BEFORE PUBLIC LAW BOARD 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

Case No. 16

STATEMENT OF CLAIM: Claim of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (General Contracting Incorporated, Ness Construction and Shurigar Construction Company) to unload concrete crossties from railroad cars, stock pile same and reload them on low boy trucks at Sarben, Nebraska for delivery to the work location at Mile Posts 8.93 to 10.59 on January 28, 29, 30, 30 and February 4, 5, 6, 7, 11, and 12, 1991 (NRAB 92-3-466).

(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 as required by Rule 52(a).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, furloughed Eastern District Roadway Equipment Operators C. D. Steuben, D. K. Melius, R. L. Wehrer and D. J. Kobza shall each be allowed pay at an equal proportionate share of the three hundred (300) man-hours expended by the outside forces in the operations of the cranes and Nebraska Division Group 15 Class C Truck Drivers D. B. Wilken and K. L. Williams shall each be allowed pay for an equal proportionate share of the one hundred twenty (120) man-hours expended by the outside contractor in the operation of the semi-trailer trucks.

FINDINGS:

On September 11, 1990, the Carrier served notice on the Organization informing it of its intent to use a subcontractor to construct a siding between Mile Posts 8.93 and 10.58. The Carrier contended that it "did not have the forces, supervision, or equipment

to do the job".

The Organization responded on September 11, 1990, opposing the subcontracting of said work and requesting a conference. A conference was held on October 15, 1990 and the issues were not resolved.

On February 21, 1991, the Organization filed a claim on behalf of Claimants Steuben, Melius, Wehrer, and Kobza who were furloughed at the time of the work in question and Claimants Wilken and Williams who were working as truck drivers at the time. The Organization contended that the Claimants were "fully qualified, capable, willing and available to perform all of the work involved here and would have readily done so had the Carrier assigned them thereto".

The parties being unable to resolve the issue, this matter now come before this Board.

This Board has reviewed the 79-page submission filed by the Organization, as well as the numerous exhibits attached thereto. The Organization contends that the work involved in this case is reserved to the Organization represented employees by the clear and unambiguous language of the Agreement. The Organization also contends that the Carrier forces have customarily performed the work in the past. Finally, the Organization contends that the Carrier failed to issue its notice to contract out the work as required by Rule 52 and discuss the matter with the General Chairman before it assigned the work to the outside forces.

The Carrier contends that this work was a "mixed practice" type of work in which the Carrier retains its discretion as to whether to use outside contractors or BMWE members. The Carrier contends that it did not have the forces, supervision, or equipment to perform the work constructing a siding. With respect to the notice, the Carrier contends that it issued the notice on September 11, 1990, and the General Chairman responded on September 17, 1990. The conference was held on October 15, 1990, and the issue was not resolved. The Carrier contends that it had a right to proceed with subcontracting the project.

This Board has thoroughly reviewed the extensive records tendered by both parties in this case and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it subcontracted the work in question. The record reveals that the Carrier properly served a notice of intent to contract the work and that a discussion was held as is required by Rule 52. Although there is no question that Organization represented employees have performed this type of work in the past, the Carrier has presented 135 pages each containing approximately one dozen instances of this type of work being subcontracted to outside concerns. Consequently, this Board must find that there has been a mixed practice with respect to this type of work. Under the numerous awards that have been issued on this property, a mixed practice is the type of work that the Carrier has retained the right to subcontract. See Third Division Award Nos. 27010, 28558, and 28610.

As the numerous Boards have held in the past, if this Carrier has established a long history of contracting out this type of work, then it is not exclusively reserved for the bargaining unit employees, and the Agreement will not be considered to have been violated. This Board can see no reason to set aside the previous rulings given the facts involved in this case.

For all of the above reasons, the claim must be denied.

AWARD

Claim denied.

PETER R. MEYERS
Neutral Member

Carrier Member

Organization Member

DATED:

DATED:
(Dissent Attached)

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 16 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 and prior precedent between the parties. Such is the case here.

The Board properly recognized that the handling of concrete crossties was work that Organization represented employes have performed in the past. This conclusion should have been easily reached based on the precedent established in Third Division AwardS 28590 and 28817. However, rather than following those awards, the Majority took it upon itself to again review the alleged past practice material submitted by the Carrier and held:

> "*** Consequently, this Board must find that there has been a mixed practice with respect to this type of work. Under the numerous awards that have been issued on this property, a mixed practice is the type of work that the Carrier has retained the right to subcontract. See Third Division Award Nos. 27010, 28558, and 28610."

The Majority in Third Division Awards 28590, 28817 and 31025 had already reviewed that same past practice instances submitted by the Carrier and had rejected it. Those awards are not general awards which were referenced by the Organization for general principles on contracting. The work at issue in those awards was the same work at issue in Award 16 and since the list submitted by the Carrier had already been rejected as not demonstrating any convincing basis for contracting, the Majority's attempt to now lend credence to that same list clearly illustrates that it did not understand the case and did not base the decision on the facts of this record.

It should also be noted that the Majority relied on three (3) Third Division Awards which did not deal with the type of work described in this case and therefore could not be used as establishing a "mixed practice".

The Majority further errored when it held that "*** The record reveals that the Carrier properly served a notice of intent to contract the work and that a discussion was held as is required by Rule 52. ***" The notice proffered by the Carrier specifically referenced grading sub-ballast installing and extending culverts and seeding. In its response, the Organization specifically questioned the Carrier whether additional work other than that specified in the notice would be performed at the location. The Carrier

did not respond to that inquiry so the Organization was left with the understanding that only the work specified in the notice would be performed. Consequently, the tie handling was not included in the notice and the Majority's holding to the contrary is in error and not based on the facts of the record.

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 16 OF PUBLIC LAW BOARD NO. 5546

Contrary to the Organization Members assertion in his "Dissent", Award No. 16 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, including the unloading of ties. Contrary to his "Dissent" the Award was based on the overall facts on the record. To also rectify the record, Award 28817 dealt with the cleaning of right of way and not with the unloading of wood ties. 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 adequacy of the Notice. The Organization Member has once again contended that since the unloading of ties for the project was not specifically addressed, the Carrier did not satisfy the Notice requirements. However, the Organization is clearly overlooking the language of Third Division Awards 30691 and 30185 (BMWE vs Union Pacific).

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