

PUBLIC LAW BOARD NO. 5567

AWARD NO. 3  
NMB CASE NO. 3  
UNION CASE NO.  
COMPANY CASE NO. 890394 MRP

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES

- and -

UNION PACIFIC RAILROAD COMPANY  
(FORMER 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 (Aguero Construction) to perform material handling and track maintenance work between Mile Posts 264 and 265 in the San Antonio Yard beginning March 13, 1989 and continuing.
2. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Palestine Division employees J. X. Munoz, M. A Lopez, R. Lopez, R. M. Orosco, L. Gildon, J. Campos and J. A. Chavez shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours consumed by the contractor's forces performing the work outlined in Part (1) above."

OPINION OF BOARD:

In mid September, 1988, Carrier sent the Organization the following:

"This is to advise of the Carrier's intent to contract the installation of one diesel fuel unloading skid, one diesel fuel (sic) dispensing skid, concrete foundations, metal canopy and new piping to an existing 12,000 BBL diesel fuel tank and fueling area along with the construction of one new 10,400 gallon lube oil tank and one 30 ton elevated sand tower. This project at the Railroad's diesel servicing facility in San Antonio, Texas, will include retiring and removing existing fueling equipment, sanding equipment, one 5,000 BBL diesel fuel tank, two lube oil tanks and a tank car unloading track. Also included in the work is the cleaning and painting of one 12,000 BBL diesel fuel tank and the removal and disposal of fuel-contaminated soil and sludge.

This is the type of work that has customarily and traditionally been performed by outside contractor forces. The Carrier has neither the skilled manpower nor the proper equipment to safely and competently undertake and complete this project in a timely manner.

Serving of this 'Notice' is not to be construed as an indication that the work described above necessarily falls within the 'Scope' of your Agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMW.

By letter of September 28, 1988, the General Chairman acknowledged Carrier's Notice and a conference to discuss that particular proposed contracting: "In a conference on September 27, 1988, I objected to the work being contracted out as this is

work belonging to the Maintenance of Way Department employees. If Carrier feels they do not have the modern, sophisticated equipment needed for the job, there are many places where such equipment can be leased or rented." The General Chairman went on to assert that Carrier had violated the December 11, 1981 "good faith" letter. Some eight (8) months later, the instant claim was filed on May 17, 1989. The Organization submitted statements from approximately twenty (20) employees, each of whom maintained the work which Agüero Construction performed had "traditionally and historically" been performed by BMW employees.

Carrier responded, maintaining that the work at issue was not within the "Scope" of the Agreement and that "any implication that the work is reserved exclusively to employees covered by the BMW is simply without substance." Carrier contended that the work which Agüero Construction performed was of the type which had been "generally" contracted out in the past, and had been done "without receipt of applicable protest" from the Organization. In support of that assertion, Carrier submitted a list of some fifty instances when "similar work" had been contracted out in the past. Further, Carrier maintained that even if the work were reserved to MoFW employees, "none of the Claimants possess sufficient fitness and ability to safely and efficiently perform the duties or operate the equipment in question." Finally, with respect to the damages sought, Carrier stated that there is "no basis for awarding monetary

relief because Claimants were "fully employed throughout the claim period." The dispute remained unresolved, therefore, it was placed before the Board for adjudication.

It is not at all clear from this record that the September 16, 1988 notice to the General Chairman encompassed the particular work at issue in this claim. In that connection, we note that in handling on the property Carrier apparently conceded that notice of this particular work had not been given and then raised the September 16, 1988 letter de novo in handling before this Board. For that reason, we do not consider it probative and conclude that Carrier did not give the requisite notice.

This record presents another case of 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.



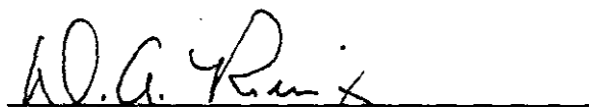
Dana Edward Eischen, Chairman

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