PUBLIC LAW BOARD NO. 5567

AWARD NO. 2
NMB CASE NO. 2
UNION CASE NO.
COMPANY CASE NO. 890405 MRP

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 Agreement was violated when the Carrier assigned outside forces to perform material hauling work (hauling black top material) in connection with repairing grade crossing on the New Orleans Lower Coast between Mile Post 0 and Mile Post 22 beginning February 3, 1989 and continuing.

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations in Parts (1) and/or (2) above, Trackmen Gabriel and Towle shall each be allowed pay for an equal proportionate share of the total number of man-hours expended by outside forces performing the work in Part (1) above."

OPINION OF BOARD:

On February 3, 1989, Carrier employed an outside contractor (Greene Construction) to haul cold mix asphalt to various road crossing work sites on the Louisiana Division. Two (2) Greene Construction employees worked in conjunction with Carrier Gangs 1649 and 1680 between New Orleans MP 0 - MP 22 on the New Orleans Lower Coast.

On April 3, 1989, the Organization submitted a claim alleging that Carrier had violated Rules 1 and 2 of the Agreement, Article IV of the National Agreement and the December 1981 Berg-Hopkins "Letter of Understanding." According to the General Chairman, Carrier's decision to hire the outside contractor resulted in a "loss of work opportunity (truck driver job) for the Claimants."

Superintendent of Transportation Services responded to the claim submitting:

> " As a result of my investigation into the merit of your claim, your claim for Loss of Work Opportunity is completely unsubstantiated and irrelevant to this case. Contrary to your contentions, the Carrier has customarily and traditionally utilized outside forces to perform the type of work you describe in this case, and we understand that outside forces have historically performed such service without protest from your Organization. Additionally, such work is not covered by the Scope of the Agreement; moreover, even if such work was reserved to employes of your craft, the fact remains that none of the employees involved in this case were actually deprived of a work opportunity.

Based on the above, this claim is respectfully declined in its entirety."

The Organization appealed the Transportation Superintendent's decision contending:

"In the past, Carrier had a dump truck which performed this task and have even carried this mix in the back of gang trucks. On March 16 and 17, 1989, a grapple truck was also used to aid in the work.

Carrier contends that this is not work falling within the guidelines of our agreements. However, work of this character has customarily, traditionally and historically been performed by the Carrier's Track Sub-department forces and is contractually reserved to them under the provisions of the Scope Rule. The Carrier's unilateral and arbitrary action in prematurely contracting this work to outside forces was unquestionably contrary to and in violation of Article IV of the National Agreement of May 17, 1968.

These Claimants are qualified as trackman/drivers, are entitled to this work, and by Carrier allowing a contractor to perform this work the Claimants are deprived of a work opportunity. Therefore, it is our contention that Carrier is in violation of certain rules of our current working Agreement of April 1, 1975, especially Scope Rules 1, 2, 10, 11, Article IV-Contracting Out, and the Hopkins 'letter of understanding."

Carrier denied the claim asserting that the Organization had "failed to identify the actual dates the work was done, how many hours were required, and who actually performed the work." Carrier went on to note that the Organization had failed to demonstrate that the work in dispute had been performed "historically, customarily and exclusively by the Claimants."

Carrier readily admitted that it had not served "Notice" to the General Chairman, maintaining that notice was "insignificant as the work in this case is not Scope covered." Carrier included a "partial list" of "similar projects" which had been contracted out in the past, noting that it did not serve notice on those occasions either.

Finally, Carrier asserted that:

> "A review of our payroll records reveals that both Claimants were fully employed throughout the claim period and have suffered no monetary loss. Both Claimants were, in fact, receiving considerable overtime compensation during the claim period. Even if the Organization were to prevail in establishing that the Agreement was, in fact, violated, there is no basis for awarding monetary relief. I have no intention of enriching the Claimants for a loss which never occurred."

During a claim conference, Carrier continued to maintain that the Scope Rule upon which the Organization premised its claim is "general in nature" and that the Organization had "failed to demonstrate that the contested work had been performed exclusively by the BMWE employees throughout the system by either custom, tradition or practice."

For its part, the Organization reasserted that the work in dispute is "routine" track work, "normally" performed by Maintenance of Way track employees on a daily basis. The Organization went on to note that:

> "We have a 'dual' seniority Memorandum of Agreement signed June 3, 1982, whereby a Maintenance of Way Employee may hold rights

> in two departments at the same time. This Carrier should have bulletined these positions under Rule 11 to the track employe and roadway machine department. Under such the Claimants could have bid in and been assigned to same. Claimants could have had the opportunity to be assigned to such machines. However, in the past, the track employes have performed the same work without backhoes, and used small tools and their hands for many, many years."

When it became apparent that the Parties were unable to resolve the dispute, it was placed before this Board for adjudication.

Aside from a difference in dates and Claimants, this case presents another claim of admitted failure by Carrier to give Article IV notice and opportunity for good faith consultation with the Organization prior to contracting out work which has in the past been performed both by Agreement-covered employees and outside contractors. This Board developed its principles for determining such "mixed practice" disputes in Awards 1,4 and 6. For reasons set forth in more detail in those decisions, we find that the Organization has not proven a violation of the Scope Rule but it did prove violations of Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding. For reasons set forth in Award No. 1, however, we shall not award monetary damages in this particular case.

AWARD

For reasons set forth in the Opinion, the claim is sustained in part and denied in part, as follows:

1) Part 1 of the claim is not proven.

2) Part 2 of the claim is sustained.

3) Part 3 of the claim is denied.

Dana Edward Eischen, ~~Chairman~~

Dated at Ithaca, New York on July 23, 1995

Union Member

Dated at Chicago, IL
on October 21, 1996

Company Member

Dated at OMAHA, NEBRASKA
on October 21, 1996