AWARD NO. 12
CASE NO. 12

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 outside concern (Pat Baker Construction Company) to perform grading, fence work, drainage, unloading of track panels and connection work in the vicinity of Mile Post 119.89 on the Victoria Branch in Flatonia, Texas on August 6, 7, 8, 9, 13, 14, 15 and 16, 1996 and continuing (System File MW-96-186/BMW 97-16 SPE).

2. The Agreement was further violated when the Carrier failed to make a good faith effort to rent or lease the equipment for Maintenance of Way employes to use on the project nor make a good-faith effort to reduce the incidence of contracting as stipulated in the December, 11, 1981 Letter of Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman L. D. Halsell, Assistant B&B Foreman R. Colmenero, Carpenter First Class J. McGlothlain, J. D. Ebner, M. Waoytasczyk, H. Pena and Machine Operators J. E. Hasty, J. Rodriguez, D. B. Wells, F. A. Hasty, L. E. Ritchie and J. Salaiz shall each be allowed an equal and proportionate share of the total number of man-hours worked by the contractor forces at their respective straight time and time and one-half rates.

OPINION OF BOARD

By notice dated July 16, 1996, the Carrier advised the Organization that it was going to contract out certain grading, fence and drainage work in connection with the installation of a connecting track at M.P. 119.89, Victoria Branch, Flatonia, Texas. Agreement was not reached at a conference held on July 31, 1996. The work was then performed by outside forces. This claim followed.

In its October 17, 1996 denial, the Carrier stated, in pertinent part:

* * *

> Review of this claim indicated there was no agreement violation by carrier and the rules cited by you lend no support to your allegations. Accordingly, your claim is denied.

The Organization appealed asserting that there was a motor grader, dozers, dump trucks and other equipment in the San Antonio area which could have been used to perform the work with operators on the equipment. The Organization further took the position that covered employees historically and traditionally performed the work under the scope of the Agreement. The Organization also noted that needed equipment could also be rented or leased.

In response dated January 31, 1997, the Carrier stated, in pertinent part, that the Carrier's position was correctly stated in the October 17, 1996 denial and further noted that Claimants were on vacation or working on the dates covered by the claim, with records showing their work history. The record also contains a memo from Assistant Division Engineer C. A. Maida stating:

> ... The Houston Division did not have the equipment ready and available as the Brotherhood has suggested. There was no track built by the contractor. ....

The record also contains statements from employees that they have performed this kind of work in the past.

For reasons fully discussed in *Awards 9* and *11* of this Board, we find the Carrier's exclusivity argument unpersuasive. The statements of the employees and the nature of the work show the disputed work to be classic maintenance of way work falling "within the scope of the applicable schedule agreement" as stated in Article 36. Further, for reasons also fully discussed in *Awards 9* and *11*, given the Organization's assertion that equipment was available and, if not, equipment could be rented, we cannot find that the Carrier's responses — which effectively only generally deny the claim — are sufficient to show that the Carrier met its obligations under Article 36 and the December 11, 1981 letter. No evidence in this record from the Carrier addresses the rental equipment issue — which the December 11, 1981 letter states that the Carrier "... will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of ... maintenance of way forces to the extent

practicable, including the procurement of rental equipment and operation thereto by carrier employees." As we have observed before, the extent of the Carrier's obligations under Article 36 and the December 11, 1981 letter may be subject to debate. But whatever the outer limit of those obligations may be, when this record is examined, all we have is a general denial of the claim as set forth in the Carrier's October 17, 1996 letter which only states "... there was no agreement violation by carrier and the rules cited by you lend no support to your allegations." Given the Organization's showing, more than that is needed for the Carrier to prevail.

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.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 7-15-02