PUBLIC LAW BOARD NO. 6205
AWARD NO. 12
CASE NO. 12

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 (Glenn's Excavating) to perform Bridge and Building Subdepartment work (excavation, removal of top soil and laying asphalt) at the Oil Separation and Water Treatment Plant located north of the 6th North Overpass in Salt Lake City Yards on October 22, 23, 26, 27, 28 and 29, 1992 (System File H-11/930178).

(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 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, Utah Division B&B Carpenter Machine Operators T. F. Sweat, J. C. Eden and D. A. Holt shall each be allowed sixty-nine and one-third (69-1/3) hours' pay at the B&B Carpenter Machine Operator's straight time 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 October 9, 1992, Carrier advised the Organization of its intent to solicit bids to cover "construction of a concrete slab and removal of contaminated soil at the waste water treatment plant at Salt Lake City, Utah." It noted that Carrier would be available to conference the notice within the next 15 days. By letter dated October 15, 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 November 2, 1992, and a conference was held on November 13, 1992 without resolution.

In its claim filed on November 18, 1992, and supplemented on November 23, 1992, the Organization asserts that the work in question is specifically reserved to employees by Rules 1 and 8 of the Agreement, and has customarily and historically been performed by them. It also notes that the October 9, 1992 notice did not cover asphalt work, yet not only did contractor's forces excavate and remove top soil on October 22, 23, 26 and 27, 1992, but they also laid asphalt on October 28 and 29, 1992, both

types of work being performed prior to the holding of a conference on the notice issued. In its correspondence on the property, the Organization 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 there is a mixed practice on this property concerning the performance of similar type of work, and relies upon the "prior existing rights" language in Rule 52(b). Carrier contends that the claim is excessive, and argues that Claimants' are improper since prior claims concerning similar type of work have been progressed by the Organization on behalf of the REO classification, and that the Organization failed to show that Claimants suffered any loss as a result of the contracting. It alleges that Claimant Sweat was on vacation 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 ability of Carrier to contract out excavating and asphalt work on this property has been upheld in Third Division Awards 32864, 32333, 31171, 30287, 30262, 29966, 29309. Given the practice established on this property for the kind of contracting involved in this case, there is no basis for determining that these Awards are palpably erroneous. In the interest of stability, we shall follow their holdings.

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. Initially we note that Carrier's October 9, 1992 notice involved construction of a concrete slab and removal of contaminated soil only, it

mentioned nothing about laying asphalt. Carrier did not take exception to the Organization's evidence that 119 man hours were spent excavating and removing topsoil on October 22, 23, 26 and 27, 1992, and 96 hours were spent laying asphalt on October 28 and 29, 1992. The record reflects that the contracting in issue commenced on October 22, 1992. Thus, even with reference to the excavating work covered by the notice, Carrier's notification did not meet the "not less than 15 days prior thereto" requirement of Rule 52(a). Further, the work was completed two weeks 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, 8 and 10 that such non-emergency situation represents a loss of work opportunity, and award monetary damages to Claimants even if they were fully employed.

AWARD:

The claim is sustained.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

D. A. Ring
Dominic A. Ring
Carrier Member
I DISSENT
Dated:

R. A. Wehrli
Rick B. Wehrli
Employe Member
Dated: 7-5-00