. *See e.g., Awards 28* and *31* of this Board and cases cited.

The claim shall be sustained. Claimants shall be compensated in accord with the Agreement provisions based upon the number of hours worked by the contractor's forces. The matter is remanded to the parties to determine the amount of relief Claimants shall receive.

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[1] Here, the Carrier did question the suitability of its pile drivers to perform the work away from the track. However, the Carrier took no other steps concerning whether that necessary equipment could be rented, and, in any event, did not respond to the Organization's contentions concerning the other work covered by the notice. *Compare Award 10* of this Board where the Carrier gave an adequate explanation why it was necessary to use outside forces for the pile driving work in that claim, which resulted in our denying the claim.

[2] According to the Carrier in the May 23, 1996 letter, "... Carrier forces could not have performed said work within time frame required." This is not enough for us to consider the project an emergency that could excuse the Carrier from its contracting obligations.

[3] Article 36 does provide that "[n]othing in this Article shall affect the existing rights of either party in connection with contracting out." What were the Carrier's "existing rights"? This record is silent in that regard.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 7-15-02