BEFORE PUBLIC LAW BOARD 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

Case No. 17

STATEMENT OF CLAIM: Claim of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (L. G. Barcus and Sons) to perform the necessary dirt work and drive bridge pilings in connection with the construction of bridges at Mile Posts 17.65 near Nevens, Nebraska and 82.64 near Lisco, Nebraska on the North Platte Branch beginning April 1 and continuing (System File S-513/910549).

(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 and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Eastern District Roadway Equipment Operators P. D. Brown, D. D. Dickinson, D. J. Kobza and D. K. Melius shall each be allowed pay at their respective straight time and overtime rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces commencing April 1, 1991 and continuing.

FINDINGS:

On February 22, 1991, the Carrier notified the Organization of its intent to subcontract work consisting of moving dirt, handling materials, and driving piling while assisting a Carrier bridge gang at Mile Posts 17.65 and 82.64. The Organization responded by opposing the use of an outside contractor and requested a conference. A

conference was held on March 15, 1991 and the issues were not resolved. On April 1, 1991, the work on the project began.

On April 26, 1991, the Organization filed a claim on behalf of Claimants Brown, Dickinson, Kobza and Melius. The Carrier denied the claim.

The parties being unable to resolve the issues, this matter now comes before this Board.

In this case, the Organization argues that the work that was performed by the outside forces has clearly been reserved to the Carrier Roadway Equipment subdepartment forces by clear and unambiguous work rules. The Organization also contends that the Carrier failed to properly notify and meet with the General Chairman concerning its intention to contract out the work involved in accordance with the provisions of Rule 52. Finally, the Organization contends that the Carrier's alleged past practice of contracting out such construction work does not justify the assignment of the work to outside forces.

The Carrier in its lengthy submission contends that once again this matter involves a "mixed practice" which allows the Carrier to assign the work either to its own forces or to a subcontractor. The Carrier has submitted a list of Maintenance of Way contracts which it contends involved similar work for which the Carrier used outside contractors.

With respect to the notice requirement, the Carrier indicates in its submission that it met the notice requirements of Rule 52 when it met with the Organization's

representives in an effort to reach some resolution.

This Board has reviewed the extensive submissions filed by both parties and we find that Organization has not met its burden of proof that the Carrier violated the Agreement by subcontracting the pile-driving work in this case. This Board agrees with the Organization that the Carrier has not proven that it did not have access to pile-driving equipment and that it apparently owns such equipment and it could easily have rented it. However, nothing in the Agreement requires the Carrier, in a mixed practice situation, to use its own forces when it believes that it will be more reasonable and cost effective to use outside forces. The Organization has failed to prove that this is an exclusive practice that can only be performed by bargaining unit personnel. Given the numerous awards on this property involving subcontracting, this Board cannot find that the Carrier violated the requirements of Rule 52 when it subcontracted the pile-driving work in this case. Therefore, the claim will be denied.

AWARD

Claim denied.

PETER R. MEYERS
Neutral Member

Carrier Member

Organization Member

DATED:

DATED:
(Dissent Attached)

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 17 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.

The Neutral apparently forgot the principles in contracting out of work cases and simply followed the Carrier's submission when this award was written. This is somewhat surprising since this Neutral has helped shape those principles with the rendering of approximately twenty-five 25 awards at the Third Division alone. The very way the Carrier handled this case smacks of bad faith and for the Board to condone such action clearly defiles the entire railroad arbitration process.

It is apparent from a reading of this award that the Majority ignored the notification process stipulated in Rule 52 and justified its decision on an alleged "mixed practice". For a mixed practice to exist there must be some evidence that other than Maintenance of Way forces have performed the work and that such evidence must establish more than a few isolated incidents. The evidence that the Board relied on here was a sixteen (16) page list that did not contain one incident of the Carrier contracting for dirt work or pile driving. The list simply referred to different pieces of equipment the Carrier had rented and the contracting of general bridge work. In other words, the Neutral simply took the Carrier's word that it had contracted out this type of work. Simply saying it is so, does not make it so. I wonder how many times that principle has been used against the organizations at the NRAB? Obviously, this award was not based on the facts as presented on the property.

The Majority then goes on to expand on its mixed practice fantasy with "*** The Organization has failed to prove that this is an exclusive practice that can only be performed by bargaining unit personnel. ***" There is nothing in the Maintenance of Way Agreement that requires this Organization to prove an exclusive practice. The reality is that the contracting out of work rule specifically refers to "work customarily performed by employes covered under this Agreement". Had the parties who negotiated the Agreement meant to include the term "exclusively" rather than "customarily" they would have done so. Moreover, the Public Law Board Agreement entered into by the parties that established this Board included language that specifically restricted the Board from changing or amending the Agreement. Consequently, this award is in violation of the Public Law Board Agreement, it is not in compliance with the terms of the Agreement and, therefore, void of precedential value.

As an aside, the NRAB, this Neutral included, has consistently held that exclusivity is not the determining factor in contracting out of work cases, customary and historical practice is.

The Majority further errored when it held that "*** However, nothing in the Agreement requires the Carrier, in a mixed practice situation, to use its own forces when it believes that it will be more reasonable and cost effective to use outside forces. ***" Not only has the economy issue been debunked by the NRAB but this very Neutral penned that principle in Third Division Award 29394.

The tone of this award is probably best expressed by what it does not impart, i.e., the presence of a proper notice. The Organization was made aware that the Carrier had contracted out this work prior to the notice being served. The Organization advised the Carrier of this fact and requested that it provide a copy of the contract with the outside concern for the Organization's review. Needless to say, the Carrier did not respond which would lead one to believe that the Organization's position was correct. If there is a dispute which would more demonstrate bad faith in a contracting out claim (December 11, 1981 Letter of Agreement), one cannot imagine.

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 17 OF PUBLIC LAW BOARD NO. 5546

Contrary to the Organization Members assertion in his "Dissent", Award No. 17 is based on similar on-property handling and therefore the Referee did not err in his findings nor is the award palpably erroneous.

As the Organization Member stated in his dissent, "For a mixed practice to exist there must be some evidence that other than Maintenance of Way forces have performed the work and that such evidence must establish more than a few isolated instances." Even though the Organization Member erroneously attacks the lists provided in the on-property handling for the dirt work (i.e. grading, build berms, stabilization, etc), more importantly he totally ignores at least seventeen (17) prior Awards rendered on the issue of dirt work and the application of Rule 52 of the Agreement. To refresh his memory the following is the list of Awards arising out of disputes he has advanced to arbitration: 27010 (1988); 27011 (1988); 27020 (1988); 28619 (1990); 28622 (1990); 29308 (1992); 29309 (1992); 29577 (1993); 30193 (1994); 30210 (1994); 30671 (1995); 30824 (1995); 31288 (1996); 31652 (1996); 31721 (1996); and, Public Law Board 5546 Awards 3 and 6 (1994). Similarly, the Organization Member, in addition to other Awards involving Bridge work, ignores Third Division Awards 30823 (1995); 31170 (1995) and 31281 (1996) all issued relative to the driving of piling for bridges. Apparently, in the Organization Members mind, such esteemed Neutrals as Goldstein, Duffy, Marx, Benn, Newman and Malin are all additionally wrong. Contrary to the assertion of the Organization Member, Referee Meyers did not err when he followed the above findings and his own Award 29577 of the Third Division.

As to the issue of the Notice, the Organization member apparently has his cases mixed up. The file showed that the Notice was served on February 22, 1991, it was conferenced on March 15, 1991 and the work commenced on April 1, 1991. This clearly is in compliance with Rule 52 and the Referee was correct in finding that proper notice was given by the Carrier. Simply put, the Referee has not erred.

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