

**PUBLIC LAW BOARD NO. 6545**

**PARTIES TO THE DISPUTE:**

THE TEXAS MEXICAN RAILWAY COMPANY, INC.

- and -

BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES

**STATEMENT OF CLAIM:**

Claim the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Huelcher Construction, Inc.) to perform Maintenance of Way and Structures Department work (install track panels and related dirt work) on the main line between San Diego, Texas and Hebbronville, Texas beginning October 22 through November 19, 1998 (System File MW-99-2-TM).

(2) The claim referenced in Part (1) above, as appealed by General Chairman R. D. Sanchez on March 4, 1999 to Assistant General Manager F. E. Hale, III, shall be allowed as presented because said claim was not disallowed by Assistant General Manager F. E. Hale, III in accordance with Rule 18.

(3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper notice of its intent to contract out the work in question and failed to exert a good faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.

As a consequence of the violations referred to in either Parts (1), (2) and/or (3) above, Claimants E. Lara, P. Benavides, T. Vasquez, A. Garcia, J. Gutierrez, J. Sciaraffa, J. Martinez, R. Garza, E. Elizalde, J. Rodriguez and F. Ramirez shall each be compensated for one hundred twenty (120) hours' pay at their respective straight time rates of pay and each shall be compensated for forty-eight (48) hours' pay at their respective time and one-half rates of pay.

[The above statement of claim is quoted from the Organization's notice of intent to file with the Third Division of the NRAB in this matter, which subsequently was withdrawn from the NRAB and placed before this Board].

Public Law Board 6545, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

Parties to said dispute exercised the right to appearance at hearing thereon.

**OPINION OF BOARD:**

Trackmen and Track Foremen employed by The Texas-Mexican Railway Company, Inc. ("Carrier") are subject to the terms of the Collective Bargaining Agreement between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Of particular import in this case are Rules 1 Scope and 29 Contracting Out, which read in pertinent part as follows:

**Rule 1-Scope**

(a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all sub-departments of the Maintenance of Way and Structures Department and such employees shall perform all work in the Maintenance of Way and Structures Department, except as specifically excluded in Paragraph (b) herein; except in emergency cases when Bridge and Building Forces are not available track forces or forces from other departments will not be used to perform work in the Bridge and Building Department nor will Bridge and Building Department forces or forces from other departments be used in doing the work of track forces except in emergency and not then if track forces are available.

(b) These provisions shall not apply to the following:

(1) Officials commonly recognized as such. (2) Clerical and engineering forces. (3) Signal, telegraph and telephone employees.

\* \* \* \* \*

**Rule 29 - Contracting Out**

When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the repair forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out such work. The carrier and organization representatives shall make a good faith attempt to reach an understanding on the contracting out of the work to be performed. In event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter or modify any provisions of the Scope rule or any rules of the applicable agreement in the handling of such matters.

The facts leading to the present claim were initiated by the following letter of August 7, 1998, from Carrier's Assistant General Manager to the Organization's General Chairman:

This is to advise you of The Texas Mexican Railway Company's intent to contract out certain track related projects as follows:

San Diego, Texas:	Renew and/or replace 14 road crossings and surface track between M.P. 108 and 110. Work will begin approximately August 24, 1998
Muil, Texas:	Prepare a roadbed for the extension of the existing siding by approximately 2,500 feet on the east end, construct and install the new switch at the east end of the extension. Work will begin approximately September 1, 1998.
Laredo to Corpus Christi:	Surface the main line. Work will begin approximately September 1, 1998.

This work is of the nature that cannot be performed by the Tex Mex' regular MOW forces due to the amount of work these forces currently have scheduled and due to the fact that the Tex Mex does not own the equipment that will be required.

As per Rule 29, this will serve as the required fifteen (15) days notice. Also, as required by Rule 29, I suggest that we discuss this contracting out at our conference scheduled for Friday, August 14, 1998.

The representatives of the Parties discussed the proposed sub-contracting on August 14, 1998 but were unable to achieve a meeting of the minds. Thereafter, Carrier proceeded with the contracting-out and the Organization filed the instant claim on November 19, 1998. On January 15, 1999, Carrier's Acting VP-Operations/Assistant VP Labor Relations denied the claim for various reasons, including lack of equipment by Carrier and lack of required "expertise" by the Carrier employees. The Organization made a timely appeal, following which the same Acting VP-Operations/Assistant VP Labor Relations again denied the appeal on April 21, 1998, stating: "Your appeal is respectfully denied and the Carrier's full position will be forthcoming". The Organization responded by letter of April 27, 1998, protesting that the appeal denial letter of April 21, 1998, was not a "proper" denial because it lacked the specificity required by the second sentence of Rule 18 (Emphasis added):

TIME LIMITS FOR PRESENTING AND PROGRESSING CLAIMS OR GRIEVANCES

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the Vice President - Operations within sixty (60) days from the date of the occurrence on which the claim or grievance is based. **Should any such claim or grievance be disallowed, the Carrier, shall within sixty(60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance.** If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

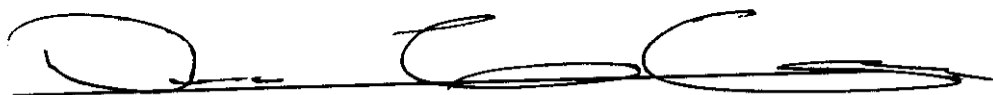
Upon receipt of the Organization's April 27, 1998 challenge to the adequacy of the April 21, 1998 denial letter, Carrier responded by letter of May 10, 1998, stating: "It is anticipated that our investigation will conclude within the next few days and we will present you with our full position" However, it was not until June 21, 1998 that Carrier's Acting VP-Operations/Assistant VP Labor Relations provide written reasons for denying the claim. When the matter remained unresolved, the Organization appealed the claim to determination in final and binding arbitration.

Notwithstanding notice, opportunity and plenty of time, the Carrier's Acting VP-Operations/Assistant VP Labor Relations inexplicably failed to comply with second sentence of Rule 18, *supra*. Accordingly, the reasons belatedly proffered by Carrier for denying the merits of the claim come too late for consideration by this Board. On a non-precedent, non-referable basis and without reaching the underlying merits of the alleged Scope Rule violation, Part 2 of the claim is sustained to the extent of twenty (20) hours pay at the straight-time rate for each of the named Claimants.

AWARD NO. 1  
NMB CASE NO. 1  
UNION CASE NO. MW-99-2 TM  
COMPANY CASE NO.

**AWARD**

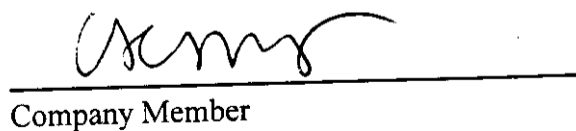
- 1) Claim sustained to the extent indicated in the Opinion of the Board.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.



Dana Edward Eischen, Chairman



Union Member



Company Member