AWARD NO. 1
NMB CASE NO. MW-31248
UNION CASE NO.
COMPANY CASE NO.

PUBLIC LAW BOARD NO. 6086

PARTIES TO THE DISPUTE:

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

STATEMENT OF CLAIM:

(1) The Carrier violated the Agreement when it assigned or otherwise allowed Burlington Northern tie gang forces to replace ties on the Carrier's property at or around Madison Yards on July 24, 25, 29, 30, 31 and August 1, 1991 (System File 1991-5/013-293-14).

(2) The Agreement was further violated when the Carrier failed to conference with the General Chairman its intention to contract out said work as required by Article IV and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Track Foremen R. Gartner, H. Goodwin, J. Derochie and W. Green, Machine Operators R. Gray, D. Stogner, R. Gower, R. Glenn, J. West, W. Bailey, L. Crouch, D. Matthes, R. Harrod and T. Whitley, Truck Drivers S. Gray, O. Rodriguez, R. Jackson, J. Mason, J. Pfeiffer and L. Gates and Track Laborers W. Edwards, R. White, E. Schuessler, J. Fenton, C. Perkins, R. Stewart, R. McCranie, M. Hudson, C. Wicks, R. Brown, R. Kurtz, T. Reed, R. Vann, M. McCann, D. Schindler, D. Bean, J. Gatlin, R. Hoffman, M. Mitchell, M. Kayser, M. Ashcroft and E. Goodwin shall each be allowed equal proportionate amounts of eight (8) hours' pay per day at their respective straight time rates and two (2) hours' pay per day at their respective time and one-half rates for each day Burlington Northern forces were allowed to perform tie removal and replacement work.

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OPINION OF BOARD: On May 17, 1991, by certified letter return receipt requested, Carrier's Chief Engineer sent General Chairman Roberds the following notification:

> This letter will serve notice of Carrier's intent to contract track work to Burlington Northern and Norfolk Southern.
>
> The Terminal Railroad Association of St. Louis does not have a complete set of mechanized tie gang equipment and cannot justify the purchase of such.
>
> There are no furloughed BMWE represented employees and there will not be any furloughed BMWE employees while either BN or NS BMWE crews are working.
>
> Should you desire a conference concerning the above, please notify the undersigned and a conference will be arranged at your earliest convenience.

In a May 20, 1991 response, General Chairman Roberds contended:

> This letter is in reference to your letter dated May 17, 1991 concerning the carrier's intent to contract out track work with the Burlington Northern and the Norfolk Southern.
>
> These employees working on the other Railroads have no seniority on this property and this work has always been performed by the employees covered by the current working agreement with the Terminal Railroad and the BMWE. Prior to your administration we had tie gangs that performed this work that the carrier wishes to now contract out the carrier simply has not tried to hire needed Employees to do this work also the carrier has not met the understanding to reduce contracting under the terms of the letter of understanding between BMWE President O.M. Berge and the Carrier's Chairman C.I. Hopkins, Jr. dated December 11, 1981. The carrier has not tried to rent equipment to perform this work the carrier has further not safeguarded work promotions for the Employees employed.
>
> We also have been advised that the ties have already been marked that are going to be replaced and these tie gangs have already make arrangement to perform this work. Due to this fact we believe this to be unfair bargaining and in violation of the understanding of good faith to reduce contracting of work.
>
> Even though your notice does not mention the work to be performed I have been advised the work will be at Madison Yards and on the Illinois Transfer. In your letter you mention that the Carrier cannot justify the purchase of this equipment you do not mention the temporary rental.
>
> At this time, I will ask that you set a conference up to discuss this contracting.

On May 27, 1991, the General Chairman contacted Carrier regarding Carrier's May 17

notification letter. After briefly discussing the proposed contracting, the General Foreman informed Carrier that he was presently "unavailable" for further discussion, and would remain so for the next several weeks. Ultimately, the Parties agreed upon a July 12, 1991 conference date. In the meantime, on June 4, 1991, Carrier informed the General Chairman that it intended to proceed with the arrangements with Burlington Northern and Norfolk Southern to perform the track work.

The conference was held as scheduled, during which Carrier reiterated that it could not "afford or justify" purchasing the necessary equipment. In that connection, Carrier noted that there were no BMWE represented employees who were furloughed, and that any overtime worked by the contractors would be offered to BMWE represented employees. Finally, with regard to the Organization's assertion, i.e., "On the TRRA we have never had this work done by any one but employees of the TRRA track department", Carrier notes that between June 26 and 29, 1989, the same BN tie gang was on Carrier property and performed the "same identical work" on the North Belt between the former M-K-T Yard and Carrier Avenue, and no claims resulted from said project.

For its part, the Organization remained steadfast in its assertion that the work in dispute accrued to BMWE employees under the Scope Rule. In that connection, the General Chairman submitted statements from twenty (20) employees to "demonstrate" that the work in dispute is "reserved" to track forces in accordance with Rules 1, 2, 5 and 6, and by "a customary, traditional and historical past practice."

The Organization further maintained that Carrier had failed to provide requisite fifteen (15)

day notice in advance of the contracting transaction. Specifically, the General Chairman maintained that the May 27 "abbreviated conversation" did not constitute a conference, and that the disputed track work commenced on July 10, two (2) days prior to the July 12 conference. As a result of Carrier's alleged violation(s), the Organization requested that each Claimant be allowed equal proportionate amounts of eight (8) hours' pay per day at their respective straight time rates, and two (2) hours' pay per day at their respective time and one-half rates for each day Burlington Northern forces performed the track work.

In its final denial, Carrier stated that it had made "several" good faith efforts to meet and conference the issue "at the General Chairman's convenience." The Carrier went on to note that the Agreement specifies a fifteen (15) day limited notification period, unless agreed to by the parties. According to Carrier, it could not delay implementing the proposed contracts, and, in light of the initial May 27 conference, said implementation could not be considered lack of good-faith bargaining.

With respect to the damages sought, Carrier noted that, as of the May 27 meeting, there were no furloughed BMWE members. Further, during that time, the claimants were offered the opportunity to work twelve (12) hours per day, seven days a week, later modified to ten (10) hours per day, six (6) days a week. According to Carrier, anyone who did not work these extensive hours did so voluntarily, and should be barred from now claiming overtime payments. Finally, Carrier maintains that "several" of the Claimants were absent without permission on claimed dates, on

vacation, or, "for other reasons", should be barred from this claim.

All of the foregoing issues or arguments were addressed and decided on January 25, 1996, when the NRAB Third Division decided a claim virtually identical to that now before us, with the same Parties, claim dates, facts, contract language, arguments and several of the same Claimants. In Award 3-31348, the Division denied that claim, stating in pertinent part as follows:

> The obligation of the Carrier under Article IV of the National Agreement to confer prior to contracting out the work at issue is not disputed. In the case before this Board, each party blames the other for the delay in holding the required conference. While the Organization maintains that the Carrier merely "mentioned', the contracting out on May 27, 1991, the Carrier alleges that a Carrier officer was readily available even after normal work hours to discuss the matter, had the Organization a sincere interest in doing so. In light of the paucity of objective evidence on this record regarding the delay in the conference, the Board finds that the Organization has failed to shoulder its burden of persuasion to show that the Carrier acted in bad faith, or in a manner contrary to the provisions of Article IV of the National Agreement. Moreover, there is no evidence on this record to contradict the Carrier's position that it lacked the equipment necessary for performing the required work. See, for example, Third Division Award 29858.
>
> Carrier complied with the requirement that it give the Organization no less than 15 days notice "... prior to the date of the contracting transaction." The original notice to the Organization was dated May 17, 1991, and there is no evidence on this record to suggest that the contracting transaction occurred less than fifteen days after that date. It is unrefuted on the record that the work itself did not begin until July 10, 1991. While it may appear that by the time the July 12, 1991, conference took place the matter was moot, had the Parties agreed at that time to have the work performed only by Carrier employees, the subcontracting could have been halted. It is also unrefuted on this record that all BMWE employees were fully employed during the time the subcontractor performed the work at issue and, further, that at least two BMWE employees were working overtime with the subcontractor.
>
> Based upon the foregoing, this Board finds no basis upon which to sustain the Organization's claim.

When there is identity of parties, contract language and facts, decisions by respected arbitrators have time and again reaffirmed the notion that proper regard for the arbitration process and for stability in collective bargaining leads to acceptance of an interpretation by a prior arbitration tribunal as authoritative, if in point and if based in the same facts and agreement. It is not necessary

that the subsequent arbitrator endorse all of the reasoning expressed in the earlier opinion, so long as there is identity of issue and the holding and decision in the earlier award is not illegal, in excess of jurisdiction or palpably erroneous. In such circumstances, seasoned arbitrators recognize that it would be a disservice to the parties to reward forum shopping and subject them to the unsettling effects of conflicting and inconsistent decisions in the same set of facts and circumstances. Although I may have decided the matter differently in the first instance, there is nothing in the record before me in the present case to warrant my rejection of the decision in Third Division Award 31348 on grounds of illegality, abuse of jurisdiction or palpable error. As that award has already finally decided the matter now before us, it is *stare decisis* and must be treated as authoritative precedent for denying this reiteration of the same claim.

AWARD

Claim denied.

Dana Edward Eischen, Chairman
Signed at Spencer, NY on August 26, 2000

Union Member 8/31/00

Company Member