AWARD NO. 23
CASE NO. 23

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 employe of an outside contractor (Pat Baker Contracting Company) to remove vegetation, grade and build a diesel storage facility at San Antonio, Texas beginning September 16, 1996 and continuing (System File MW-97-31/BMW 97-72 SPE).

2. The Carrier further violated the December 11, 1981 Letter of Agreement when it failed to make a good-faith effort to reduce the incidence of outside contracting and to increase the use of its Maintenance of Way forces.

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Track Foreman C. R. Lohse, Track Laborer E. L. Rodriguez, Machine Operators J. E. Hasty, J. Salaiz, D. B. Wells, F. A. Hasty, K Magirl and M. F. Lieffler shall each be compensated at their respective straight time and time and one-half rates of pay for an equal proportionate share of the total number of man-hours expended by the outside contractor in the performance of the work in question beginning September 16, 1996 and continuing.

OPINION OF BOARD

By notice dated August 26, 1996, the Carrier advised the Organization of its intent to contract out certain work as follows:

* * *

> Presently at San Antonio, Texas, locomotive diesel fuel is loaded into tank cars directly from tanker trucks at an uncontained area. The Company's plans in this regard are to construct a railroad tank car loading facility utilizing an existing fuel storage tank. Two (2) diesel fuel loading tracks along with a fueling platform and spill containment system will be constructed.
>
> In connection with the above, it is the Company's intent to utilize a contractor(s) to perform the following work:
>
> Strip and dispose of vegetation (approx. 2 acres); scarify; grade

> area to drain; re-compact and lime stabilize as required; import, grade and compact approximately 1,000 tons of aggregate base; rebuild the existing asphalt roadway and approaches to new tracks utilizing approximately 100 tons of asphalt; pour concrete footings for prefabricated overhead fuel track/walkway; assist Company forces in the handling of prefabricated track material.
>
> Company forces will be utilized in constructing the two (2) diesel fuel loading tracks, installing the prefabricated overhead fuel track/walkway platform and installing the spill containment system.

* * *

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

In its appeals, the Organization maintained that maintenance of way employees "... performed this exact type of work along with a carrier owned equipment in the past ... [t]he Carrier has their own machinery and no special equipment is necessary to do the work ... B&B employees recently completed with other Carrier maintenance of Way employees a diesel fueling facility at El Paso, Texas without contractor forces ... this work has historically and traditionally been done by Maintenance of Way Employees."

In its December 12, 1996 denial from Engineer B. L. Reinhardt, the Carrier stated:

* * *

> Review of Carrier records indicates that on the dates in question, all employes mentioned above were working and were being utilized in conjunction with the contractor to perform work at Kirby Yard. The appropriate notice was filed with the Organization regarding the work mentioned. There was no loss of time or job opportunity for these employes.
>
> For reasons stated above, claim as presented, is, therefore, denied in its entirely.

The Carrier further denied the Organization's appeals by letter dated March 12, 1997:

> There is no basis for compensating Claimants "forty (40) hours of overtime. Arbitration Awards have consistently held that payment at the punitive rate is only for work actually performed.
>
> Without prejudice to above, after making an investigation into this matter, Carrier's position is correctly stated in Mr. B. L. Reinhardt decision of December 12, 1996.
>
> For your ready reference attached is a copy of statement from Division Engineer D. W. Morrow who has knowledge of this claim.
>
> Per the attached "Daily Activity (DAR) Report", Claimants were on duty and were compensated for service performed on claimed dates, therefore, they were not available on dates claimed.

* * *

A statement from Division Engineer D. W. Morrow added the following:

* * *

> A review of our records indicates that on the dates in question all employes mentioned above were working and were being utilized in conjunction with the contractor to perform work at Kirby Yard. The appropriate notice was filed with the Organization regarding the work mentioned. There was no lost [sic] of time or job opportunity for these employes. It is for the reasons stated above that I feel that this claim lack [sic] merit and no violation of agreements exists, therefore it should be denied in it's [sic] entirety.

* * *

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 — described in the claim — 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 August 26, 1996 notice.

2. The Carrier's December 12, 1996 denial of the claim stating "all employes mentioned above were working and were being utilized in conjunction with the contractor to perform work at Kirby Yard. The appropriate notice was filed with the Organization regarding the work mentioned. There was no loss of time or job opportunity for these employes."

3. The Carrier's March 12, 1997 letter asserting that there was no basis for compensating Claimants' overtime requests; the December 12, 1996 denial corrected stated the Carrier's decision; also providing the DAR reports showing Claimants were working on the dates set forth in the claim.

> 4. The statement of Division Engineer Morrow stating that "... all employees mentioned above were working and were being utilized in conjunction with the contractor to perform work at Kirby Yard. The appropriate notice was filed with the Organization regarding the work mentioned. There was no lost [sic] of time or job opportunity for these employes. It is for the reasons stated above that I feel that this claim lack [sic] merit and n violation of agreements exists, therefore it should be denied in it's [sic] entirety."

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.

* * *

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 requested relief; and a defense which states that notice was given and the employees were working.

As found in *Award 11* of this Board:

> ... [T]o 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.

See also, Third Division Award 30182 ("... [O]ther than argument, the Carrier offered no evidence of justification at all in the on-property handling of the dispute.").

With respect to the remedy, 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.

Make whole relief shall therefore be required.[1]

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: 9-24-02

[1] 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.