

AWARD NO. 1
CASE NO. 1

PUBLIC LAW BOARD NO. 6218

PARTIES)	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TO)	
DISPUTE)	UNION PACIFIC RAILROAD COMPANY (FORMER MISSOURI PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned an outside contractor (MK Track Work) to perform Maintenance of Way work (removing and loading rail and crossties) between Mile Posts 49.5 to 93 on the Midland Valley territory beginning April 9 through May 31, 1993 (Carrier's File 930512 MPR).

2. The claim as presented by General Chairman L. W. Borden on June 7, 1993 to Superintendent J. E. Dennis shall be allowed as presented because said claim was not disallowed by Superintendent J. E. Dennis in accordance with Rule 12.2(a).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman J. L. Gilstrap, Trackman L. D. Hurst and Trackman/Driver

F. D. Smith shall each be allowed ten (10) hours' pay at their respective rates for each date during the period in question.

OPINION OF BOARD

By notice dated February 10, 1993, the Carrier advised the Organization of its intent to solicit bids to contract the work of "[r]emove trackage, appurtenances, and bridges from Railroad's Midland Valley Branch." The specifically designated area was "Midland Valley Branch M.P. 93.50 to M.P. 50.50 (Shopton to Kerr McGee)." Further, according to the notice, the Carrier advised the Organization that "[t]his is the type of work that has customarily and traditionally been performed by outside contractor's forces" and "[t]he Carrier has neither the skilled manpower nor the proper equipment to safely and

competently undertake and complete this project in a timely manner."

Conference was held on February 16, 1993 without resolution.

On February 17, 1993, the Organization reiterated its objections voiced that the February 16, 1993 conference. According to the Organization's letter of that date:

* * *

In conference on February 16, 1993, I objected to the above work being contracted out as this is work belong to Maintenance of Way employes. They have performed such work in the past and are skilled sufficiently to do this. If Carrier feels they do not have the modern, sophisticated equipment needed for the job, there are many places where such equipment can be leased or rented, such as American Railroad Maintenance Equipment, Inc. of Mitchell, Illinois, the Victor L. Phillips Company of Kansas City, Missouri, Martin Machinery, Inc. and Houston Bulldozer of Houston, Texas.

Carrier is in violation of the December 11, 1981, letter of "good-faith" in which Carrier agreed to reduce subcontracting and to procure needed equipment it does not have through lease or rental and place Maintenance of Way Employes thereon to operate such equipment. Carrier is in violation of the National Agreement of December 1981 in that it has not reduced any subcontracting to date.

The Carrier contracted the work to MK Track Work. On June 7, 1993, claim was filed.

The dispute was then progressed on the property. The record reveals a letter dated June 21, 1993 from the Carrier's Superintendent denying the claim and asserting in part that "... the Carrier has customarily and traditionally utilized outside forces to perform the type of work you have described in this case, and we understand that outside forces have historically performed such service without protest from your organization." In that letter the Carrier also stated that "... the fact remains that the employee involved in this case was not actually deprived of work opportunity."

In its letter of August 20, 1993, the Organization took issue with the Carrier's assertion that it lacked manpower and equipment to perform the work. The Organization pointed out in that letter that Claimants were skilled and competent to perform the work.

The Organization's argument that the Carrier did not respond to the claim in a timely fashion is not supported by the record. Claim was filed on June 7, 1993. The Carrier produced a denial letter dated June 21, 1993. Rule 12, Section 2(a) requires a denial of the claim within

60 days. The Carrier's June 21, 1993 letter met that requirement.

The Carrier's argument that the Organization must demonstrate that covered employees must perform the disputed work on an exclusive basis is rejected. See *Third Division Award 32862*:

... [U]nder Article IV, exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims. See e.g., *Third Division Award 29792* ("As explained more fully in *Award 29007*, however, a showing of less than 'exclusive' past performance of the disputed work by the employees is sufficient to establish coverage for purposes of Article IV notice and conference provisions"). See also, *Third Division Award 32338* and awards cited therein ("... [I]t is clear from prior Awards between these parties that Carrier has repeatedly been informed that the Organization need not prove exclusive performance of the work to establish a violation of the notice requirement of Article IV").

We are satisfied that the type of work contracted by the Carrier falls "within the scope of the applicable schedule agreement" as contemplated by Article IV. The scope rule covers Track Foremen, Trackmen and Trackmen-Drivers. The contracting out provisions of Article IV therefore apply.

With respect to the merits, the evidence shows that in the past the Carrier has contracted out the kind of work involved in this dispute.

According to the Carrier's February 10, 1993 letter, "[t]his is the type of work that has customarily and traditionally been performed by outside contractor's forces." That assertion is echoed in the Carrier's June 21, 1993 letter. With respect to that contention, see *Third Division Award 32746* involving a claim that the Carrier improperly contracted out the picking up of crossties¹:

As to the merits of the contracting action, on the property in its June 10, 1991 letter, the Organization stated that "[t]he fact is the Organization has long acquiesced to this work without benefit of notice and it is only in the last few years that any claims have been progressed ..." Therefore, the record establishes that this kind of work has been contracted in the past without objection by the Organization. Further, this claim involves the same kind of work resulting in denials of claims by this Board where we found that "in the past the Carrier has contracted out similar work which has been acquiesced to by the Organization." *Third Division Awards 31277, 31273*. See also, *Third Division Award 32745*. Those awards govern this dispute.

The rationale in *Award 32746* governs this case. See also, *Award 4* of this Board. The claim shall be denied.

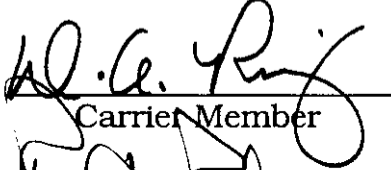
¹ The Carrier's notice in *Award 32746* addressed "... the removal of trackage and appurtenances on the Oklahoma Subdivision between Muskogee, Oklahoma ... and KOG Junction, Oklahoma ..." — work similar to that involved in this dispute.

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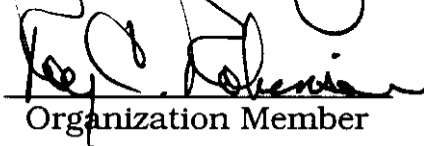
Claim denied.



Edwin H. Benn
Neutral Member



Carrier Member



Organization Member

Chicago, Illinois

Dated: 7/31/02