

AWARD NO. 12  
NMB CASE NO. MW-32587  
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 Norfolk and Southern employes to perform Maintenance of Way and Structures Department work (pulling spikes on the inner guard rail) on the MacArthur Bridge, Merchants Bridge and West Belt beginning July 25, 1994 and continuing (System File 1994-38/013-293-14).
- (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 Track Sub-Department employes D. Bean, A. Ramirez, W. Wiley, J. King, J. Gatlin, M. Kayser, M. Mitchell and Messrs. R. Gartner, W. Bailey, J. Derochie, W. Green, R. Gray, D. Stogner, R. Gower, R. Glenn, J. West, L. Crouch, D. Matthes, C. Jefferson, O. Rodriguez, J. Wilson, J. Headrick, J. Mason, R. Brown, C. Laden, S. Gray, L. Gates, R. White, Sr., E. Schuessler, J. Fenton, T. Allen, C. Perkins, R. Stewart, R. McCranie, M. Hudson, E. Myers, C. Perry, A. McCarter, J. Mason, T. Harris, C. Owens, C. Wicks, S. Millard, R. Kurtz, T. Reed, M. McCann and D. Schindler shall each be allowed eight (8) hours' pay per day, at their respective straight time rates, and any overtime performed by the N&S forces beginning July 25, 1994 and continuing until the violation ceased.

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OPINION OF BOARD: By letter of July 6, 1994, Carrier gave the BMW General Chairman Article IV written notice of its intent to contract out to the Norfolk Southern the following projects on TRRA property:

- 1) MacArthur Bridge - Valley Junction turnout, switches #222 and #224 to north end of Crossover #1 at Valley Junction. Contractor to provide labor, equipment and material to install new 136lb. CWR and OTM, and relocate trackage to the center of the bridge. Also remove the existing 100lb. guard rail and realign the existing 115# jointed rail as inner guard rail.
- 2) MacArthur Bridge - Valley Junction turnout, Switches #222 and #224 to the ALS Railroad hand-throw crossover. Contractor to provide labor, equipment and material to install 15,000 linear feet of 115lb. CWR and OTM.
- 3) Merchants Bridge - Contractor to provide labor, equipment and material to install 6,200 linear feet of 115lb. CWR and OTM, and relocate trackage to center of the bridge. Also remove existing 100lb. guard rail, realign the existing 115lb. jointed rail as inner guard rail and install six pairs of rail expansion joints.
- 4) Merchants Bridge - West Approach. Contractor to provide labor, equipment and material to install 4,000 linear feet of 136lb. CWR and OTM.
- 5) MacArthur Bridge - Main Spans. Contractor to provide labor, equipment and material to install 136lb. CWR and OTM, and relocate trackage to center of bridge. Also remove existing 100lb. jointed rail inner guard rail and realign the existing 115lb. jointed rail as inner guard rail, and install six pairs of rail expansion joints.
- 6) MacArthur Bridge - North Approach. Contractor to provide labor, equipment and material to install five #12 - 136lb. turnouts.
- 7) West Belt - Pennsylvania Avenue to Rock Island Junction. Contractor to provide equipment and labor to install 1.9 miles of 115lb. CWR and OTM and removal of existing 100lb. jointed rail and OTM.
- 8) Various locations - Contractor to provide equipment and labor to install 16,700 cross-ties.

Carrier asserted that the work was being contracted out because it "was not well equipped to perform a project of this magnitude", because Carrier's own track force employees "were already committed" to other projects. The Chief Engineer concluded the correspondence by informing the

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General Chairman that should he desire to conference the issue, he would be available at the General Chairman's convenience.

Following a requested conference on July 20, 1994, Carrier began utilizing the N&S to perform the described work on July 25, 1994 and the General Chairman filed the instant claim on August 29, 1994. That claim, on behalf of forty-seven (47) currently working and furloughed Track employees, allege that Carrier's contracting arrangement with the Norfolk Southern Railroad violated the current Schedule Agreement, as well as the 1968 Agreement on contracting. Specifically, in that dual-basis claim, the General Chairman alleged on the merits and the good-faith aspects, respectively, as follows (Spelling, punctuation and emphasis as in original):

In your letter dated August 18, 1994 you state that the carrier recognizes the fact that there are several employees are laid off, I must point out to you that there has been Seven (7) employees from the N&S not doing anything but pulling spikes sence July 25, 1994 on inner guard rail, this is still continuing as I write this letter. There is no excuss for you not calling back these laid off employees this is there agreed to work under there contract not other employees from other properties, and the statement of piece meal, I would like to bring to your attention once more Board award No. 28998 on this property that clearly states that there is noting wrong with separating work.

As of July 26, 1994 the N&S has had a Burro operator working moving rail on both the bridges on regular time and overtime there is no reason why our burro operators are not also being allowed this work oportunity.

In April 1994 the Carrier was already preparing for this contracting. The Carrier was already unloading the 16,700 ties mentioned in your contracting notice, please see my claim 1994-23. Due to your notice not being until July 6, 1994, I must state that this contracting was clearly not in good faith. We fill (sic) this is truly unfaithful and not in compliance with the 1968 Agreement on contracting of work and the letter of understanding to reduce contracting between the Carrier and BMWE.

The Chief Engineer denied the claim by letter of October 27, 1994. Regarding the General Chairman's assertion that the work in dispute was contracted in bad faith prior to Carrier's July 6 notice, he stated:

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You mentioned that in April 1994 Carrier was preparing for 'this contracting' by unloading 16,700 ties. This is totally untrue. Although the ties were ordered in early 1994 because of a long lead time, Carrier had not yet finalized its 1994 work program until later after evaluating various proposals. No contract was executed to perform this work until several days after our conference of July 20, 1994. The delivery, unloading and distribution of ties, which was all done by TRRA forces, started in April but continued all through the summer. In fact, to date, there are still two more truck loads of ties due for delivery.

With respect to the merits, the Chief Engineer denied the claim for the following reason:

'Very simply put Carrier's employees, equipment and supervisor (sic) people were already committed to other work for the entire construction season" and the furloughs were "a seasonal (winter) adjustment". Finally, he "took exception", for various reasons, to four (4) of the 47 Claimants which the General Chairman had listed and , with respect to the remaining forty-three (43) individuals, contended that they did not suffer any work loss during the contract work since they had been employed on other work for Carrier, including working ahead of, or with, the NS track forces distributing ties, rail and other track materials.

In the interim appeal letter dated December 20, 1994, the General Chairman conceded that the claims of Messrs. J. DeRochie and R. Gartner were limited by periods of disciplinary suspension but disputed the challenges to Messrs. King and Ramirez. With respect to the merits, however, the General Chairman further asserted the following points:

[T]he carrier has a obligation to use its work force to perform this contracted work, the N&S employees have worked from July 25, 1994 in good weather through this date , also in good weather, while our employees have been laid off, these laid off employees have not been offered a recall or allowed a job performing their classified work.

On the property awards No. 23928 allows employees compensation of equal proportionate share of number of hours contracted out by the carrier, on the property Award No. 28998 states that that a manpower shortage that is prolonged and persistent is not recognized as reason for contracting out work belonging to a craft and class of bridge and building mechanics. Award No. 29938 that was denied on this property stated that the carrier because it had tried to hirer employees and due to all of its employees working the board denied the claim, in this claim the carrier has not hired since 1991, has not replaced furloughed, sick our hurt employees over twenty six (26), since 1992.

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Mr. Trices states that there are several employees that may not be proper claimants, I disagree these employees ( Ramirez & King ) have not been recalled under Rule 16 (King subject to appeal). Mr. Trice would be correct on the other two employees as to limiting there claim.

The carrier now has around 37 track employees working and in 1991 had over 60 track employees, and as you are aware this is not a sudden loss of employees, and since this time of 1991 the carrier, has had more contractors on the property than employees.

The carrier has a obligation to maintain a force to perform the work that has been contracted out, Mr. Trice understands and knows that we have perform this work in the past on the Eads Bridge, the Merchants Bridge the MacArthur Bridge, on the main lines all over the property in St. Louis and IL. when extra equipment was needed the carrier rented it. I have saw the work being performed with these contractors and it is work that we have always done in the past.

In additional correspondence predating the Carrier's final denial letter of March 22, 1995, January 25, 1995 interim denial letter, the General Chairman also protested the layoff of several of the Claimants in December 1994 and January 1995, while the N&S track forces continued to perform the work which is the subject of this claim. In that connection, the General Chairman's letter of February 15, 1995 reads as follows:

Please refer to your letter of denial dated January 25, 1995, on system file & claim 1994-38 on the behalf of 47 track employees and Bridge employees this claim is due to the carrier allowing the N&S track employees to perform work on the Merchants Bridge, and the West belt main lines while several employees were laid off prior to the contracting started on July 26, 1994, during, and after up to December 16, 1994. A additional 20 employees were laid off again on January 4, 1995 as well as the seven that has been laid off all through this contracting, the N&S employees were allowed to return to the property on January 10, 1995 even after this lay off please see my letter to you dated January 10, 1995, on January 10, 1995 at there end of tour of duty the N&S employees were removed from the property and work was completed with the carriers forces that had not been laid off.

Finally, during claims conferencing the General Chairman supplemented his own undisputed statements concerning prior performance by Agreement-covered employees of work identical to the work claimed in this case with written statements dated August and November 1994 from Claimants Bailey, Stogner and Wilson describing their prior performance of this work.

In response, Carrier's Director Labor Relations and Personnel issued a generic denial by letter of March 22, 1995, reading as follows:

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This will confirm our conference of February 21, 1995, wherein we discussed claim identified by Organization File No. 1994-38, on behalf of various Track and B&B employees account contracting out work on the MacArthur Bridge, Merchants Bridge and the West Belt.

The instant claim must fail for the following reasons:

1. The Organization was properly notified in accordance with the contracting-out provisions contained in the 1968 Agreement between the parties.
2. The work to be performed, considerable bridge work and work on the West Belt, is not work that cannot be subcontracted out.
3. Carrier forces are not well-suited to handle projects of the magnitude involved in the instant claim.
4. The disputed work is of a character customarily and historically contracted out.
5. The BMW Scope is a general Scope Rule and does not reserve exclusively the disputed work to BMW-represented employees.

There is simply no valid basis for overturning Chief Engineer Trice's decision of the instant claim, which decision is herewith reaffirmed and claim remains respectfully declined in its entirety.

There is insufficient evidence in this record to support the allegation that Carrier violated the good faith notice and conference requirements of Article IV and the Borg-Hopkins letter in this case. But for reasons fully explained fully in Awards 3,4,6,10, 11 and 13 of this Board, the Organization presented persuasive detailed record evidence of a *prima facie* violation of the Scope Rule in the contracting out of the work which is the subject of this particular claim. None of that evidence was addressed in the initial or interim denials and generic unsupported counter-assertions in the final denial letter are not an effective rebuttal to the Organization's detailed evidence. Finally, Award 29998 is distinguishable on its facts and it does not overrule the earlier on-property holding in NRAB Third Division Award 28998 that a prolonged and persistent manpower shortage does not justify contracting out the Agreement-covered work of furloughed employees

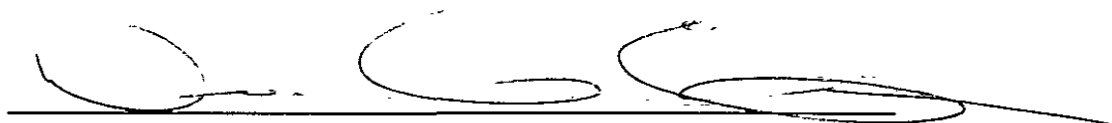
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As this Board held in Awards 3, 6, 11 and 13, citing NRAB Third Division Awards 28998, 31756 and 32748, between these same Parties, there is ample precedent for requiring Carrier to make the named Claimants whole for the proven violation of the Scope 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 July 6, 1994, during the period July 25, 1994 through January 10, 1995, 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, but with appropriate limitations on the damages for Claimants J. Derochie and R. Gartner).

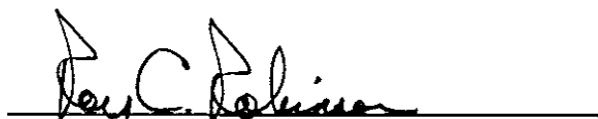
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AWARD

- 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