PUBLIC LAW BOARD NO. 5567

AWARD NO. 6
NMB CASE NO. 6
UNION CASE NO. M-52-7125/7129
COMPANY CASE NO. 860225

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

- and -

UNION PACIFIC RAILROAD COMPANY (Former
Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces to perform repair work on concrete piers in the vicinity of Sulphur Springs, Missouri at Mile Post 23 from August 4 through 8, 1986 and in the vicinity of Annapolis, Missouri at Bridge 109.3 from August 11 through 16, 1986.

2. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

3. As a consequence of the violations referred to in Part (1) and/or (2) above, furloughed B&B Mechanics C. L. Weidenbenner, H.V. Cox, J. F. Adams and R. C. Siebert shall each be allowed eighty (80) hours of pay at the B&B Mechanics straight time rate and eight (8) hours of pay at the B&B Mechanic's time and one-half overtime rate."

OPINION OF BOARD:

Claimants have established and hold seniority as B&B Mechanics and were regularly assigned to B&B Gang 2045, headquartered at Steeleville, Illinois. On July 28, 1986, Claimants were furloughed as a result of force reductions.

The following facts are not in dispute. On August 4 through 8, 1986, an outside contractor (Chris Construction Company) retained by Carrier performed repair work on concrete piers in the vicinity of Sulfur Springs, Missouri on the DeSoto Division. On August 11 through 16, Carrier assigned the same outside contractor to perform similar pier repair work on a bridge in the vicinity of Annapolis, Missouri. Four (4) Chris Construction Company employees performed the work which required a total of three hundred fifty-two (352) hours to complete.

On September 9, 1986, the Assistant General Chairman submitted a claim asserting:

> "...Claimants were furloughed and had filed their names and addresses in line with rule 2(J) for recall. They have not waived their rights to work temporary or extra under rule 2(K). They were familiar with the work performed by the contractors and were available for said work but since Carrier neglected to recall them for same it caused 'a loss of work opportunity' for claimants.'
>
> It is our contention that certain rules of our current working agreement have been violated, especially Scope, Seniority Datum Rule (1), Seniority Rights Rule (2), Work Week Rule (14), the National Agreement of May 17, 1968, Article IV, in that Carrier failed to notify General Chairman of its intentions

> to contract out work, and the December 11, 1981 'good faith' letter from C. I. Hopkins, Jr. to reduce incidents of contracting our of MofW work."

In denying the claim, Carrier's Regional Engineer conceded that advance notice and opportunity to consult had not been provided, but asserted that this was an unintentional "oversight" and "insignificant" because the work in question was "not Scope-covered". Carrier also asserted that the work was performed with specialized expensive equipment which the employees lacked qualifications to operate and which Carrier could not justify purchasing for infrequent use.

The Organization reply to Carrier's denial contended that:

> "High pressure grouting is simply the latest step in the evolution of processes (grout, granite, shotcrete) used to repair concrete. It is applied with a pump in much the same way as the formerly used materials and takes no special skills or equipment that would be unavailable to the Carrier. There is absolutely no reason why the Carrier's B&B forces could not have performed this work if the Carrier had made a good-faith effort to assign them thereto as contemplated by the December 11, 1981 Letter of Agreement. The requirement to 'assert good-faith efforts to reduce the incidents of subcontracting and increase the use of their maintenance of way forces to the extent practicable' clearly devolved upon the Carrier and the Carrier failed to show that it make any effort whatsoever to meet its obligation. If the Carrier had made such an effort, the Carrier would have found that the application of epoxy requires no special expertise.

In that connection, the General Chairman supplied copies of correspondence from Abatron, Inc., in which the manufacturer

stated: "No special expertise is required to use ABO-JET." The attachment further stated: "...Can be used without costly injection, compression or other molding equipment. For Crack-injection use blend is poured into an air driven caulking gun cartridge, which is placed into an air-driven caulking gun, spray gun types are also used." The General Chairman went on to contend that the cost of the aforementioned equipment "is nil compared to $100,00.00 as alleged."

Further, the General Chairman submitted:

> "As for your statement that all Claimants in this claim were fully employed throughout the claim period and suffered no monetary loss, I must disagree. Claimants were assigned to B&B Gang 2045, and the gang was cut off on July 28, 1987. Claimants filed their names and addresses for recall per Rule 2(j), and did not waive rights to work temporary or extra work under Rule 2(k) of the current working Agreement. You have not shown me any records to prove the claimants were working."

Finally, the Organization submitted numerous statements from their members attesting to the fact that they had performed such concrete bridge repair work in the past.

As this and innumerable prior boards of arbitration have held, the Scope Rule under construction is considered to be "general" in nature because it does not expressly describe and reserve the disputed work to Agreement-covered employees to the exclusion of all others. To that extent, custom, practice and tradition of work performance take on greater significance. Close review of the record evidence demonstrates a "mixed

practice" of performance of this concrete bridge repair work both by Agreement-covered employees and subcontractors. This is insufficient to make out an independent violation of the Scope Rule in the instant case. However, for purposes of Article IV of the May 17, 1968 National Agreement, that history is sufficient to trigger Carrier's responsibility to give notice and opportunity to consult to the BMWE General Chairman in advance of such subcontracting. **See** NRAB Awards 3-27636; 3-29007; 3-29003 and 3-29912. The contrary holding in PLB 4219-8, cited by Carrier, misconstrues the majority line of cases and is just plain wrong on the notice issue.

In this case, Carrier has advanced the affirmative defense of lack of equipment and trained manpower, but those issues of fact are strongly contested and far from definitively proven on this record. Moreover, in addition to the lack of notice, there is no indication that Carrier even attempted to comply with the commitments contained in the December 11, 1981 Letter of Agreement. What the results might have been if the issues of equipment, expense and expertise had been fully explored before subcontracting cannot now be known.

So far as this record shows, the violation of the notice provisions is clearly proven, Claimants were furloughed and unemployed on claim dates, and the time spent by subcontractors employees is not contested. Based upon such a record,

compensatory monetary damages clearly are appropriate. A long history of Organization acquiescence to Carrier subcontracting without notice the particular types of disputed work at isssue in each case underlay the rational of Awards 3-28849, 3-29021 and 3-29792, which declined to award montary damages for proven or admitted notice and consultation violations in "mixed practice" situations. Instead, the Board put Carrier on notice that future such failures to abide by Article IV and the December 11, 1981 letter might well result in monetary damages. However, such acquiescence or condonation is not proven regarding the particular work at issue on the present record. Based upon all of the foregoing, the claim is sustained.

PLB NO. 5567

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AWARD

1) Claim sustained in accordance with the findings.

2) Carrier shall implement this Award within 30 days of its execution by a majority of the Board

Dana Edward Eischen, Chairman
Dated at Ithaca, New York on July 23, 1995

Union Member
Dated at Chicago, IL
on October 29, 1996

Company Member
Dated at Omaha, Nebraska
on October 21, 1996