AWARD NO. 21
CASE NO. 21

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 (U.S. Fence and Gate Company) to install a chain link fence in the vicinity of Mile Post 171.7 at the Lake Charles, Louisiana Yard on July 22 through August 28, 1996 (System File MW-97-12/BMW 97-50 SPE).

2. As a consequence of the violation referred to in Parts (1) above, B&B Foreman A. J. Dalfrey, Assistant Foreman J. B. Marcantel, Carpenters L. Huval, D. P. Barras and Machine Operator H. G. Oliver shall each be allowed two hundred sixteen hours at their respective straight time rates.

OPINION OF BOARD

By notice dated June 27, 1996, the Carrier advised the Organization of its intent to contract out the installation of a fence at Lake Charles, Louisiana:

> The Engineering Department advises that there have been several recent instances wherein transients have gained access to Company property at Lake Charles, Louisiana (M.P.171.7). One incident resulted in a stabbing, another was a near fatal shooting. Several less serious incidents have occurred. Pedestrian traffic across Company property, where the Company is constantly switching and moving trains, is unusually high. The construction of an overpass at Shattuck Street was undertaken to alleviate an at-grade crossing and provide for pedestrian traffic — however, the overpass has not eliminated the safety problem of transients gaining access to Company property.
>
> In view of the serious security problems which affect the safety of Company employees as well as the security of Company property, the Company has determined it is essential to utilize a Contractor to install a chain link fence at Lake Charles as follows:
>
> * * *
>
> B&B Department does not have sufficient forces to install the above fence consistent with the urgency of it's [sic] need. Moreover, B&B forces are fully employed in the Lake Charles area.

* * *

Conference was held. The Carrier contracted the work. This claim followed.

In its November 13, 1996 denial from Engineer B. L. Reinhardt, the Carrier asserted:

* * *

> Review of this claim indicated there was no agreement violation by carrier. Notification No. 96-15, dated June 27, 1996, was sent to General Chairman Lewis with Carrier's intention of contracting out said work. Accordingly, your claim is respectfully denied.

Further denial by Carrier dated March 6, 1997 pointed out that Claimants were on duty on the dates covered by the claim and further stated:

* * *

> After making an investigation into his matter, Carrier's position is correctly stated in Mr. B. L. Reinhardt decision of November 13, 1996.

* * *

With respect to the Carrier's exclusivity argument, in *Award 11* of this Board we stated the following:

> 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].

As in *Award 11*, there can be little real dispute that the contracted work was work "within the scope" of the Agreement. The disputed work — construction of a fence — 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.

With respect to the reasons for contracting out the work, as we stated in *Award 11*:

> 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 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.
>
> * * *

Here, in its June 27, 1996 notice, the Carrier asserted that the contracting of the fence work was necessary because "... of the serious security problems ..." and "... the urgency of it's [sic] need." In this case, that is not enough.

It has long been held that "emergency" conditions — *i.e.*, "... an unforeseen combination of circumstances that calls for immediate action" — excuse a carrier from its contractual obligations.[1] However, "urgency" does not equate with "emergency".[2] We can assume that many, if not most projects undertaken by carriers have an element of "urgency". But, if an "urgency" is allowed to excuse the Carrier from its contractual obligations, then the exception would become the rule and the Carrier could claim in most cases that its urgent need to perform a project excuses it from its contractual obligations.[3] Urgent

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[1] *See Third Division Award 35529* where it was stated:

> Sixth, with respect to emergencies, "... in emergency situations the Carrier has latitude to use its discretion in the assignment of forces." Third Division Award 32420 and Awards cited therein. However, when the Carrier claims the existence of an emergency, it "... bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees." Third Division Award 32419. That burden is for the Carrier to demonstrate the existence of "... an unforeseen combination of circumstances that calls for immediate action." ...

[footnote continued]

[continuation of footnote]

For an example of a found emergency, *see Third Division Award 31036* between the parties:

> We are satisfied that when the work commenced on June 20, 1990, the Carrier was faced with an emergency thereby excusing the Carrier from its notice obligations for that emergency. The record shows that at the time the work began, the situation was unstable, the structure was damaged and the conditions were such that there were heavy rains, flooding and slides.

[2] "Urgent" is defined as "... imperative; pressing ...." *The Random House Dictionary of the English Language* (2nd ed.).

[3] *See Third Division Award 31030* between the parties:

> Taken to its logical extent, the failure to maintain any structure or piece of equipment could have potentially dangerous ramifications and every maintenance function would become an emergency. The exception carved out for emergencies in Rule 52 would then swallow up the rule. We must find that no emergency existed.

conditions therefore do not excuse the Carrier from its obligations.[4]

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.[5]

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: 7-24-02

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[4] We have considered *Third Division Award 29204* cited by the Carrier and cannot follow that result. There, it was held:

* * *

> In the final analysis, Carrier concluded that since this was a large project, there was a certain urgency in getting it completed, and current forces were elsewhere employed, it was necessary to utilize outside forces. Under all of the circumstances present here, this Board cannot dispute that decision.

First, that dispute came off a different property (Conrail). Second, if that rationale became the basis for deciding the disputes on this property, then, as discussed, the contract language would be rendered meaningless. The better reasoned authority is that only an "emergency" — not an "urgency" — excuses a carrier from its contractual obligations. We choose to follow that authority.

[5] In light of the result, the Organization's other arguments are therefore moot.