PUBLIC LAW BOARD NO. 5567

AWARD NO. 5
NMB CASE NO. 5
UNION CASE NO.
COMPANY CASE NO. 870407

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 basic track maintenance work (installing crossties) on the DeQuincy Division in the vicinity of Orange, Texas beginning November 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 Parts (1) and/or (2) above, furloughed Trackman P. Williams shall be allowed pay for eight (8) hours each work day, including any holidays falling therein and any overtime worked by contractor, beginning November 16, 1986, and continuing so long as contractor Pat Hammer works putting in cross ties in the vicinity of Orange, Texas, Dequincy Division."

OPINION OF BOARD:

Trackman P. Williams (Claimant) has established and holds seniority in the Track Subdepartment of the Maintenance of Way and Structures Department on the DeQuincy Division. As a result of force reductions, Claimant was furloughed and awaiting recall when this dispute arose.

Beginning November 16, 1986, Carrier utilized Backhoe Operator Pat Hammer, an outside contractor, to assist existing track department forces with switch and cross tie renewal in the vicinity of Orange, Texas. It is not disputed that Carrier employed the outside contractor without notice to or consultation with the BMWE General Chairman. On January 13, 1987, the Organization submitted a claim alleging:

> "It is our contention that rules of our agreements are in violation, especially Rules 1 and 2 of the current Agreement. Claimant holds and maintains seniority with Carrier as displayed on the 1986 seniority roster, while contractor's employe does not have any such seniority. Claimant was furloughed, and clearly this was a loss of work opportunity suffered by him.
>
> Carrier is also in violation of the May 1968 National Agreement, Article IV, in that Carrier has not furnished me a notice of intent to contract the work in question. Also, Carrier is in violation of the December 11, 1981 letter of agreement signed by Mr. Charles I. Hopkins, Jr., Chairman of the National Railway Labor Conference, in which Carrier agreed they would make 'good-faith' efforts to reduce subcontracting and procure rental equipment to be operated by carrier employes. Carrier has not lived up to this agreement, a part of the National Agreement

of December, 1981.

> If Carrier did not have the equipment it desired to have this work performed with, there are many places where such equipment can be procured by lease or rent and without contractor furnishing the employes. Carrier could have easily leased the equipment used for grade crossing or tie renewal work."

Regional Engineer Lilly denied the claim maintaining that:

> "Contrary to your contentions otherwise, the Carrier has customarily and traditionally utilized contractor's forces to perform the type of work disputed in this case. Your contention that such work is reserved exclusively to employes covered by the BMWE is without substance. In fact, contractor's forces have historically performed such service without protest from your organization.
>
> This claim is presented to the Carrier completely upon contention and without supportive evidence that, in fact, the Agreement has been violated. Since you have not recognized you burden of proof to substantiate the allegation outlined in your letter, there is no basis to the claim."

The General Chairman responded to Engineer Lilly's rejection stating that "until recently, this type of work has been performed by employes of the BMWE. And, each time contractor's have been utilized, this Organization has protested the fact that Carrier is depriving our employes of work opportunities."

On June 12, 1987, Carrier sent further correspondence to the Organization reiterating that:

> "This claim is presented to the Carrier completely upon contention and without supportive evidence that, in fact, the Agreement has been violated. More importantly, we emphasize that there is

absolutely nothing contained in the Schedule Agreement which would imply or even suggest that the work as described above is actually work falling under the scope of your Agreement. Since you have not recognized your burden of proof to substantiate the allegation outlined in your letter with facts relevant to the instant issues, there is no basis to the claim.

While notice of our intent to contract unfortunately was not served in this instance, such lack of notice was merely an oversight, and we assure you that there was no deliberate attempt to evade our obligation under Article IV of the May 17, 1968 National Agreement. Nonetheless, we point out that you have contended in the past that such 'notice' is required only when 'scope-covered' work is to be contracted. Obviously, the work in the instant case does not fall under the scope of your Agreement, and as such, the argument you have advanced with regard to the lack of 'notice' would, therefore, appear to be insignificant in this case.

Carrier went on to note that:

"Mr. Hammer was merely operating a backhoe to assist existing track forces in the renewal of cross ties. It is certainly no secret that such contractor's forces have customarily been utilized on this property to assist Maintenance of Way forces in the performance of their duties, and I certainly see nothing unusual in this instance to substantiate that the Agreement was purportedly violated, as you contend. Moreover, I emphasized to you that even if the operation of a backhoe by contractor's forces did constitute an Agreement violation, it is significant to note that Mr. Williams does not retain Machine Operator rights and would not have under any circumstances, be entitled to the relief sought."

Continued efforts between the Parties to resolve the dispute were not successful. Therefore, the issue has been placed before

the Board for adjudication. The record in this case supports a finding that Carrier violated the notice and consultation requirements of Article IV of the May 17, 1968 National Agrement, as enhanced by the December 11, 1981 Letter of Understanding. However, because the dispute arose prior to June 25, 1991 (the issuance date of NRAB Award 3-28849) and additionally because the record supports Carrier's defense that this particular Claimant was not a qualified Machine Operator, no monetary damages are awarded.

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