BEFORE PUBLIC LAW BOARD 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

Case No. 15

STATEMENT OF CLAIM: Claim of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Herzog Contracting Corporation) to unload crossties within the Omaha, Nebraska yard and between Mile Post 40 near Fremont, Nebraska and Mile Post 106.50 near Havens, Nebraska and between Mile Post 175 near Gibbon, Nebraska and Mile Post 191 near Kearney, Nebraska from February 17 through and including March 17, 1991 (NRAB 91-3-451).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work in accordance with Rule 52(a).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Eastern District Equipment Operators D. J. Kobza and C. D. Skala shall each be allowed pay at their respective roadway equipment operator's rate of pay for an equal proportionate share of the three hundred four (304) straight time hours and one hundred sixteen (116) overtime hours expended by the contractor forces.

FINDINGS:

On March 28, 1991, the Organization filed a claim on behalf of Claimants D. J. Kobza and C. D. Skala after the Carrier utilized a subcontractor to pick up crossties and other material along the right-of-way in Nebraska.

The Carrier denied the claim pointing out to the General Chairman that this type of

work has been subcontracted in the past. Further, the Carrier argued that the Claimants were fully employed at the time of the work in question. In addition, the Carrier made reference to the fact that "use of the cartopper represents a technological change and therefore is covered by the February 7, 1965 National Agreement."

The parties not being able to resolve the issues, this matter now comes before this Board.

The Organization filed an 87-page submission and attached several hundred pages of awards and documents in support of its arguments. The Organization contended that the work of unloading crossties along the right of way is reserved to the Carrier's track department and roadway equipment subdepartment employees by the clear and unambiguous language of the Agreement between the parties. The Organization contended that the Carrier's B&B forces have customarily performed the work in the past as contemplated by Rule 52(a). Finally, the Organization contends that the Carrier failed to meet the notice and meeting requirements set forth in Rule 52.

In response, the Carrier has filed its own 27-page submission with hundreds of pages of exhibits and awards attached in support of it. The Carrier contends that the work involved here is a "mixed practice" and that the terms of Rule 52(a) and the awards that have been issued thereunder allow it to subcontract that type of work. The Carrier further contends that the subcontractor was used so that the Carrier would have the benefit of their patented "cartopper" material handler which the Carrier did not have and which was

needed for the project. Finally, the Carrier contends that the Claimants were working full time in their regular jobs and lost no service at all. Consequently, the Carrier argues that any claim for loss of earnings should be denied.

This Board has thoroughly reviewed the extensive submissions and the voluminous record in this case. We find that the Carrier has submitted extensive documentary evidence confirming that it has subcontracted this type of work in the past. The Carrier has often rented roadway equipment and hired subcontracted employees to perform this same type of tie unloading work. Consequently, we find that the work involved must be considered a "mixed practice" where the Carrier has a right to use its discretion to have either contractors or BMWE members perform various aspects of the track work. Numerous awards have held that a mixed practice task may be subcontracted if the Carrier so desires.

The Carrier contends that the type of cartopper vehicle utilized in this work is patented and therefore, the Carrier must subcontract the work in order to obtain the use of the equipment. The Organization has put into the record a photograph of a Carrier employee performing work on a cartopper in the past. That cartopper bears the insignia of the Carrier. However, that evidence is not dispositive of this dispute. The Organization has failed to rebut the Carrier's evidence that it has historically, from time to time, subcontracted for this type of tie unloading work which has on other occasions been performed by bargaining unit members.

Although this Board recognizes the arguments raised by the Organization relating to the subcontracting of work which its members can and have performed in the past, the clear language from the previous awards which interpret the Agreement relating to subcontracting makes it evident that, in this case, the Carrier has not acted in violation of the Agreement. Therefore, the claim must be denied.

AWARD

Claim denied.

PETER R. MEYERS
Neutral Member

Carrier Member

DATED:

Organization Member

DATED:
(Dissent Attached)

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 15 OF PUBLIC LAW BOARD NO. 5546
(Referee Meyers)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on property handling. Such is the case here.

One would assume that to render a decision in an arbitration case, the Majority would take the time to read the record as developed on the property and make its decision therefrom. However, it appears in this case that to reach its predetermined decision to deny the claim, the Majority simply ignored the facts of the case. For example, the Majority in attempting to recite the Organization's position pointed out that "*** The Organization contended that the Carrier's B&B forces have customarily performed the work in the past as contemplated by Rule 52(a). ***" (Page 2 of the award) Even a cursory review of the STATEMENT OF CLAIM would establish that the claim was filed for roadway equipment operators and not B&B employes. Moreover, the Majority set forth that "*** Finally, the Organization contends that the Carrier failed to meet the notice and meeting requirements set forth in Rule 52." However, since the Carrier violated the notice provisions of the Agreement, the Majority simply ignored that aspect of the claim.

The Majority goes on to embellish the Carrier's position by stating that "*** We find that the Carrier has submitted extensive documentary evidence confirming that it has subcontracted this type of work in the past. ***" The Carrier supplied a six (6) page list containing forty-one (41) entries of alleged subcontracting. Not one of those forty-one (41) entries mentioned tie unloading work. Consequently, if the Carrier's list proved anything it was that roadway equipment operators are the ones who have performed this work in the past. Of course that position would be consistent with Third Division Award 28590 which held:

> "In considering this case the Board concurs with the Organization's position. The central defining issue herein is whether Carrier could have used alternate equipment to unload crossties or was compelled by the lack of such machines to utilize the Koehring 6611. There is no question that said work accrued to Maintenance of Way forces and hence was protected, subject to the contracting "exceptions delineated in Rule 52 and further implicitly protected by the December 11, 1981 Letter of Understanding. Since we find that it was plausible indeed to use the Jimbo Crane or some of the other equipment identified by the Organization, though it might have been less efficient, we must conclude that Rule 52 was violated. None of the Rule 52 exceptions was present to justify subcontracting."

There was no "mixed practice" when Award 28590 was rendered and there was no "mixed practice" here. Again, the decision in this case was not based on the facts of the record.

The fact that no practice exists for contracting tie unloading work certainly establishes as false the Majority's further revelation that "*** The Organization has failed to rebut the Carrier's evidence that it has historically, from time to time, subcontracted for this type of tie unloading work which has on other occasions been performed by bargaining unit members." When the Carrier was challenged to present evidence and none was forthcoming, it would not fall to the Organization to rebut something that did not exist. No history of contracting existed; consequently, this award was not based on the facts of the on property record and therefore in error.

To further illustrate the Majority's specious handling of this case, it did not bother to address the notice issue. The notice proffered by the Carrier was received by the Organization on December 12, 1990 and the Organization responded thereto on December 17, 1990 requesting that a conference be held prior to the work being assigned and performed by a contractor which is exactly what the rule (Rule 52) of this Agreement requires. Again, since the Carrier failed to comply with the notice provision, the Majority simply ignored the infraction.

The award is therefore palpably erroneous and of no precedential value.

I, therefore, dissent.

Respectfully submitted,

R. B. Wehrli
Organization Member

CARRIER'S RESPONSE

TO

ORGANIZATION MEMBERS DISSENT

TO

AWARD 15 OF PUBLIC LAW BOARD NO. 5546

Contrary to the Organization Members assertion in his "Dissent", Award No. 15 is based on similar on-property handling and therefore the Referee did not err in his findings nor is the award palpably erroneous.

The Organization Member in his submission to the Board Hearing and in the Executive Session advanced the same arguments contained in his "Dissent". Apparently he is attempting to rehash his old arguments one more time. The Organization Member is clearly avoiding the fact the Carrier has a substantial practice of leasing and renting equipment to perform all facets of work. Contrary to his "Dissent" the Award was based on the overall facts on the record. The Referee did not err.

Another contention of the Organization Member in his "Dissent" concerns the issue of the Notice of the intent to subcontract the work involved in the dispute and the scheduling of conference. What the Organization Member is clearly overlooking is the language of the following Awards dealing with similar circumstances. These Awards are Third Division Award 30690 (issued January 31, 1995) and Third Division Award 30034 (issued February 17, 1994) by Referee Herbert L. Marx, Jr; Third Division Award 30287 (issued July 19, 1994) by Referee Gil Vernon; and, Third Division Award 24888 (issued July 28, 1984) by Referee Marty Zusman. Obviously Referee Meyers in issuing the above Award, and three (3) other distinguished Referees cannot be considered to be in error because the Organization Member is dissatisfied.

In any event, the Carrier considers the Award to have precedential value and the Carrier will continue to cite the above findings in similar disputes.

D. A. Ring
Asst. Director Labor Relations
Union Pacific Railroad
Carrier Member to PLB 5546