PUBLIC LAW BOARD NO. 6205
AWARD NO. 2
CASE NO. 2

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 to perform right of way cleaning work (removal of ties, tie butts and debris) between Mile Post 456 near Bushnell, Nebraska and Mile Post 481 near Burns, Wyoming from August 19, 1991 through and including August 29, 1991 (System File S-603/920060).

(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 C. D. Steuben, D. K. Melius and Truck Drivers K. B. Miller and R. S. Mostek shall each be '*** allowed an equal proportionate share of the man-hours worked by the outside contracting force as described in this claim, at their respective Roadway Equipment Operators and Truck Drivers straight time and overtime rates of pay as compensation for the violation of the Agreement for hours worked by the outside contracting 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 February 11, 1991, Carrier advised the Organization of its intent to solicit bids "to cover the furnishing of a track mobile and cartopper, fully operated and maintained, to load ties replaced by Railroad's System Tie Gang No. 9061 working on the Council Bluffs, Marysville, and Sydney Subdivisions." The Organization objected to both the vagueness of the notice (as it related to time and location) and the actual contracting of the equipment and work, noting that Carrier possessed four Tie Exterminators to do this type of work and that it had always been performed by the employees until a few years prior, at which time the Organization has excepted to each instance of contracting. Conferences were held on February 26 and March 18, 1991 without resolution.

This claim covers the period from August 19-29, 1991 when Carrier utilized a Cartopper Material Handler and operators from Herzog Contracting Corp. to perform the right-of-way cleaning and tie removal work at various locations on the Nebraska Division rather than utilizing Claimants, Eastern District Roadway Equipment Operators and Nebraska Division Track Subdepartment Truck Drivers. Carrier's initial response dated December 3, 1991 avers that it has used contractor forces in the past to perform this type of work.

The correspondence on the property reveals that the Organization provided pictures of "Lucky" tie handling cranes in Carrier's inventory that it claims was designed to do work of this nature, pointed out that this non-emergency contracting was a loss of work opportunity for Claimants who were working in lower-classified positions or on furlough, and asserted that the work in issue had been customarily performed by employees and specifically reserved to them by Agreement Rules 9 and 10. Carrier's position was that it had a mixed practice of performing this work with both employees and contractors as well as utilizing rental equipment, attaching numerous summaries and reports purporting to support this contention. The Organization took exception to the listing of past practice as it related to cleaning the right-of-way, arguing that the instances involved different types of work and did not reveal whether any of the Rule 52 exceptions were applicable to the particular situation. In its March 17, 1992 appeal denial, Carrier noted that the Cartopper was a technological breakthrough capable of safely loading more ties than Carrier's equipment during a given time period, and presented proof that it was unable to lease this patented equipment without operators. It asserted that a Cartopper was not simply a front end loader with a backhoe attachment, as depicted in the pictures submitted by the Organization, and produced specifications and diagrams of the equipment.

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, six months prior to the actual contracting of the work. The Organization was clearly informed of Carrier's intention to utilize a cartopper and operators provided by the contractor to clean the area and remove ties replaced by a designated System Gang within a large geographic area. As Carrier pointed

out, the Organization gets a copy of each System Gang schedule at the beginning of the year as well as timetables showing the boundaries of each subdivision. Even prior to the first conference, the issues in dispute between the parties and their respective positions were clearly formed. Thus, we find no notice violation occurred. See Third Division Awards 30185, 30287, 32322, 32333.

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. 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 find that none of the prior cases cited by either party deal specifically with the use of specialized equipment and the proven fact that the equipment was patented and could only be leased with operators provided by the contractor. While the Organization did identify equipment in Carrier's inventory that could do the job of tie removal, it was unable to disprove Carrier's evidence that the cartopper was different from this equipment, could perform the job safely in a more efficient and timely fashion, and that its own equipment was being fully utilized elsewhere

during the relevant time period. It is within Carrier's province to make decisions concerning the efficiency of the operation, so long as it does not violate specific rights set forth in the Agreement. We are unable to say, on the record before us, that Carrier's use of the cartopper and contracted operators violates the Agreement in this case. Rule 52(a) specifically permits Carrier to contract out work customarily performed by employees provided that specialized equipment not owned by Carrier is required.

We do note that this decision is based upon the finding that Carrier supported its affirmative defense of the necessity of specialized equipment, and its inability to procure this equipment without operators. It is not based upon any finding with respect to the adequacy of the evidence of a past practice adduced concerning this type of work or on the findings of prior awards cited by the parties, which we believe are distinguishable on their facts.

AWARD:

The claim is denied.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Carrier Member

Dated:

Rick B. Wehrli
Employe Member

Dated: 7-5-00