

PUBLIC LAW BOARD NO. 6218

PARTIES) **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
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 outside forces (Gilliam Contractors) to perform Maintenance of Way work (removing ties from track, transporting them to crossings and stacking them for pick-up at a later date) within the limits for the EDTG on the Memphis Sub beginning February 10, 1992 and continuing (Carrier's File 920351 MPR).

2. The Agreement was violated with the Carrier assigned outside forces (Oberkramer Contractors) to perform Maintenance of Way work (picking up crossties and scrap) from Mile Post 3 to Mile Post 6 in the vicinity of Dupon, Illinois on March 7 and 8, 1992 (Carrier's File 920385).

3. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it

failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work.

4. As a consequence of the violations referred to in Parts (1) and/or (3) above, Machine Operator Helper S. L. Richardson shall be compensated, at the machine operator's straight time and/or overtime rate of pay, for an equal amount of man-hours expended by the contractors' forces beginning February 10, 1992 and continuing until the violation ceases.

5. As a consequence of the violations referred to in Parts (2) and/or (3) above, Foreman L. C. Barnes, Machine Operators S. D. Ackman and E. A. Nanney and Trackman Driver D. S. Luther shall each be compensated for sixteen (16) hours' pay at their respective time and one-half rates.

OPINION OF BOARD

The record in this case consists of combined claims. The first claim

asserts that without prior notice to the Organization, the Carrier contracted with Gilliam Contractors to remove, transport and stack ties on the Memphis subdivision beginning February 10, 1992. The second claim asserts that without prior notice to the Organization, the Carrier contracted with Oberkramer Contractors to pick up crossties and scrap in the vicinity of Dupo, Illinois. The claims have been combined.

The first question is whether the Carrier notified the Organization of its intention to contract out the disputed work.

With respect to the contracting of the work to Gilliam, on the property the Carrier did not contest the Organization's assertion that notice was not given.¹

With respect to the contracting of the work to Oberkramer, on the property the Organization asserted in its April 16, 1992 letter that the "[C]arrier failed to notify the

General Chairman of their intent to subcontract said work" In its June 10, 1992 response, the Carrier asserted that "[t]he general chairman was notified of intent to contract work by letter of February 10, 1992." In its August 5, 1992 letter, the Organization disputed that assertion, again stating that the "[C]arrier failed to notify the General Chairman of their intent to subcontract said work" By letter dated September 1, 1992, the Carrier disagreed, stating "[n]otice of intent to contract was properly served you on February 10, 1992, and conference was held February 18, 1992, without the matter being resolved."

Thus, with respect to whether notice was given to the Organization concerning the Carrier's contracting of the work to Oberkramer, the record consists of the Organization's denial that it received notice and the Carrier's assertion that notice was given. However, the record before us contains no copy of the notice the Carrier maintains was sent to the Organization. The Carrier's assertion that it sent notice (and that conference was held) is an affirmative defense to the Organization's assertion that notice was not sent. Under the circum-

¹ In its May 18, 1992 denial, rather than disputing the Organization's assertion that notice was not given, the Carrier argued that notice was not required. Specifically, the Carrier asserted in that letter that "[s]ince the work in the instant case does not fall under the scope of your Agreement, your argument with regard to the lack of notice is obviously irrelevant in this case"

stances, having made the assertion that notice was sent, the Carrier had an obligation to furnish this Board with a copy of that notice to substantiate its affirmative defense that notice was sent. The Carrier did not do so. We therefore must find that notice was *not* given to the Organization by the Carrier concerning the Carrier's intent to contract out the work to Oberkramer.

For reasons stated in *Award 1* of this Board, the Carrier's argument that the Organization must demonstrate that covered employees exclusively performed the work is not persuasive:

... [T]he 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 perfor-

mance 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.

Article IV states that "[i]n the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization" Like *Award 1*, the disputed work — here, removing, picking up transporting and stacking ties and picking up scrap — is classic maintenance of way work and is therefore "within the scope of the applicable schedule agreement". See also, *Award 32862, supra*:

... [U]nder Article IV, we are satisfied that the described work falls "within the scope of the applicable schedule agreement". The work involved was Machine Operators' work on a track project — the kind of work the employees have performed. We need not determine for notice purposes whether the equipment utilized by the contractor was specialized, necessary, whether alternative equipment could have been rented, or whether the employees were actually capable of operating the specific equipment utilized by the contractor. The threshold inquiry is does the work fall "within the scope of the applicable schedule agreement"? We find that it does. As such, Article IV

mandated the Carrier to give the Organization notice.

The Carrier was therefore obligated under Article IV ("shall notify") to give the Organization notice of its intent to contract out the work. It did not do so. A violation of Article IV has been shown.

With respect to a remedy, *Award 32862* also governs:

... [O]n the issue of remedy, in the past where the Carrier has failed to give advance notice to the Organization in contracting disputes, this Board has often fashioned limited remedies. Some awards have limited relief to employees in furlough status. See e.g., Third Division Award 31285. The rationale behind those awards flows from the fact that notwithstanding the clear language of Article IV mandating the Carrier to give notice, for years the Organization allowed contracting to go on without objection. It was not until a change of leadership in the Organization on this property that Article IV became a focal point of hundreds of claims which served to put the Carrier on notice that the Organization thereafter intended to enforce the language in Article IV. For this Board to have required the Carrier to compensate non-furloughed employees after those initial claims were filed when the Organization previously allowed the wide spread contracting out of work falling "within the scope of the applicable schedule agreement" would have been manifestly unfair.

However, the language in Article IV concerning the Carrier's obligation to give notice to the Organization of its intent to contract work which falls "within the scope of the applicable schedule agreement" is clear. See Award 31285 ("[S]hall notify" is mandatory). Through the persis-

tent filing of claims, the Organization has put the Carrier on notice that it intends to enforce that language. This Board has repeatedly acknowledged that a point exists where the Carrier's reliance on the Organization's prior willingness to permit contracting of such work would no longer shelter the Carrier from liability in cases where the Carrier does not give the required notice. See Third Division Award 32338:

We have carefully considered the Awards cited by Carrier in support of the proposition that monetary compensation is normally only awarded to furloughed employees or those suffering a loss of work opportunity or a difference in pay rate as a result of contracting on this property. See e.g. Third Division Awards 31835, 29021, 29023. However, we believe that under the circumstances of this case, monetary relief is appropriate for the following reasons. First, Awards on this property have denied such relief when the dispute arose prior to Carrier being put on notice in June, and again in October, 1991 that such notice was required, and have stated such as the basis for denying monetary relief. Third Division Awards 29560, 29474, 29792, 29791. This dispute arose in April, 1993, over two years after the principle of the requirement of notice was established. Second, this Board has subsequently warned Carrier that "future failure to comply with the notice provisions of Article IV ... will likely subject [it] to potential monetary damage awards, even in the absence of a showing of actual monetary loss by Claimants." Third Division Award 29825 and Awards cited therein. See also Third Division Award 29792.

The contracting of work in this case occurred after the 1991 admonitions from this Board that when the Carrier thereafter failed to give notice as required by Article IV, the Carrier could be liable for more than only compensation for furloughed employees. Award 32338 and the Awards cited therein therefore require the imposition of remedial relief irrespective of whether the involved employees were furloughed. See also Third Division Award 28513 quoted in Award 32338 (imposing such relief "... where the Carrier failed to the degree demonstrated by this record to follow the previous admonitions of this Board over the requirement to give notice").

* * *

... The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement (here, notice) to contract work within the scope of the Agreement. Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion.

The Carrier's demonstrated violations of Article IV occurred in 1992 — after the 1991 admonitions from the Third Division that further similar violations would subject the Carrier to full make whole relief irrespective of whether the employees were working. Award 32862, *supra*. As a result of the demonstrated violations, Claimants lost potential work opportunities. Full make whole relief is therefore in order.

The claims shall be sustained. Claimants shall be compensated in

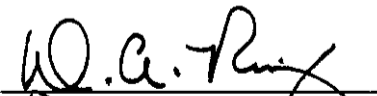
accord with the Agreement provisions based upon the number of hours worked by the contractors' forces. The matter is remanded to the parties to determine the amount of relief Claimants shall receive.

AWARD

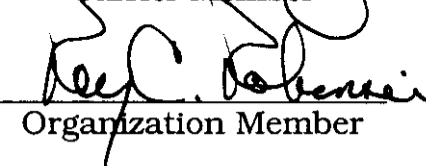
Claims sustained in accord with the opinion.



Edwin H. Benn
Neutral Member



Carrier Member



Organization Member

Chicago, Illinois

Dated: 7/31/02