AWARD NO. 28
CASE NO. 28

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 outside forces (Berry Brothers Company) to perform Bridge and Building and Roadway Machine Sub-department work (unload and handle materials) at Mile Post 80.05, Burwick, Louisiana on December 16, 1996 (System File MW-97-82/1048344 SPE).

2. The Agreement was violated when the Carrier assigned outside forces (Alpha Railroad and Piling, Inc.) to perform Bridge and Building and Roadway Machine Sub-department work (make repairs, remove and replace bridge ties) on the drawbridge and Burwick, Louisiana on December 19, 20, 21, 22 and 23, 1996 (System File MW-97-81/1048343).

3. The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the work described in Parts (1) and (2) above in accordance with Article 36.

4. As a consequence of the violations referred to in Parts (1) and/or (3) above, Messrs. A. J. Dalfrey, F. S. Scarborough and H. G. Olivier shall each be allowed eight (8) hours' pay at their respective straight time rates.

5. As a consequence of the violations referred to in Parts (2) and/or (3) above, Messrs. A. J. Dalfrey, R. Alex, L. Huval, D. P. Barras, M. J. Boney, H. G. Olivier, R. W. Leger and M. E. Hanks shall each be allowed forty (40) hours' pay at their respective straight time rates and fifteen (15) hours' pay at their respective time and one-half rates.

OPINION OF BOARD

This is a contracting out dispute.

On December 16, 1996, employees of Berry Brothers Company unloaded, handled and stacked bridge ties at the drawbridge at M.P. 80.05 on the Burwick and Morgan City,

Louisiana sides of the bridge. On various days following in December, 1996, Alpha Railroad and Piling, Inc. made repairs and removed and replaced bridge ties at that drawbridge.

The Carrier did not give the Organization prior notice for the contracting out of this work.

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.

The work involved is "... work within the scope of the applicable schedule agreement ...." The described work is classic maintenance of way work. "... [E]xclusivity is not a necessary element to be demonstrated by the Organization in contracting claims." *Third Division Award 32862* and awards cited therein.

Therefore, the Carrier was obligated under Article 36 ("shall notify") to give the Organization prior notice of the subcontracting of the work involved in this dispute. The Carrier did not do so. 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*. A violation of Article 36 has been shown.

No reasons for excusing the required notification have been demonstrated.[1]

With respect to the remedy, as a result of the demonstrated violation Claimants lost potential work opportunities. In such cases, make whole relief has been required, irrespective of whether the employees seeking relief were working. *Award 32862, supra:*

> ... The record shows that Claimants worked at the site at the time the contractor's forces were present. The Carrier argues that granting relief to Claimants who were employed at the site is unfair. That argument is not persuasive so as to change the result. The remedy in this case seeks to restore lost work opportunities. It may well be that Claimants could have performed the contracted work (or the work they actually performed) on an overtime basis or could have resulted in more covered employees being called in to work on the project. Indeed, had the Carrier given notice, those questions could have been the subject for discussion in conference between the parties. On balance, having failed to give the required notice, the Carrier cannot now argue that the result is unfair.
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> From the handling of the hundreds of claims presented to this Board between the parties on the issue of contracting work, we are also cognizant that the notice, objection by the Organization and conference procedure often is a pro forma exercise which ends up in a literal battle of word processors and copy machines as the parties posture themselves on the issues and put together the voluminous records in these cases. Our function is not to make certain that the process is a meaningful one—that is the obligation of the parties. Our function is to enforce the language the parties agreed upon. The Carrier's course of action now is a straight forward one—simply give notice where the work arguably falls "within the scope of the applicable schedule agreement". If it does so, the Carrier will not be faced with the kind of remedy imposed in this case because it failed to give notice.

The claim shall be sustained. Claimants shall be compensated in accord with the Agreement provisions based upon the number of hours worked by the contractors' forces. The matter is remanded to the parties to determine the amount of relief Claimants shall receive.

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[1] The Carrier initially argued that as of December 12, 1996, the property involved in this dispute transferred to the jurisdiction of the BNSF Railroad as part of the UP/SP merger "and any work perform[ed] at that location is no longer the responsibility of the UP/SP Railroad." However, the required notice for the transfer did not occur until March 21, 1997:

> Pursuant to Section 1 of the Agreement dated December 11, 1996, between the Union Pacific Railroad Company and the Brotherhood of Maintenance of Way Employes pertaining to the sale of the SP line between Iowa Junction, Louisiana and Avondale, Louisiana, to the Burlington Northern Santa Fe (BNSF), please accept this notice that, at the expiration of (15) days from the date of this notice, all work performed by BMWE employees on the aforementioned lines will be transferred to the BNSF. Thereafter, the BMWE collective bargaining agreement will cease to apply to all such work.

The Carrier had control over the property at the time this dispute arose.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Dated: May 2, 2002