

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 Union Pacific Railroad Company forces to perform Maintenance of Way work in connection with laying 136 pound continuous welded rail (CWR) on the High Speed 55 and 56 tracks from 23rd Street to 14th Street, St. Louis, Missouri and laying 115 pound CWR at various locations on the Terminal Railroad property in Illinois on the Eads Main between CP Junction and Old Cabin No. 1 at CD Yard and North Approach to the MacArthur Bridge between Q Tower and Trendley Avenue beginning September 1, 1993 and continuing (System File 1993-37/013-293-14).

(2) As a consequence of the violation referred to in Part (1) above, furloughed Track Subdepartment employees A. Ramirez, W. Wiley, J. King and Messrs. R. Gartner, J. Derochie, W. Green, J. Wilson, J. Pfeiffer, R. Gray, D. Stogner, R. Gower, R. Glenn, J. West, W. Bailey, L. Crouch, D. Matthes, O. Rodriguez, C. Jefferson, J. Headrick, P. Poss, R. Brown, C. Laden, S. Gray, L. Gates, W. Edwards, 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, R. Kurtz, T. Reed, M. McCann, D. Schindler, J. Gatlin, M. Kayser and M. Mitchell shall each be allowed eight (8) hours' pay at their respective straight time rates and two (2) hours' pay at their respective time and one-half rates for each of their regularly assigned workdays the Union Pacific forces were allowed to perform the work in question, and they shall each be allowed ten (10) hours' pay at their respective time and one-half rates for each of their regularly assigned rest days the Union Pacific forces were allowed to perform the work in question beginning September 1, 1993 and continuing.

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OPINION OF BOARD: For reasons set forth in Award No. 2 of this Board, Carrier's motion to dismiss this claim for alleged improper filing of the Notice of Intent is denied. The material facts underlying this claim are not in dispute. By letter dated August 18, 1993 Carrier's Engineer of Track gave the Organization's General Chairman written notice, citing Article IV of the May 17, 1968 National Agreement, of Carrier's intent to contract out to the Union Pacific Railroad Company (hereinafter referred to as "UP") the work of laying approximately 2.3 miles of continuous track ("CWR") on TRRA Tracks 55 and 56. Specifically, the work in St. Louis consisted of laying new 136 pound CWR on approximately 1.3 miles of track, and in Illinois, 115 pound CWR, for a distance totaling one (1) mile. In the notice, Carrier stated that the work was to be contracted because its forces "were not well suited for a project of such magnitude."

By letter dated August 20, 1993, the General Chairman requested and was granted a conference at which the situation was discussed on September 7, 1993. The undisputed record shows that during the September 2, 1993 telephone conversation in which the General Chairman and Chief Engineer Trice set up that conference, during that conference on September 7, 1993, in the claim dated October 14, 1993, and at all stages of handling of this matter, the General Chairman informed Carrier that the UP gang was already performing the work which was to be the subject matter of September 7, 1993 conference. The specific details of that "good-faith" aspect of the dual-basis claim filed on October 14, 1993 are set forth by the General Chairman in the claim letter as follows:

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On September 1, 1993 and continuing, during the hours of 7.30 a.m. through 5.30 each day and on rest days the carrier contracted with the Union Pacific Rail Gang consisting of about Sixty (60) men to lay rail on tracks 55 and 56, 23rd street to 14th street, Eads Main, and North Approach to the MacArthur Bridge. This gang consisted of small machines, such as spike pullers, spikers, tie handlers, Burro Cranes. . . I informed you in my letter dated September 6, 1993 and during our phone conversation on September 2, 1993 that this gang had already started work on these locations on September 1, 1993 and this was a clear violation of proper notice and time limits. I also confirmed this at the conference on September 7, 1993.

Close examination of the record evidence shows that the Carrier never responded to, let alone refuted, that aspect of this dual-basis claim at any level of handling. Accordingly, it is undisputed on this record that the contracted-out work described in Carrier's notice of August 18, 1993 was already in progress and nearly one-third completed by the time the Article IV conference was held on September 7, 1993. As this Board held in Award No. 2, this is hardly in keeping with the "good faith" obligations imposed upon Carrier by the literal language of the second paragraph of Article IV of the May 17, 1968 Agreement, which was jointly reaffirmed in the December 11, 1981 Berg-Hopkins Letter.

It is well-recognized that merely cosmetic compliance with the notice and/or "good-faith discussions" mandates in a *fait accompli* contracting-out situation is contrary to the mutual intent set forth in Article IV of the May 17, 1968 Agreement and the December 11, 1981 Berg-Hopkins Letter. See Third Division Awards 32748, 31867, 31756, 31599, 30976, 30977, 27614 and 26593. On the basis of Carrier's proven failure to comply with those critical contractual commitments prior to performance of the disputed work by the outside forces, we shall sustain this claim. In doing so, we award monetary damages to the named Claimants, with such damages calculated and apportioned

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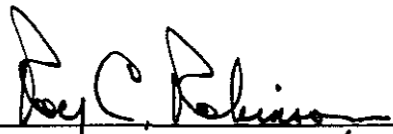
in accordance with the precedent set in NRAB Third Division Awards 23928 and 31756 between these same Parties.

AWARD

- 1) Claim sustained.
- 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