AWARD NO. 11
NMB CASE NO. MW-32586
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 Agreement was violated when the Carrier assigned outside forces (Annex) to perform Maintenance of Way and Structures Department work (replacing bridge ties, pulling spikes, etc.) on the MacArthur Bridge beginning July 6, 1994 and continuing (System File 1994-37/013-293-14).

(2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of their Maintenance of Way forces as required by the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Bridge and Building Sub-Department employes S. Millard, A. Ramirez, J. King, furloughed Track Sub-Department employes W. Wiley, J. Gatlin, D. Bean, Track Foreman W. Bailey and MTO-TMO O. Rodriguez and J. Wilson shall each be allowed pay, at their respective rates, for ten (10) hours per day [eight (8) hours at the applicable straight time rate and two (2) hours at the applicable time and one-half rate], four (4) days a week beginning July 6, 1994 and continuing until the violation ceased.

OPINION OF BOARD: On April 28, 1994 Carrier Chief Engineer Maintenance, Signals and Communications sent the Organization the following advisory:

> Under provisions of Article IV of the May 17, 1968 Agreement, this will serve to advise of Carrier's intention to contract out to Benchmark Rial Group, Inc., the following work at North Approach junction on the MacArthur Bridge:
>
> 1. Install approximately 900 bridge timbers
> 2. Install approximately 630 switch ties
> 3. Install approximately 820 linear feet of steel walkway
> 4. Install approximately 3,300 feet of wooden outer guard rail
>
> Carrier is not well equipped to perform a project of this magnitude within the time frame required. Due to all the other work on the property that our Maintenance of Way employees, equipment and supervisors are already committed to, Carrier desires to contract out this deck work commencing around June 1, 1994.
>
> Should you desire a conference to discuss this, I am available at your convenience.

The General Chairman responded to Carrier's notice, requesting a conference and asserting the following:

> 1. Carrier B&B employees have shown that work of this magnitude is not beyond their capability, and these employees have performed several jobs for Carrier, in the past, on this same structure.
>
> 2. Carrier has not maintained, hired or tried to reduce any contracting as described in the 1981 National Agreement Letter of Understanding to reduce contracting.
>
> 3. I have reviewed the equipment Carrier has, as well as the manpower, and the Carrier is still well equipped to perform this work.
>
> 4. This is work that is classified under the current working agreement and is work that has always been performed with the B&B forces.
>
> I have been advised that this project went out for bidding prior to your notice. I will ask that this information is allowed prior to conference.

A conference between the Parties was held on May 24, 1994 during which Carrier advised the General Chairman that no contract with Benchmark Rail Group, Inc. had been signed previous

to Carrier's April 28, 1994 notice. Subsequently, Carrier proceeded to contract out the work in dispute to Annex when Benchmark was unable to accept the assignment. Thereafter, the General Chairman filed the instant dual basis claim on August 29, 1994, asserting a violation of the "good-faith" requirements in this contracting out and claiming that the work of "replacement of ties and pulling of spikes", started by the subcontractor on July 6, 1994, was reserved to Agreement-covered employees by a custom, practice and tradition of performance spanning many years.

At various stages of handling on the property, the General Chairman made the following detailed assertions of fact, none of which have ever been effectively answered or repudiated by Carrier in the handling of this case: 1) "On this Bridge, the Bridge employees and the three that are presently laid off replaced over (10) ten thousand ties in 1991 and again in 1992" (Letter of May 2, 1994 requesting conference); 2) "It was only two years ago that the carrier awarded the B&B department with awards for doing such a fine job replacing ties on this bridge, in 1991 and 1992 we replaced over 20,000 bridge ties on this bridge" (claim letter of August 29, 1994); 3) "Some of the work these contractors did was nothing more than spiking of ties, bolting up wood guard rail and replacement of 1,530 ties, the same work that our employees have performed on the Merchants Bridge...as well as other locations on the property"... as I stated in my claim, it was only in 1990-92 that over 30,000 (thirty thousand) ties were put in with the B&B forces, as well as miles of steel walkway and miles of wooden outer guard rail" (letter of April 19, 1995 rejecting final denial).

At no point in the handling of this claim on the property did Carrier ever address, let alone effectively contradict, the fact that Agreement-covered employees had performed tie replacement,

steel walkway and outer guard rail bridge work on Carrier-owned bridges, including this very bridge, identical to that which is the subject matter of the instant case.

A belated, generic and unsupported assertion in the final denial letter that "the disputed work is of a character customarily and historically contracted out" does not suffice to rebut the Organization's specific and detailed claim that Agreement-covered employees previously performed identical work. In that connection, Carrier denied the claim at all levels of handling by reasserting the reasons for contracting out this particular work advanced by Chief Engineer Trice's letter of October 27, 1994. In that letter, he questioned the status of several of the named claimants and asserted the following grounds for the subcontracting decision: 1) "Carrier was not well equipped to perform a project of this magnitude"; 2) "Carrier's supervisors, employees and equipment were already committed to the other projects for the remainder of this year".

In this case, just as in the claim decided in our Award No. 13, the Organization has made out on this record a *prima facie* case that the work on the MacArthur Bridge which Carrier contracted out to Annex, Inc., pursuant to its Article IV letter of April 28, 1994, was identical to work regularly and consistently performed in the past by Agreement-covered employees. *See* NRAB Third Division Awards 32748 and 29007. Carrier did not effectively dispute that fact on this record and offered no reason recognizable under the controlling contract language as justification for unilaterally outsourcing this particular work without the concurrence of the Organization. *See* Third Division Award 28998.

As this Board held in Awards 3, 6 and 13, citing NRAB Third Division Awards 28998,31756 and 32748, between these same Parties, there is ample precedent for requiring Carrier to make the

named Claimants whole for the proven violation of the Scope Rule in this case. There is a divergence of authority on this property concerning payment of monetary damages to "fully employed Claimants", but for reasons articulated by the Third Division in Awards 31756 and 32748, we find such damages appropriate in this case. *Cf.*, Third Division Awards 29938 and 30829. As in Third Division Award 31756, we will remand the matter to the property for the Parties to determine the number of hours outside contractor forces spent performing the work described in the notice letter of April 28, 1994, which is the subject matter of this claim. Once the final determination is made as the number of such hours and damages have been calculated at the applicable wage rates, we further order that the liquidated damages be divided equally among the employees named as Claimants in the instant case (including Claimant Ramirez, unless Carrier can show that he released or waived this claim)

AWARD

1) Claim sustained to the extent indicated in the Opinion.

2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

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

Union Member 8/31/00

Company Member