

PUBLIC LAW BOARD NO. 6596

Case No. 1

Award No. 1

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work of stabilizing the side walls, install rock bolts, remove rock and fill material, blast rock at the Big Cut and shotcrete the walls of the Potash Tunnel between Mile Posts WAE 22 and WAE 24 and Mile Posts WAE 28 and WAE 30 beginning May 20, 1996 and continuing (System File D-96-11C/BMW 96-245).**
- (2) As a consequence of the violations referred to in Part (1) above, Claimants M. McCoy, D. P. Overhold, W. B. Bergamo, L. K. Cady, G. W. Wallace, D. L. Drake, B. C. Murray, O. R. Ratliff and F. D. Ward shall each be allowed ‘ . . . an equal and proportionate share of all straight time hours worked by the contractor’s employees (at his respective straight time rate of pay) and that they be compensated at the time and one-half rate of pay for hours worked outside of regular assigned hours by the contractor’s employees.’”**

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

This dispute revolves around the Carrier’s contracting out of the work of placing track back into service at the Cane Creek Branch, the Potash Line, near Moab, Utah. It had been out of service due to rock fall problems. The Carrier notified the Organization on May 1, 1996 of its intent to contract out the work due to its size and the

required specialized techniques, equipment and expertise. The Organization disagreed. It maintained that the work belonged to the employees and was protected by the Scope Rule. It argued that it was not an extensive job and that the employees had the ability and expertise to perform the work.

The Carrier's primary argument and evidence for the work were presented by its Director of Construction. He stated in pertinent part that:

Approximately 8,710 cubic yards of rock and material is to be scaled, 1,600 linear feet of 12 foot each rock bolts installed, and 8,300 square feet of slopes to be in turn shotcreted. The prying of the rock from the face [sic] of the cut areas, scaling, the drilling and placement of the rock bolts, and possible blasting all requires specialized techniques, equipment and expertise.

Subsequent to the stabilization of the cut, approximately 20,000 cubic feet of material either sided, or that which has already fell toward the track section is to be removed, and drainage reestablished.

In addition to the soft shale sidewells at the cut to be shotcreted, thus erosion reduced, plan to apply shotcrete to approximately 400 feet of the wells of the Potash Tunnel.

The Carrier supported its position on the property with a report from the Director of Construction noting that the project requires "working from ropes . . ." which he considered "extremely dangerous" due to its height of more than 125 feet, and that "the company does not have forces in this seniority district qualified to perform the blasting, . . ." and "does not have machine operators available to perform this work on this scale." In denying the claim, the Division Engineer had stated the same and maintained that the "Company forces have not done anything of this magnitude . . ."

The Organization denied the Carrier's position indicating that a review of the project detailed that while the work was protected to the Rock Subdepartment, the outside contractor only used two men to do all the scaling and blasting work. It further pointed out that the Scope Rule reserved the work of removing debris to the Equipment Operators Subdepartment and yet, the outside contractor was using four machines; two dozers, one front end loader and a backhoe. The project shotcrete work belonged to the Bridge and Building Subdepartment and not outside forces. In short, the Claimants

were “qualified and available and have customarily and historically performed the claimed work . . . ”

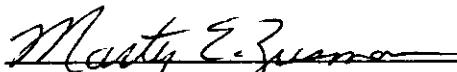
In support of its position, the Organization produced a large number of supporting statements and noted that the rock gang has drilled holes, is experienced in blasting and could have performed the work. It noted that in a 1993 Notice of Intent for loading and hauling debris out of the “Big Cut,” the Organization had prevailed. The Board notes no discussion on the property of failure to fully conference and it is therefore not properly before us for consideration.

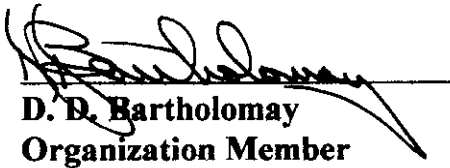
On the basis of the Scope Rule and the evidence of record, the Board must conclude that this type of work has been performed by the employees in the past. The issue therefore falls to consideration of whether the size and expertise preclude performance. Our review finds that all of the employees were fully employed at the time of the instant claim. Further, there is no evidence that the Carrier had “qualified” forces in the seniority district to perform the work. Even though only two contractor’s employees performed the scaling and blasting, we find no proof that the Carrier had employees who had the expertise to safely perform the work.


A review of the Organization’s evidence does not persuade this Board that the Carrier violated the Agreement in its contracting out of the work disputed. Even the Claimant’s statement notes that due “to force reduction the ability of the rock gang is limited to the size of the project we can handle.” No where does the Organization provide probative evidence that its employees had the expertise to do this instant work or could handle the size of the project disputed. The Organization is the moving party and must demonstrate that the Claimants can work from 125 feet on ropes and perform this type of blasting. The Organization must prove that the employees in this seniority district have performed work “on this scale” and “of this magnitude” and that both the “expertise” exists and the “equipment” can be made available with skilled personnel to perform the work. The Carrier said the employees were not qualified to handle this size of a project and have never “done anything of this magnitude . . . ” The Organization did not agree, stating that “much of the work . . . could have or should have been done” by the employees. However, the burden of proof is on the Organization to prove that point. It did not do so and therefore, the claim must be denied.

AWARD:

Claim denied.


Marty E. Zusman, Chairman
Neutral Member


D. D. Bartholomay
Organization Member


D. A. Ring
Carrier Member

Date: 6/30/03