PUBLIC LAW BOARD NO. 6205
AWARD NO. 10
CASE NO. 10

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Power Company) to perform Bridge and Building Subdepartment work (installing new chain link fence and gates) at Hinkle, Oregon on September 14, 15, 16, 17, 18, 21, 22, 23, 24 and 25, 1992 (System File H-2/930096).

(2) The Agreement was further violated when the Carrier's advance written notice of its intention to contract out said work was improper and when it 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 a consequence of the violations referred to in Parts (1) and/or (2) above, Oregon Division B&B Foreman W. L. Kernan shall be allowed sixty-four (64) hours' pay at the B&B foreman's rate and B&B Carpenters G. M. Genzel, D. H. Hector, G. G. Perrenoud and W. D. Huffman shall each be allowed sixty-four (64) hours pay at the B&B First Class Carpenter rate."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

By notice dated June 22, 1992, Carrier advised the Organization of its intent to solicit bids "to cover the installation of asphalt at the store area facility in the Hinkle Yard on the Portland Subdivision." It noted that two named individuals would be available to conference the notice within the next 15 days. By letter dated June 26, 1992, the Organization objected to Carrier's intent to contract the work, relying upon Rules 1 and 8 as reserving the work to employees and referencing prior employee written statements furnished to Carrier in another specified file establishing the fact that employees have customarily performed this type of work and are skilled at doing so. The Organization requested a conference prior to the work being performed. Carrier responded on June 30, 1992, and a conference was held on July 6, 1992 without resolution.

On September 18, 1992 Carrier served the following notice to the Organization:

> "This refers to the Company's June 22, 1992 notice concerning installation of asphalt at the store area facility in the Hinkle Yard on the Portland Subdivision.
>
> A review of out file U-52-2278 reveals that we inadvertently omitted to include in our notice this project also includes fencing."

The Organization again objected to the contracting, noting that this was the first time notice was given concerning contracting fencing at Hinkle Yard and that it cannot be considered to be part of the prior notice concerning asphalt at that location. The Organization requested a conference on this notice. Carrier responded on October 2, 1992 indicating a willingness to meet, and conference was held on October 8, 1992 without resolution. The disputed work took place between September 14 and 25, 1992.

In its claim filed on October 20, 1992, the Organization asserts that the work in question is specifically reserved to employees by Rules 1, 8, 9 13 and 16 of the Agreement, and has customarily and historically been performed by them. It also notes that the contracting took place before the notice was served and conference held. In its correspondence on the property, the Organization took issue with the type of past practice evidence introduced by Carrier, and again argued that Carrier failed to meet its good faith notice and conference obligations. It asserts that a full monetary remedy is appropriate for loss of work opportunity regardless of whether Claimants were fully employed.

Carrier argued throughout that the Scope rule was general in nature and did not specifically reserve this type of work to employees under the Agreement. It contends that it has established a well-known and documented past practice of contracting similar type of work, and relies upon the "prior existing rights" language in Rule 52(b) as well as prior precedent on the property to justify its contracting, citing Third Division Awards 29393, 28558, 28789. Carrier contends that the claim is excessive, and argues that Claimants' suffered no loss as a result of the contracting since Claimant Hector was on vacation on September 14, 1992, Claimant

Perrenoud was on vacation on September 24, 1992 and the other claimants were fully employed during the entire claim period. Finally, Carrier asserts that it fulfilled its notice and conference obligations under Rule 52.

The decisions concerning Carrier's ability to contract out various types of work on this property are abundant, and Carrier relies specifically on Third Division Awards 31649, 31227, 31034, 30210, 30202, 30201, 30167, 30163, 30008, 30007, 30004, 29916, 28789, 23892, 32860, 32350, 30469, 30221, 30219, 30165, 29393 in arguing that it has established a past practice of contracting work involving chain link and regular fencing.

With respect to the merits, as noted in Case No. 9 of this Board, given the practice established on the property for contracting out fence construction work, there is no basis for determining that these Awards are palpably erroneous, and, in the interests of stability, we shall follow their holdings. We find that Carrier has established the existence of a mixed practice on this property with respect to the work in question.

However, a review of the record convinces the Board that Carrier did not satisfy its Rule 52(a) notice and conference obligations in this case. We do not believe that Carrier's September 18, 1992 notice attempting to amend the prior June 22, 1992 notice on asphalt to include fencing work was proper. The correspondence and conference held on July 6, 1992 dealt with Carrier's attempt to contract asphalting work and there was no reason for the Organization to know to include the subject matter of fencing in that conference. Thus, the September 18, 1992 notice was the first opportunity the Organization had to protest Carrier's intent to contract fencing, and it did so promptly, resulting in a conference held on October 6, 1992. The record reflects that the contracting in issue commenced on September 14, 1992, even prior to the attempt to amend the prior notice,

and ended on September 25, 1992, prior to the conference held to discuss the matter. Accordingly, we conclude that Carrier violated Rule 52(a) by failing to meet both its obligation to serve notice at least 15 days, and engage in a good faith discussion, prior to the contracting. Third Division Awards 31652, 31284, 31287.

With respect to the appropriate remedy for a violation of Rule 52 based solely upon Carrier's notice violation occurring after 1991, we adopt the rationale contained in Case Nos. 6 and 8 that such situation represents a loss of work opportunity, and award monetary damages to Claimants even if they were fully employed. Since Carrier did not dispute the fact that the contractor's employees worked a total of 320 hours on the claim dates performing the work in issue, or show that the disputed work or the work being performed by Claimants was of an emergency nature and could not have been assigned or scheduled at another time, we will sustain the claim.

AWARD:

The claim is sustained.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Carrier Member
DISSENT TO follow

Dated:

Rick B. Wehrli
Employe Member

Dated: 7-5-00