BEFORE PUBLIC LAW BOARD NO. 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
UNION PACIFIC RAILROAD COMPANY

Case No. 9

STATEMENT OF CLAIM: Claim of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Monroe Fence Company) to perform Bridge and Building Subdepartment work (installed new chain link fence) in the breeze way located on the south side between the Steel Car Shop and the Store Department at Pocatello, Idaho between July 7 and 9, 1992 (System File R-53/920557).

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 twenty-four (24) hours' pay at the B&B First Class Carpenter's straight time rate.

FINDINGS:

On July 7 and 9, 1992, the Carrier hired an outside contractor to install a fence around an outdoor storage area 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. Furthermore, the Organization argues that the Carrier did not give the Organization sufficient notice of intent and therefore, was in violation of the

Agreement.

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. We find that the Organization has met the requirements of Rule 49 and properly notified the Carrier of its rejection of the Carrier's decision.

With respect to the substantive issues, this Board has reviewed the extensive record in this case and we find that the Carrier notified the Organization on July 6, 1992 of its intent to solicit bids to cover the installation of a fence in the Freight Car Triangle Area in Pocatello, Idaho. In that notice the Carrier notified the Organization's General Chairman that the Carrier's Assistant Director of Labor Relations would be available to conference the notice within the next 15 days.

The record further reveals that on July 14, 1992, the Organization responded to the Carrier's notice with the usual objections to the subcontracting. The Carrier replied to the Organization's response on August 14, 1992. In that reply, the Carrier contended that this type of work had been traditionally contracted out by the Carrier. The Carrier's Director of Labor Relations also stated that he would be willing to meet with the Organization to discuss the notice.

The record reveals that the conference of this subcontracting took place on August 19, 1992.

Once again, we must find that the Carrier violated the terms and spirit of the Agreement when it gave notice to the Organization of the proposed subcontracting on

July 6, 1992, actually had the work performed on July 7 through 9, 1992, and then did not hold the conference until August 18, 1992. We must find that that notice was insufficient to enable the Organization to meet with the Carrier in an effort to convince the Carrier that the work should be performed by Carrier forces represented by the Organization.

This Board has held on several occasions in the past that the purpose of the rules requiring the notice is to allow for the parties to meet to discuss the upcoming subcontracting. The Organization has negotiated that language so that it may be afforded an opportunity to convince the Carrier to have the work done by its own employees. When the Carrier issues the notice a day or two before the subcontracting and does not hold the conference until after the subcontracting is over, the language of the Agreement is frustrated.

This Board has held that although it may be an imperfect solution, the only way to give the Carrier an incentive to issue a timely notice to the Organization and allow for a conference to take place before the subcontracting actually occurs, is to allow these claims and have the Claimants made whole for work that was performed by outside forces.

However, the problem for the Organization in this case is that there has been an insufficient showing that the two named Claimants had a loss of work opportunity or a loss of earnings due to the Carrier's failure to tender the required notice. The Organization has not presented sufficient evidence that the failure of the Carrier to issue the notice directly led to a monetary loss to the two named Claimants.

There is a long line of cases from the Third Division that precludes the Board from providing claimants with pecuniary relief where they have not proved their loss of work opportunity or loss of earnings due to the carrier's failure to tender the required notice. It should be pointed out that there have been decisions that have held that if the carrier has flagrantly and repeatedly failed to comply with Rule 52, monetary damages will be imposed. Consequently, this Board urges the Carrier to make a better effort at meeting the requirements of Rule 52 with respect to the notice.

AWARD

Claim sustained in part. The Agreement was violated when the Carrier failed to furnish the Organization with the proper advance written notice. However, there will be no monetary relief awarded.

PETER R. MEYERS
Neutral Member

Carrier Member

DATED: 9/23/94

Organization Member

DATED: 9-30-94