

AWARD NO. 31
CASE NO. 31

PUBLIC LAW BOARD NO. 6249

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) 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 to prepare forms for pouring and poured a concrete slab for the Car Department and used a crane to move material used in the construction of a metal building on December 9, 1996 through January 10, 1997 in the vicinity of Lower Yard, Eagle Pass, Texas (System File MW-97-102/1050711).

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice and failed to conference same in accordance with Article 36 and the December 11, 1981 Letter of Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above:

... B&B Foreman, Mr. R. Diaz, SS# 528-48-1855, seniority date of 9-10-73

and Mr. A. Diaz, SS# 472-56-2321, seniority date of 03-12-73, Assistant B&B Foreman Mr. E. Silva, SS# 460-92-7260, seniority date of 08-17-87, Mr. S. Resendez Jr., SS# 455-53-5869, seniority date of 07-23-84, Carpenter First Class, Mr. A. Lira, SS# 450-60-6649, seniority date of 02-16-70, and Mr. F. R. Gonzales, SS# 566-50-8932, seniority date of 06-18-83, Mr. F. Rodriguez, SS# 458-60-0930, seniority date of 09-18-63, Mr. L. M. Lara, SS# 449-70-7746, seniority date of 10-25-71, Mr. R. Colmenero Jr., SS# 466-80-9406, seniority date of 08-20-73, Mr. J. D. Ebner, SS# 467-11-2856, seniority date of 09-10-79, Mr. M. W. Woytasczyk, SS# 461-06-4148, seniority date of 08-07-78, Mr. H. M. Martinez, SS# 499-88-6367, seniority date of 06-29-76, Mr. J. R. Chavarria, SS# 346-44-9213, seniority date of 11-27-95, Mr. J. O. Fuentes, SS# 460-80-7484 seniority date of 07-09-79, Mr. V. S. Sanchez, SS# 461-68-9076, seniority date of 12-10-69,

and Machine Operator Mr. R. Cooper, SS# 451-04-9738, seniority date of 07-01-74, Mr. A. C. Silva SS# 585-01-0565, seniority date of 07-14-72 for an equal portion share of the total man hours worked on December 9, 1996 thru January 10, 1997 for Two hundred (200) hours straight time and one hundred twenty eight (128) hours of overtime rate of pay each.

OPINION OF BOARD

Without prior notice to the Organization, the Carrier used outside forces to prepare forms, pour a concrete slab and complete the final assembly of a prefabricated steel building the vicinity of Lower Yard in Eagle Pass, Texas.

We have previously addressed the issues raised in this dispute. See *Award 28* of this Board. However, because of the magnitude of what's involved, the rationale requires repeating.

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 in dispute is "... work within the scope of the applicable schedule agreement" Statements from the employees show that they have regularly performed this kind of work in the past. See also, *Third Division Award 32321* (sustaining a claim over the Carrier's failure to give notice concerning the contracting of similar work).

The fact that the employees may not have exclusively performed the does not change the result. "... [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*. See also, *Award 32321, supra* ("If the Carrier makes no attempt to notify the General Chairman and hold a good faith conference as envisioned by Article 36, the Organization does not have the contractually protected ability to participate as is obviously contemplated by the Agreement."). A violation of Article 36 has been shown.

No reasons for excusing the required notification have been demonstrated.

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.

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.

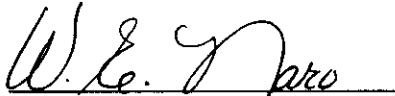
The claim shall be sustained. Claimants shall be compensated in accord with the Agreement provisions based upon the number of hours worked by the contractor's forces. The matter is remanded to the parties to determine the amount of relief Claimants shall receive.

AWARD

Claim sustained in accord with the opinion.



Edwin H. Benn
Neutral Member



Carrier Member



Organization Member

Dated: 7-15-02