

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 Agreement was violated when the Carrier assigned outside forces (Pat Baker Contracting Company) to perform off-track pile driving in the vicinity of Mile Post 202.26 at Kirby, Texas on April 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, May 1, 2, 3, 6, and 7, 1996 (System File MW-96-91/BMW 96-182 SPE).

2. The Agreement was further violated when the Carrier failed to make an effort to use its own employees and equipment pursuant to the December 11, 1981 Letter of Agreement.

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, B&B Foreman R. Diaz, Machine Operators T. Galvan, K. J. Magirl and Welder A. Burlingame shall be allowed one hundred twelve hours each at their respective straight time rate of pay, and thirty hours of overtime each

or for all hour of overtime worked by the contractor, or for an equal portion share of total man hours worked by contractors on claim dates ... and on a continuing basis.

OPINION OF BOARD

By notice dated February 5, 1996 (the same notice discussed in *Award 9* of this Board), the Carrier advised the Organization of its intent to contract out certain work, which included off-track pile driving. Conference was held with the Organization objecting, without success, to the subcontracting of the work.

In its June 28, 1996 denial, the Carrier justified the use of outside forces for the pile driving work:

... Contractor was needed because Carrier forces could not drive the piling at the location needed from where the pile driver was at without turning it over. The Carrier operators are not trained or qualified on driving pilings with off track equipment using swinging leads. Since the Operators do not have the experience in driving with swinging leads this becomes a safety issue as well.

....

A similar explanation was given in a memo from Regional Bridge Supervisor B. Lunsford.

The Organization disputed the assertions that the employees were not skilled in the particular pile driving work.

In *Awards 9* and *11* of this Board, in sustaining the claims we focused upon the lack of development of the record in support of the Carrier's position. In *Award 11* we observed:

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. ...

And, in *Award 9* we observed [footnotes omitted]:

Why couldn't the Carrier rent equipment or use its forces, whether active or on furlough? What was it about the project that caused the

Carrier to use outside forces rather than its employees? What has the Carrier done in the past in similar contracting circumstances? This record fails to give us even a clue.

Here, in the development of this record, the Carrier gave us the needed explanation. In its June 28, 1996 letter and in Regional Bridge Supervisor Lunsford's memo, we are advised by the Carrier that it was of the opinion that there were safety problems using its forces because the Carrier's forces were not trained or qualified on driving pilings with off track equipment using swinging leads.

That showing by the Carrier certainly meets the Carrier's burden in these cases. The fact that the Organization was of a different opinion concerning the qualifications of the employees and the needs of the job does not change the result. The Organization's contrary position, without more, just leaves a record in dispute on this crucial point. The ultimate burden, however, is on the Organization. A record which is, at best, in dispute on a critical showing does not allow us to conclude that the Organization met its required burden.

This claim shall be denied.

AWARD

Claim denied.

Edwin H. Benn

Edwin H. Benn
Neutral Member

W. E. Naro

Carrier Member

[Signature]

Organization Member

Dated: 7-15-02