

PUBLIC LAW BOARD NO. 6205
AWARD NO. 11
CASE NO. 11

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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 to perform right of way cleaning work (removal of ties, tie butts and debris) between Mile Post 6.41 near Muncie, Kansas and Mile Post 28 near Linwood, Kansas on the Kansas Division beginning October 5, 1992 through November 23, 1992 (System File H- 13//930207).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intent to contract out the work involved here in accordance with Rule 52.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators D. N. Breeding and D. D. Zulkoski shall each be allowed pay at their respective straight time and overtime rate, for an equal proportionate share of the total straight time and overtime man-hours expended by the outside contractor's forces."

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 January 14, 1992, Carrier advised the Organization of its intent to solicit bids "to cover the unloading and the pickup and disposal of cross ties, switch ties, etc. in connection with the Carrier's 1992 Tie Program" listing 28 different locations. The Organization responded on January 21, 1992 objecting to the contracting on the basis that work had customarily been performed by employees, that the few instances of contracting in the last few years met with protest from the Organization, that Carrier failed to assert that any of the Rule 52(a) conditions existed and requested a conference prior to the work commencing. Carrier's February 3, 1992 reply relied upon the general nature of the scope rule and agreed to meet in conference. The Organization avers that a conference was held on February 13, 1993 without resolution, although Carrier claimed no record of such discussion.

This claim filed on November 30, 1992 covers the period from October 5 - November 23, 1992 and protests Carrier's use of Gillman Railway Services to perform the right-of-way cleaning and tie removal work using REO equipment with logging attachments at a specified location on the Wyoming Division rather than utilizing Claimants, Eastern District Roadway Equipment Operators. It alleges that no prior notice was given

with reference to this work. Carrier's initial response dated January 28, 1993 avers that it had no record of Gillman Railway Services being contracted to perform services in that area and that Claimants' were fully employed during the claim period.

The correspondence on the property reveals that the Organization provided evidence in the form of a written statement from its Local Chairman specifying that the contractor in issue came with its name on its equipment (a picture of such was also provided) and used a tie handler to put the ties on push cars which were carried to road crossings, where a fork lift would bind them together and load them on a trailer. The Organization pointed out that Carrier has this equipment and that Claimants have three years seniority operating it, thereby negating any claim that specialized equipment or skills were required. The handwritten letter also noted that the employee saw the final statement from the contractor left on the desk of MTM Pensick's desk indicating that the work was finished and that 150 used ties were left for the division. The Organization asserted that this non-emergency contracting was a loss of work opportunity for Claimants, and argued that the work in issue had been customarily performed by employees and specifically reserved to them by Agreement Rule 10, relying on Third Division Award 28817.

Carrier's position on the property was that it had a mixed practice of performing this work with both employees and contractors, referencing a document previously supplied to the Organization in the underlying file in Case No. 7 presented to this Board to support this contention. Carrier averred that the contractor used was Gillam Railroad Services, not Gillman Railway Services, and asserted that it neither had the equipment or skilled manpower to operate it. Carrier stated that Claimants' records do not show

that they could operate this type of equipment. Carrier also noted that proper notice had been served in compliance with Rule 52, and that Claimants were fully employed during the relevant time period, showing that Claimant Zulkoski was working as a Sectionman and asserting that he had insufficient seniority to work as a REO at the time.

The Organization took exception to the listing of past practice as it related to cleaning the right-of-way, arguing that of the 467 instances on the summary, only 3 referred at all to ties, and none referred to tie butts and related debris, only 4 related to trackage removal and all such instances involved abandoned trackage, all other instances involved different types of work, were undated and had no contractor names or locations for verification, and did not reveal whether any of the Rule 52 exceptions were applicable to the particular situation.

With respect to the Organization's objection to the notice given by Carrier in this case, we are of the opinion that it meets the requirements set forth in Rule 52. The notice was given, and conference held, some six months prior to the actual contracting of the work disputed in this claim. The notice itself, while listing 28 different areas where the work will be performed, does set forth the Mile Post locations within each listed subdivision for ease of reference and specificity. While there are no specifics in the record concerning the conference held, neither party asserts that the conference requirements were not complied with. Thus, we find no notice violation occurred.

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 Award 30063 and Public Law Board No. 5546, Award 14


in arguing that it has established a past practice of contracting similar work which should be followed by this Board. It also relies upon the summary of prior contracting instances presented to the Organization on the property as evidence of its past practice. The Organization relies upon Third Division Award 28817 as the seminal case on this property involving tie removal and the cleaning of right-of-ways, finding that such work was specifically reserved to employees by the Agreement and could not be contracted. That case has been cited and subsequently relied upon to sustain similar claims in Third Division Awards 31042, 31044, 31045, 30005, 31037, 30528.

The Board has carefully reviewed the extensive record in this case, as well as all cited contracting cases on the property dealing with similar type of work. We are of the opinion that the Organization has sustained its burden of proving that Carrier violated Rule 52 by contracting out the right-of-way cleaning work in this case for the reasons set forth specifically in Case No. 7 herein. This case relies specifically on the past practice evidence furnished in the prior file, which we have found to be insufficient to prove a mixed practice on this property with reference to the type of work here involved. We also conclude that this record does not establish either the specialized equipment or specialized skills exceptions to the prohibition against contracting contained in Rule 52(a).

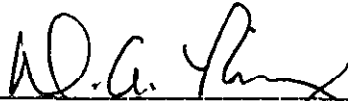
In finding a violation of the Agreement on the basis of the merits rather than the sufficiency of the notice, as well as limiting the remedy to furloughed employees, we adopt the reasoning set forth more fully in Case No. 7.

AWARD:

The claim is sustained in accordance with the Findings.

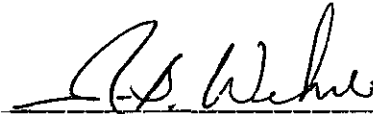


Margo R. Newman
Neutral Chairperson



Dominic A. Ring
Carrier Member

Dated: _____



Rick B. Wehrli
Employee Member

Dated: 7-5-00