BEFORE PUBLIC LAW BOARD NO. 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
UNION PACIFIC RAILROAD COMPANY

Case No. 8

STATEMENT OF CLAIM: Claim of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Brennan Construction Company) to perform Bridge and Building Subdepartment work (framing in five [5] doors) in the breezeway located between the Steel Car Shop and the Store Department Building at Pocatello, Idaho between July 9 and 15, 1992 (System File R-61/920587).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of their Maintenance of Way forces as required by Rule 52(a) and the December 11, 1981 Letter of Understanding.

3. As consequence of the violations referred to in Parts (1) and/or (2) above, furloughed B&B Carpenter W. S. Wallace and B&B Carpenter T. D. Stalder shall each be allowed forty (40) hours' pay at the B&B First Class Carpenter's straight time rate.

FINDINGS:

On July 9 and 15, 1992, the Carrier used an outside contractor to frame door openings at the Signal Shop at Pocatello, Idaho.

The Organization took exception to the use of an outside contractor and filed this instant claim arguing that this type of work has historically and customarily been

performed by B&B carpenters.

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

This Board has reviewed the procedural argument raised by the Carrier and we find it to be without merit. The Carrier was well aware that the Organization rejected its response and was continuing this case through the claim procedure.

With respect to the substantive issue raised in the claim, this Board finds that the Carrier issued its notice advising the Organization's General Chairman of its intent to solicit bids to cover the construction of a concrete dock ramp, extension of existing dock and ramp, insulation of overhead door and various items of related work at the Signal Shop at Pocatello, Idaho on July 2, 1992. In that notice, the Carrier's Assistant Director of Labor Relations stated that he would be available to conference the notice within the next 15 days in accordance with Rule 52 of the Agreement.

The record reveals that the Organization responded to the Carrier's notice on July 7, 1992, raising the usual objections. The Carrier replied to the Organization's July 7, 1992, letter on July 14, 1992, stating essentially that this type of work had traditionally been contracted out by the Company. In its July 14, 1992, letter the Carrier's Director of Labor Relations indicated that he would be willing to meet in conference to discuss the notice.

The problem in this case is that the Carrier actually had the work performed on July 9 and July 15, 1992. According to the Carrier's submission, it had two subcontracted men work a total of 10 man hours on July 9 and then two men work a total of 13 man

hours on July 15, 1992. Obviously, there had been no opportunity for the Organization to meet and discuss the proposed subcontracting out as is contemplated by the Agreement.

There is no question that the Carrier retains a broad right to use subcontractors despite the numerous objections by the Organization. However, the rules that have been negotiated by the parties specifically envision that the Carrier will give notice to the Organization with sufficient time to allow the Organization to meet with the Carrier to discuss it. In this case, because of the Carrier's late notice the case was not conferenced until July 22, 1992, thirteen days after the work had started and seven days after the work had been finished.

This Board has held on several occasions in the past that if the Carrier fails to live up to the notice requirements, it will be responsible for making the Claimants whole for the work that was assigned to the subcontractors. Although this is not necessarily the best solution to these cases, it appears the only way to give the Carrier an incentive to follow the terms and spirit of the Agreement and meet with the Organization prior to contracting out of the work.

The problem for the Organization in this case is that there is a long line of Third Division awards that precludes this Board from providing the claimants with pecuniary relief where they have not proved a loss of work opportunity or loss of earnings due to the carrier's failure to tender the required notice. Although the Organization has argued that there has been a significant reduction of rosters in Idaho, that is not enough to justify the award of monetary damages in this case. The record reveals that the Claimants were

fully employed and suffered no loss of wages. Consequently, although the Carrier was guilty of a serious violation of the Rules in this case, this Board is without the authority to issue monetary damages to the two Claimants listed in the claim.

This Board does remind the Carrier, however, that there is some language which allows the award of pecuniary relief where the carrier has "flagrantly or repeatedly failed to comply with Rule 52." This Board finds that there is a very important reason for the requirement of the conference before the subcontracting takes place; and if the Carrier continues to ignore the conferencing language of the Rule, this Board will not hesitate to award pecuniary relief in the future.

AWARD

Claim sustained in part. The Carrier was in violation of the Agreement. However, there will be no monetary damages awarded.

PETER R. MEYERS
Neutral Member

Carrier Member

DATED: 9/23/94

Organization Member

DATED: 9-30-94