BEFORE
PUBLIC BOARD No. 7097

Award No. 8
Case No. 8

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	
vs.	)	**PARTIES TO DISPUTE**
UNION PACIFIC RAILROAD COMPANY	)	

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Advance Warning) to perform Maintenance of Way and Structures Department work (crossing watchman duties) on the Kenosha Subdivision at road crossings between Mile Posts 73 and 52.2 beginning June 13, 2004 and continuing through July 3, 2004 instead of Seniority District 8 employes (System File 8WJ-7417T/14090346 CNW)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the above-referenced work as required by Rule 1(b).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants L.J. Denbiec, C.D. Howley, D.E. Braaten, J.L. Paulson, J.J. Fisher, T.W. Kneebone, R.L. Harrison, G.L. Winchester, M.L. Ninmann, D.J. Kaminski, T.P. Raith, R.C. Schuett, S.M., Lehmann, J. Zavala, D.L. Golla, R.C.Stuber, J.R. Beilke, R.A. Otto, R.J. Vervoren, F.W. Brown, D.L. Jewson, K.P. Engeldiner, S. M. Growelle, J.E. Panosh, J. Harris, G.E. Patten,

> D.J. Dewitt, D.J. Klingseisen, A.J. Sosinski and J.A. Rickert shall now '*** each be compensated at their respective rates of pay for an equal share of the five thousand four hundred sixty (5,460) man/hours of work performed by Contractor forces in performing the Crossing Watchman duties.'"

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employes and Carrier involved in this dispute are respectively Employes and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

The Claimants identified in the Statement of Claim all have established and hold seniority in various classes of the Maintenance of Way and Structures Department on Seniority District 8. During the relevant time period, all Claimants were regularly assigned.

Beginning on June 13 and continuing through July 3, 2004, without notice to General Chairman Bushman, the Carrier used outside contracting forces from Advance Warning to perform the work of crossing watchman duties on the Kenosha Subdivision at road crossings between Mile Posts 73 and 52.2. The Organization asserts that twenty employes of the contractor worked a total of 5,460 hours in the performance of this crossing watchman work. The Organization contends that the Carrier violated Rules 1,2,4,5, and 7 of the CNW BMWE Agreement by contracting out this work which properly belonged to District 8 employes of the Maintenance of Way and Structures Department, and violated Rule 1 (B) by contracting out work without giving 15 days advance notice to the General Chairman.

The Carrier responds that there was no contract violation because the crossing protection work was provided by Advance Warning in conjunction with new track construction projects being performed by UP BMWE Consolidated System Gangs. Because Consolidated System Gangs are governed by the rules and practices of the UP BMWE Agreement, and the crossing protection work is outside the Scope of that Agreement, and has been routinely contracted out in the past, there was no contract violation, the Carrier contends.

The Board notes that under the Consolidated System Gang Agreement (Appendix T of the UP-BMWE contract), since June 1, 1998, System Tie and Ballast Gang Work and System Rail and Concrete Tie Gang Work has been combined on UPRR, WPRR, SPRR and D&RGW territories and has been subject to the Collective Bargaining Agreement between UPRR and BMWE. The record establishes that the disputed work was performed in connection with UP System Tie Gangs 9066 and/or 9067. Therefore, this Board finds that the UP-BMWE Agreement is applicable to the work, and the CNW agreement, including Rules 1, 2, 4(d), 7 and 44, is inapplicable.

The Board finds that the Organization has failed to show that Claimants were entitled to the disputed work. Although the Organization asserts that protection work has historically, traditionally and customarily been assigned to and performed by Seniority District 8 Maintenance of Way employes, the Organization does not refute the Carrier's evidence that crossing protection work performed in conjunction with gangs working under the UP Agreement, like the work disputed here, routinely has been performed by outside parties. In the absence of proof that the Claimants had any claim to the disputed work under Rule 1 of the CNW Agreement, the notice requirement of Rule 1(B) of that Agreement does not apply. See, e.g., Third Division Award Nos. 31668 and 28788. As the Third Division noted in Award No. 28788,

> [I]n the absence of evidence that Claimants were entitled to perform the work, we find that there was no obligation upon the Carrier to provide the General Chairman with advance notice. The requisite notification is required only where the planned contracting out is within the scope of the applicable Agreement. . . .

Rule 52 of the UP-BMWE Agreement does apply to the disputed work. Under Rule 52, notice is not required where the Carrier contracts out work that has historically been contracted out (Rule 52 (b)) or work not customarily performed by employes covered by the UP Agreement (Rule 52 (d)). See, among others, Third Division Award Nos. 28610, 30004, 30190. Because the Organization has not refuted the Carrier's evidence that the protection work in conjunction with Consolidated System Tie Gang projects has historically been contracted out, Rule 52 does not require notice of the contracting out in this instance, and there has been no contract violation. Accordingly, the claim is denied.

Due to this disposition of the claim, it is unnecessary to address the other issues raised by the parties.

AWARD

Claim denied.

Lisa Salkovitz Kohn
Neutral Member

Carrier Member

Organization Member

Dated: June 27, 2008

LABOR MEMBER'S DISSENT
TO
AWARD 8 OF PUBLIC LAW BOARD NO. 7097
Referee Kohn

The Majority in this instance based its decision on the premise that the only applicable provision of an agreement was Rule 52 of the UP Agreement. That premise is false.

On the former C&NW territory, where the new track construction was performed, the Carrier has the option of performing the work with employes holding seniority under the terms of the C&NW Agreement or it may assign such work to employes drawn from the former C&NW, UP, D&RGW, SPW and WP territories under the terms of the Implementing Agreement effective January 1, 1998. This Implementing Agreement referred to as the Consolidated System Gang Agreement is Appendix "13" of the C&NW Agreement ***and*** Appendix "T" of the UP Agreement. Employes holding seniority under the C&NW Agreement and Consolidated System Gang Agreement have overlapping contract rights to construct track on the former C&NW territory. While the Carrier has the option of performing new track construction on former C&NW territory under the terms of the C&NW Agreement ***or*** the UP Consolidated System Agreement, the work is not exclusive to either Agreement.

Similar sets of overlapping contract rights exist on the separate territories covered by the SPW Agreement and the UP Agreement. On territory covered by the SPW Agreement (primarily former SPW and WP territory), UP has the option of performing certain work under the terms of the SPW Agreement or the Consolidated System Gang Agreement. Likewise, on territory covered by

the UP Agreement (primarily former UP and D&RGW territory), UP has the option of performing certain work under the terms of the UP Agreement or the Consolidated System Gang Agreement. In essence, on territories covered by each of the three (3) Agreements (C&NW, UP and SPW Agreements), BMWE-represented employes have a dual set of contract provisions to protect their rights to perform certain work such as new track construction. In addition to the work reservations provided by the local C&NW, UP or SPW rules and practices, BMWE-represented employes covered by these agreements enjoy the protections provided by the Consolidated System Gang Agreement and the provisions of the UP Agreement incorporated therein. Therefore, the majority erred when it denied the claim based on presumed applicability of only the UP Agreement rather than the proven violation of C&NW Agreement which occurred when the Carrier failed to provide the General Chairman with proper advance notice of the intent to contract crossing watchman duties. The Organization did not dispute the Carrier's ability to assign the new track construction work to a consolidated system gang in accordance with Appendix "13" of the C&NW Agreement. It challenged the Carrier's violation of Rule 1(B) when it assigned outside forces to perform work customarily and historically performed by C&NW District 8 employes without providing proper advance notice. The Majority's decision erroneously rejected the applicability of the C&NW Agreement and based its decision solely on Rule 52 of the UP Agreement, therefore, I respectfully dissent.

Respectfully submitted,

Timothy W. Kreke

Timothy W. Kreke
Labor Member

CARRIER MEMBER'S RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 8 OF PUBLIC LAW BOARD 7097
Referee Kohn

Of utmost importance in the Organization's dissent is their concurrence that the Carrier can assign this work to either employees working on Consolidated System Gangs under the terms of the Union Pacific (UP) BMWE collective bargaining agreement or employees working under the terms of the former Chicago and North Western (CNW) BMWE collective bargaining agreement. However, by their dissent, it is apparent the Organization cannot decide which agreement rules should prevail or what position they should take in a dispute where these overlapping BMWE collective bargaining agreement contracts are in effect. Apparently, what the Organization was attempting to do was to place the Carrier in a Catch-22 situation.

By the language in their dissent, it is clear that while the work can be performed under the rules of either the UP or the CNW collective bargaining agreement forces they should be able to pick and choose which contract they want to file a claim under. In other words, if the Carrier has the work performed under the UP agreement then all the Organization would have to do is sit back and file a claim under the CNW agreement. Or, vice versa, if the Carrier had the work performed under the CNW agreement then all they would have to do is sit back and file a claim under the UP agreement. Fortunately, the Referee was able to see through this potential "game playing" and the award puts an end to that. The Referee correctly found that where the UP agreement was the agreement under which the work would be performed Rule 52 of the UP Agreement would be applicable and Rule 1(b) of the CNW Agreement would not. The Majority's decision was therefore not an erroneous one.

Respectfully submitted,

D. A. Ring

Dominic A. Ring
Carrier Member