

PUBLIC LAW BOARD NO. 5567

AWARD NO. 4
NMB CASE NO. 4
UNION CASE NO.
COMPANY CASE NO. 870842 MRP

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

- and -

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 (Marlatt Contracting) to perform mowing work in the yards between Kansas City, Kansas and Omaha, Nebraska and between Union, Nebraska and Louisville, Nebraska from September 21 through October 9, 1987.
- (2) The Agreement was further violated when the Carrier failed to notify and confer with the General Chairman concerning its intentions to contract said work as required by Article IV of the May 17, 1968 National Agreement.
- (3) As a consequence of the violations referred to in Parts 1) and/or (2) above, Track Foreman R. W. Dame and Trackmen M. F. Petesche, N. E. Ford and J. R. Hutchens shall each be allowed one hundred twenty (120) hours of pay at their respective rates.

OPINION OF BOARD:

Claimants have established and hold seniority within Carrier's Track Subdepartment on the Old Omaha Division, and were regularly assigned to positions within their respective classes when this dispute arose. Carrier's contracting out of grass and weed cutting work constitutes the gravamen of this dispute.

Beginning September 21, 1987, without notice or discussion with the Organization, Carrier contracted with Marlatt Contractors to perform mowing work (cutting grass and weeds), in the yards between Kansas City, Kansas and Omaha, Nebraska and between Union, Nebraska and Louisville, Nebraska. It is not disputed that four (4) employees of Marlatt Contractors utilized a tractor mower, weed eaters, and chain saws to accomplish the brush cutting work. The Marlatt employees worked for eight (8) hours per day, from September 21 to October 9, 1987, for a total of one hundred twenty (120) hours each. Organization assertions that Carrier-owned mowing equipment was available and idle during this time are unrefuted on the record.

On October 14, 1987, the Organization submitted a claim with regard to the aforementioned activities, contending that:

"The Carrier is in violation of our current working Agreement, especially Rules 1 and 2, Seniority Datum and Seniority Rights. Also, Article IV of the National Agreement of May 1968, in that the Carrier has not notified

the office of our General Chairman of their intent to contract the work in question.

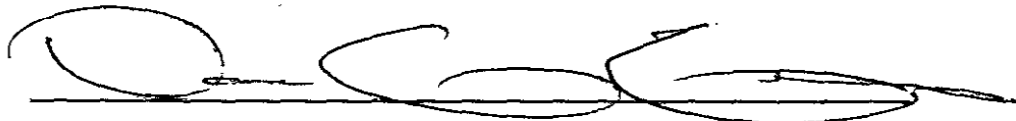
The Claimants hold seniority with the U. P. system as displayed on the current roster for the Old Omaha Sub. To use contractors in the place of tenured employees, not only creates a loss of work opportunity, but is also a direct contradiction of the 'Good Faith Letter' dated December 11, 1981 from Charles I. Hopkins, Jr., Chairman of the National Railway Labor Conference."

Carrier conceded a "mixed practice" but denied the claim on grounds that lack of "exclusivity" vitiated any alleged violation of the Scope Rule, as well as the notice requirements. Failure to give notice also was conceded, but Carrier argued that this was an unintentional and insignificant "oversight." For reasons set forth with more particularity in Award No. 6 of this Board, these defenses do not overcome the proven violations of Article IV of the May 17, 1968 National Agreement, as reinforced by the December 11, 1981 Letter of Agreement. However, for reasons set forth in more detail in Award No. 1, the Organization did not prove a violation of the general Scope Rule. Finally, as in Award No. 1, we shall bow to the precedent on this property and decline to award monetary damages. In so doing, we make it plain that had this dispute arisen after June 25, 1991, we would have found damages appropriate for the proven notice violation. Based upon those reasons, the claim in this particular case is sustained in part and denied in part.

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 October 14, 1996



Union Member

Dated at Chicago, IL
on October 21, 1996



Company Member

Dated at Omaha, Nebraska
on October 21, 1996