AWARD NO. 20
CASE NO. 20

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 remove vegetation, excavate, remove sand, grade, compact base material, apply dust control agent and remove a concrete ramp at the Alfalfa Yard Intermodal Facility at El Paso, Texas beginning April 28, 1996 and continuing (System File MW-97-18/BMW 97-56 SPE).

2. The Agreement was further violated when the Carrier failed 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 reduce the incidence of contracting and to rent or lease equipment if necessary to perform this work.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Track Foreman T. L. Travieso, Machine Operators J. B. Causey, A. A. Esperza, A. Cordero, R. W. Crim, L. R. Wiesman, L. E. Ritchie, Track Laborers E. Salas and A. Q. Giner shall each be allowed an equal proportionate share of the total number of man-hours worked at their straight time and time and one-half rates of pay beginning August 28, 1996 and continuing.

OPINION OF BOARD

By notice dated February 29, 1996, the Carrier advised the Organization that it was going to utilize a contractor to scarify, reapply a dust retarding agent, recompact approximately 180,000 square yards, overlay approximately 10,000 square yards of roadway area with asphalt and make certain draining improvements to the Alfalfa Yard Intermodal Facility. By notice dated August 23, 1996, the Carrier further advised the Organization that it was

going to construct a 3,600 lineal foot track along the north property line of the Alfalfa Yard Intermodal Facility which required stripping and disposal of approximately one acre of vegetation, excavating and disposing of approximately 10,000 cubic yards of sand, importing, grading and compacting approximately 20,000 tons of aggregate base, applying dust control agent and demolishing and disposing of an existing concrete ramp. The Carrier further stated in its August 23, 1996 letter that Carrier forces will be utilized for the track construction, but contractor forces may be utilized to assist in the handling of prefabricated track panels. Further, because of and asserted need for specialized equipment and expertise for the dust retarding work, the Carrier notified the Organization that it would use a contractor to perform that work as well.

This claim followed.

In its November 20, 1996 denial, the Carrier asserted:

* * *

> Review of this claim indicated that notice of the Carrier's intent to contract this work was provided to the General Chairman in compliance with the provisions of the Agreement. Furthermore, this type of work has historically been performed by contracted forces and is not the normal work of MofW employees. Accordingly, your claim is respectfully denied.

The claim lacks merit.

First, as shown by the record, on February 29 and August 23, 1996, notice was given to the Organization of the Carrier's intent to contract out the disputed work. The Carrier's notice obligations under Article 36 have therefore been met.

Second, for reasons fully discussed in *Awards 9* and *11* of this Board, we find the Carrier's exclusivity argument unpersuasive. However, even though exclusivity need not be demonstrated by the Organization, Article 36 further states that "[n]othing in this Article shall affect the existing rights of either party in connection with contracting out." In this case, on the property in its November 20, 1996 denial and in a similar statement proffered by Division Engineer D. E. Smith, the Carrier *very specifically* stated "... this type of work has historically been performed by contracted forces ...." That assertion has not been refuted by the Organization.[1]

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[1] *See also, Third Division Award 30780* which involved a dispute over the contracting of similar work, where it was found "Carrier offered evidence in handling on the property of no fewer than ten prior occasions dating from 1968 through 1980 when *[footnote continued]*

Third, with respect to the December 11, 1981 letter which obligates the Carrier to "... 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", given the Carrier's showing in this case that this kind of work has been contracted out in the past, the Organization must do more than merely state that the Carrier did not meet its obligations. In these circumstances, and given that the Carrier has also advised the Organization that certain specialized equipment is necessary, there must be some kind of affirmative and specific showing by the Organization that such rental or lease equipment was available and adequate for the work. The Organization has not done so. Here, the Organization merely stated in its December 16, 1996 letter that "... furthermore this equipment can be rented or leased." In this case, particularly where the Carrier has shown that it has contracted out this work in the past, that is not enough.

As we have stated before, we can only decide these cases on the basis of the individual records developed by the parties in each case. Under the circumstances and based on this record, the Organization has not met its burden. The Organization's other arguments do not change the result.

The claim shall be denied.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 7-24-02

[continuation of footnote]
'dirt work' of the type in dispute was contracted out following notice and conference."