AWARD NO. 13
CASE NO. 13

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 on April 15, 1996, the Carrier assigned outside forces (J. C. Trucking Company) to haul roadway track equipment (Holland Welder No. 05600208) from the Beaumont, Texas Yard to the Carrier's property in Denver, Colorado (System File MW-96-103/BMW 96-197 SPE).

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out the work in question in accordance with Article 36.

4. As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operator J. P. Castro shall be allowed thirty-two (32) hours' pay at his straight time rate and sixteen (16) hours' pay at his time and one-half rate."

OPINION OF BOARD

Without prior notice to the Organization, the Carrier utilized a contractor to move equipment from Beaumont, Texas to Denver, Colorado. Beaumont, Texas is on the Eastern Lines territory. Denver is on the Denver and Rio Grande territory.

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.

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.
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> * * *
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> ... Article 36 makes it clear that "[i]ts 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." As has been found, "... the Carrier's failure to give the Organization notice of its intent to contract the work frustrates the process of discussions contemplated ...." *Award* 32862, *supra.*

But, while the concept of exclusivity does not apply to contracting out cases, under Article 36 the disputed work must nevertheless be "... within the scope of the applicable schedule agreement ...." Further, the Organization has the burden of demonstrating that the work is "... within the scope of the applicable schedule agreement ...." In this case, the Organization has not met that burden.

First, had the work been performed within the boundaries of the Eastern Lines, the Organization would have been correct that advance notice of contracting out the work was required by Article 36. That kind of work — the transporting of equipment — would have been considered classic maintenance of way work and would have been "... within the scope of the applicable schedule agreement ..." therefore requiring advance notice of contracting out as specified in Article 36.

Second, however, the disputed work involved was not work performed within the boundaries of the Eastern Lines. Here, a contractor moved the equipment from a point within the Eastern Lines territory to a point within the boundaries of the D&RGW territory. That fact raises the question of whether the work was "... within the scope of the applicable schedule agreement ..." — *i.e.*, the Eastern Lines Agreement

Third, the question of whether the movement of equipment from

the Eastern Lines to the D&RGW is work "... within the scope of the applicable schedule agreement ...." is not really a contractual question. Rather, it is a question of fact.

Giving the Organization the benefit of the doubt, the record is in conflict over whether such movements of equipment are "... within the scope of the applicable schedule agreement ...." According to Engineer B. L. Reinhardt, the Carrier does not have trucks "... to move equipment ... off company property." Similarly, according to Work Equipment Manager D. R. Daniels, the Carrier "... never had company owned trucks to move equipment into, around, or off the property." The thrust of those statements is that the kind of work claimed by the Organization has not been performed by employees covered under the Eastern Lines Agreement.

The employee statements offered by the Organization do not sufficiently demonstrate the opposite. The vast majority of those statements address movements within the Eastern Lines territory. But, that is not the issue. The issue here is the movement of equipment *outside* of the Eastern Lines to the D&RGW. To the extent that the employee statements can be read to state that they may have moved equipment outside the Eastern Lines boundaries, that level of proof is insufficient to negate the Carrier's assertion that such has not been done. But the burden is on the Organization. Based on what is before us in this record, we cannot find that burden has been met.

Fourth, Article 22 does not change the result. That provision states:

ARTICLE 22

HEAVY DUTY TRUCKS

SECTION 1 - When heavy duty trucks assigned to the Roadway Machine Department are regularly used to transport material, roadway equipment, or to handle material for maintenance of way gangs in performance of their work, such trucks will be operated by Roadway Machine Operators, and the position of truck operator will be established and will carry the rate as shown in rate schedule for heavy duty truck.

Here there is no sufficient factual showing made by the Organization that the Carrier's "... heavy duty trucks assigned to the Roadway Machine Department are regularly used to transport ... equipment ..." from the Eastern Lines to the D&RGW.

Fifth, *Third Division Awards 31679* and *32791* also do not change the result. Those awards do address the hauling of equipment and conclude that notice of contracting out

was required. However, those awards (which involved disputes concerning hauling equipment between Houston and Kirby, Texas and Houston and El Paso, Texas) do not discuss the issue presented here concerning the hauling of equipment *outside of the Eastern Lines.*

In sum then, there is just not enough evidence for us to conclude that the transportation of equipment from the Eastern Lines to the D&RGW was "... work within the scope of the applicable schedule agreement ..." under Article 36 so as to have required the Carrier to give advance notice prior to contracting out such work. At best, the record is in conflict. A record in conflict is insufficient to meet the Organization's burden. For that reason, this claim shall be denied.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: May 2, 2002