AWARD NO. 10
CASE NO. 10

SPECIAL BOARD OF ADJUSTMENT NO. 1130

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**
	)	
	)	**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 (W. T. Byler, Inc.) to perform routine Maintenance of Way work (track construction) to connect Settegast Yard to Englewood Yard in Houston, Texas beginning April 15, through May 29, 1998 (System File MW-98-141/1140968 MPR).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out said work or make a good-faith effort to reduce the amount of contracting, as provided in Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. D. Guidry, K. C. Blount, P. H. Jackson, R. L. Peters, R. H. Johnson, J. F. Abrego, C. R. Stoot, H. J. Parker, F. L. Alonzo and L. E. Zeigler shall each be allowed two hundred and fifty-six (256) hours' pay at their applicable straight time rates.

OPINION OF BOARD

As a preliminary matter, this dispute arose on the former Southern Pacific property, but after the effective date of the November 7, 1997 Implementing Agreement, which provides, in relevant part:

> **Section 1: CONSOLIDATION OF AGREEMENTS AND SENIORITY**
>
> (A) The collective bargaining agreement between the Union Pacific Railroad Company and the Brotherhood of Maintenance of Way Employes (BMWE) effective April 1, 1975, as amended, will become applicable on the SPCSL, MKT, OKT, SPEL and SSW as of 12:01 am on the implementation date of this agreement. ... Except as provided in this agreement, all understandings, interpretations, and agreements applicable to employees covered by the UP collective bargaining agreement will apply to employees covered

> by the present collective bargaining agreements between MKT, OKT, SPEL, SSW, and BMWE.
>
> (B) The collective bargaining agreements between SPCSL, SPEL, SSW, MKT, OKT and BMWE and all understandings, interpretations, and memorandum agreements in connection therewith are hereby abrogated as of 12:00 midnight on the date immediately prior to the implementation date of this agreement. The agreement of July 5, 1997, between UPRR and BMWE concerning the former SPCSL will be retained with respect to employees on the roster as of July 5, 1997.

* * *

As the Carrier argues, under the Implementing Agreement because "... all understandings, interpretations, and memorandum agreements in connection therewith are hereby abrogated ...", it therefore follows that the guiding principles for deciding this dispute (and others on this Board) are not those which arose on the predecessor properties, but are those which have governed on the Carrier — specifically, the treatment of mixed practices for contracting out disputes.

Turing to this particular dispute, by letter dated January 20, 1998, the Carrier notified the Organization:

> This is a 15-day notice of our intent to solicit proposals and/or bids to contract to contract the following work:
>
> Location: Houston, Texas
>
> Specific Work: grading (site preparation), drainage and track construction for construction of a connection track in the Northwest quadrant at Tower 87, plus install culvert, clearing & grubbing, sub excavation, place sub-ballast and ballast, place and compact lime, place rip rap, install road crossing, install asphalt, install guard rail and fencing, install welds, road stripping, and traffic control.

* * *

Conference was held on February 8, 1998. The contractor began performing the work on April 15, 1998.

Article IV of the 1968 National Agreement states in relevant part:

> In 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 involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to

> give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.
>
> * * *

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 contracted work — track construction — is classic maintenance of way work. The contracting out provisions of Article IV therefore apply.

The Carrier met its notice obligations under Article IV. Notice was given on January 20, 1998 and conference was held on February 8, 1998. The Organization's arguments do not show that the notice quoted above is deficient in terms of Article IV requirements.[1]

With respect to the particular work in dispute, the evidence shows that in the past the Carrier has contracted out this type of work. The evidence further shows that covered employees have also performed this

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[1] The result in *Third Division Award 32862* where the Carrier did not give the appropriate notice and was required to compensate employees whether they working or not even though the Carrier may have been able to otherwise justify the subcontracting under Article IV requires repeating:

> From the handling of the hundreds of claims presented to this Board between the parties on the issue of contracting work, we are also cognizant that the notice, objection by the Organization and conference procedure often is a pro forma exercise which ends up in a literal battle of word processors and copy machines as the parties posture themselves on the issues and put together the voluminous records in these cases. Our function is not to make certain that the process is a meaningful one — that is the obligation of the parties. Our function is to enforce the language the parties agreed upon. The Carrier's course of action now is a straight forward one — simply give notice where the work arguably falls "within the scope of the applicable schedule agreement". If it does so, the Carrier will not be faced with the kind of remedy imposed in this case because it failed to give notice.

The Carrier gave the appropriate notice in this case.

type of work. Given that demonstrated mixed practice, the well-developed body of decisions involving the Carrier requires a finding that the Carrier did not violate the Agreement when it contracted out the disputed track construction work.[2]

This claim shall be denied.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Chicago, Illinois

Dated: 7-29-02

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[2] *See e.g., Third Division Awards 31275, 31285, 31277, 32744, 32745, 32867* and awards cited therein. *See also, Third Division Awards 29714, 32601.*