

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 construct a 10,000 foot siding in the vicinity of Mile Post 11.4 at Eagle Pass, Texas on January 22 through March 4, 1996 (System File MW-96-62/BMW 96-130 SPE).

2. As a consequence of the violation referred to in Part (1) above, Messrs. J. J. Thomas, G. R. Gonzalez, R. A. Morales, H. Batiste, M. H. Abrego, Jr., R. G. Marquez, R. W. Crim, J. Salaiz, H. R. Villarreal, H. R. Robertson, R. G. Garcia and F. M. Ortiz shall each be allowed "... two hundred forty eight hours each at their respective straight time rate of pay, for 62 hours each at their respective overtime rate of pay, or for an equal portion share of total man hours worked by contractors on claim dates and for 31 days to be used as qualifying days for

vacation purposes and on a continuing basis account the Carrier used contractor forces to perform Maintenance of Way duties on the carrier's property on January 22-26, 29-31, February 1-2, 5-9, 12-16, 19-23, 26-29, March 1 and 4, 1996.

OPINION OF BOARD

By notice dated January 4, 1996, the Carrier advised the Organization of its intent to contract out certain work at Milepost 11.4 on the Eagle Pass Branch:

* * *

Due to increases in business to and from Mexico and in train traffic resulting from trackage rights from the BNSF, the Carrier plans to construct a 10,000 foot siding on the Eagle Pass Branch near the old station of Darling. This will allow trains to meet between Eagle Pass and Spofford without holding them out CTC (main line).

Because of the time sensitive manner in which this project must be completed, a contractor shall be utilized to perform all grading work, culvert extensions, pile driving, and fence work. This will involve the movement and placement of approximately 6000 cubic yards of cut and

fill material, import of 12,000 tons of base material, and driving piling for construction of a 60 foot bridge, including related excavation and backfill. Carrier forces will be utilized to perform all track construction and other work related thereto.

...

Conference was held on January 10, 1996 with the Organization objecting, without success, to the contracting of the work.

By letter dated January 17, 1996, the Organization stated that employees were on furlough; Carrier owned dozers, graders, trucks and trailers were idle at various locations on the Carrier's system; and that the Carrier had a pile driver capable of performing the work. The Organization also stated that additional equipment could be rented to perform the work.

The Carrier proceeded with the contracting. This claim followed.

On the property, the Carrier asserted that Claimants were not furloughed during the entire period covered by the claim. The Carrier further stated in its January 9, 1997 letter:

* * *

In accordance with Article 36 of the current Agreement the Carrier advised the Organization of its intent to contract out work on the Eagle Pass Branch by letter dated January 6, 1996. Conference was held on January 10, 1996 with Manager T. M. Johnson. The Carrier enter[ed] into

a agreement with Pat Baker Company to perform this work on January 19, 1996.

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 January 4, 1996 of its intent to contract out the work

and conference was held on January 10, 1996.

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:*

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].

There can be little real dispute that the contracted work was work "within the scope" of the Agreement. The disputed work — construction of a siding — 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.

Close examination of the record developed on the property shows the following correspondence from the Carrier:

1. The Carrier's January 4, 1996 notice.
2. The Carrier's April 26, 1996 denial of the claim stating "... there was no agreement violation by carrier and the rules cited by you lend no support to your allegations."
3. The Carrier's January 9, 1997 letter asserting that the remedy sought by the Organization was excessive; sought after vacation entitlements were improper; continuing relief was also improper; there is no obligation for the Carrier requiring it to make a joint review of its records; the Carrier gave notice and held a conference; and Claimants were not furloughed during the entire period covered by the claim. The Carrier also provided a copy of the agreement with Pat Baker Company showing that the work was not commenced prior to the January 10, 1996 conference. The Carrier further provided payroll records concerning Claimants' work history.

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 re-

duce 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.¹

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.²

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

¹ The Carrier's statement in the notice that the project was "time sensitive" does not, by itself and without more of a factually supported explanation in the record, excuse the Carrier from showing more than it did in this record. Nor is there anything in this record for us to find that an emergency existed that would excuse the Carrier from its obligations.

² That rationale must apply in cases such as this where Claimants may have been working on the same project as the contractor's forces. There is no reason in this record to show why Claimants could not have been scheduled to perform the work or could not have performed the work on an overtime basis.

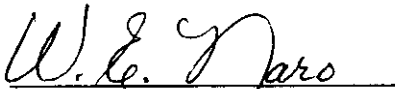
forces. The matter is remanded to the parties to determine the amount of relief Claimants shall receive.

AWARD

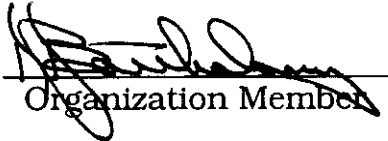
Claim sustained in accord with the opinion.



Edwin H. Benn
Neutral Member



Carrier Member



Organization Member

Dated: 7-15-02