AWARD NO. 2
NMB CASE NO. 2
UNION CASE NO. MW-99-3 TM
COMPANY CASE NO. EP99-72

PUBLIC LAW BOARD NO. 6545

PARTIES TO THE DISPUTE:

THE TEXAS MEXICAN RAILWAY COMPANY, INC.

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim the System Committee of the Brotherhood that:

(1) 1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (install ties) in the vicinity of Mile Post 43 between Hebronville,, Texas and Laredo, Texas beginning June 7, 1999 through July 30, 199 (System File MW-99-3-TM).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper notice of its intent to contract out the work in question and failed to exert a good faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in either Parts (1), (2) and/or (2 above, Claimants E. Lara, J. P. Lopez, T. Vasquez, V. Moncivais, A. Garcia, J. Sciaraffa, J. Martinez, R. Garza, E. Ellizalde, J. Rodriguez, R. Couling, M. Paz and J. Garcia shall each be compensated for three hundred twenty (320) hours' pay at their respective straight time rates of pay and each shall be compensated for eighty (80) hours' pay at their respective time and one-half rates of pay.

[The above statement of claim is quoted from the Organization's notice of intent to file with the Third Division of the NRAB in this matter, which subsequently was withdrawn from the NRAB and placed before this Board].

Public Law Board 6545,upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

Parties to said dispute exercised the right to appearance at hearing thereon.

OPINION OF BOARD:

Trackmen and Track Foremen employed by The Texas-Mexican Railway Company, Inc. ("Carrier") are subject to the terms of the Collective Bargaining Agreement between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Pertinent to this case, Rules 1 Scope and 29 Contracting Out read as follows:

Rule 1-Scope

(a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all sub-departments of the Maintenance of Way and Structures Department and such employes shall perform all work in the Maintenance of Way and Structures Department, except as specifically excluded in Paragraph (b) herein; except in emergency cases when Bridge and Building Forces are not available track forces or forces from other departments will not be used to perform work in the Bridge and Building Department nor will Bridge and Building Department forces or forces from other departments be used in doing the work of track forces except in emergency and not then if track forces are available.
(b) These provisions shall not apply to the following:
(1) Officials commonly recognized as such. (2) Clerical and engineering forces. (3) Signal, telegraph and telephone employees.

* * * * * *

Rule 29 - Contracting Out

When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the repair forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out such work. The carrier and organization representatives shall make a good faith attempt to reach an understanding on the contracting out of the work to be performed. In event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter or modify any provisions of the Scope rule or any rules of the applicable agreement in the handling of such matters.

By letter dated March 17, 199, August 7, 1998, Carrier served notice upon the Organization's General Chairman, as follows:

> This is to advise you of a certain track-related project that will be performed by, and under the direction of, an insurance company.
>
> M.P. 42 Replace main line ties destroyed as the result of a derailment
>
> This work is being performed under the direction of an insurance company as the result of a derailment in the vicinity of M.P. 42. It is the responsibility of the insurance company to repair the damage caused by the derailment. The insurance company has chosen to provide their own means of repairing the damage caused.
>
> Although it is the Tex Mex' position that this type work being done by individuals other than Tex Mex employees does not fall under Rule 29, and in addition, that no notice is required under Rule 29, this letter is to notify the Organization that the work will be done and that the insurance company is making the arrangements.
>
> Should the Organization desire a conference in connection with this track related project being done with individuals other than employees of the Tex Mex, I suggest that we discuss this issue on the first date you have available for conference.

Following a conference at which the Organization claimed the work and the Carrier insisted the work was beyond its dominion and control, the insurance company solicited bids for the repair of the damage caused by the derailment, Railroad Contractors submitted the winning bid and proceeded to perform the disputed work for which the insurance company eventually paid the bill. The Organization filed a timely claim of Scope Rule violation which was properly denied at all levels of handling until appeal to determination by this Board.

The record in this case persuades the Board that Carrier's affirmative defense, which was advanced at the outset and at every stage of handling of the dispute, was persuasively established and not effectively challenged or refuted in handling on the property. Thus, the record supports the conclusions that (1) the insurance carrier required the use of a contractor to perform the work, (2) the insurance company (not the railroad Carrier) solicited the bids for performance of the work, and

(3) the successful bid was awarded by the insurance carrier.

Based upon the unique facts of the NRAB Third record before us in the instant case and without precedent or prejudice in other arguably similar cases, we are persuaded that Third Division Award No. 35634, and cases cited therein, support our decision to deny the instant claim:

> The Board has recognized in numerous prior Awards that the Carrier is generally not liable for contracting out where the work is totally unrelated to railroad operations, or where the work is undertaken at the sole expense of the other party and is for the ultimate benefit of others, or where the Carrier has no control over the work for reasons unrelated to having contracted out the work.

See also Third Division Awards 33936, 32319, 28941 and 26212.

AWARD

Claim denied.

Dana Edward Eischen, Chairman

Union Member

Company Member