PUBLIC LAW BOARD NO. 6205
AWARD NO. 6
CASE NO. 6

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 (Brennan Construction Company) to perform Bridge and Building Subdepartment work, (excavation, preparatory work, concrete forming, pouring, finishing and other related work) in connection with the construction of a loading dock between the Steel Car Shop and the Store Department Building at Pocatello, Idaho on June 9, 10, 11, 12, 15, 16, 17, 18, 22, 23, 24, 25, 29, 30, July 1 and 2, 1992 (System File R-48/920531).

(2) The Agreement was further violated when the Carrier assigned outside forces (Brennan Construction Company) to perform Bridge and Building Subdepartment work, (excavation, level area for construction, set concrete forms, tied and bent rebar, poured and finished concrete, stripped concrete forms and other related cleanup work) in connection with the construction of a loading dock and ramp at the Signal Shop at Pocatello, Idaho on July 6, 7, 8, 20 and 21, 1992 (System File R-56/920590).

(3) The Agreement was further violated when the Carrier assigned outside forces (Brennan Construction Company) to perform Bridge and Building Subdepartment work,

(vibrating sand in roughs and holes, preparatory work, concrete forming, pouring finishing and other related work) in connection with the repair/construction of the existing floor in the Old Bearing Room (Building 30) at Pocatello, Idaho on July 30, August 3, 4, 5, 6, 7, 10 and 17, 1992 (System File R-80/920665).

(4) The Agreement was further violated when the Carrier assigned outside forces (Brennan Construction Company) to perform Bridge and Building Subdepartment work, (preparatory work, concrete forming, pouring, finishing and other related work) in connection with the construction of a forty-five foot (45') by twenty-two foot (22') loading dock ramp and connecting approach pads north of the Pocatello Wheel Shop at Pocatello, Idaho on August 18, 19, 20, 24, 25, 26, September 3, 7, 8 and 9, 1992 (System File R-110/930056).

(5) The Agreement was further violated when the Carrier assigned outside forces (C&M Construction Company) to perform Bridge and Building Subdepartment work, (preparatory work, concrete forming, pouring, finishing and other related work) in connection with the construction of an extension to the front and west side of the Pocatello Signal Shop at Pocatello, Idaho on August 19, 20, 21, 24, 25 and 26, 1992 (System File R-114/930067).

(6) The Agreement was further violated when the Carrier failed to meet the good-faith notice/conference requirements in accordance with Rule 52(a) relative to Parts through (5) above.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, furloughed B&B Carpenter W. S. Wallace and B&B Carpenter T. D. Stalder shall each be allowed three hundred thirty (330) hours' pay at the B&B First Class Carpenter's straight time rate.

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, furloughed B&B Carpenter W. S. Wallace and B&B Carpenter T. D. Stalder shall each be allowed one hundred (100) hours' pay at the B&B First Class Carpenter's straight time rate.

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, furloughed B&B Carpenter W. S. Wallace and B&B Carpenter T. D. Stalder shall each be allowed one hundred forty-one (141) hours' pay at the B&B First Class Carpenter's straight time rate.

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, furloughed B&B Carpenter W. S. Wallace and B&B Carpenter T. D. Stalder shall each be allowed one hundred fifty (150) hours' pay at the B&B First Class Carpenter's straight time rate.

(11) As a consequence of the violations referred to in Parts (5) and/or (6) above, furloughed B&B Carpenter W. S. Wallace and B&B Carpenter T. D. Stalder shall each be allowed seventy-two (72) hours' pay at the B&B First Class Carpenter'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 March 25, 1992, Carrier advised the Organization of its intent to solicit bids "to cover construction of a new shipping and

receiving area for Building 34A at Pocatello, Idaho, which includes construction of a dock, furnishing and installation of an overhead door, furnishing and installation of a 12-foot by 24-foot dock cover, and all related work thereto." In this and in all subsequent notices relevant to these claims, Carrier concluded by stating that it would be available to conference the notice within the next fifteen (15) days. A conference was held on April 16, 1992 without resolution.

A subsequent notice was served by Carrier on July 2, 1992 indicating its intent to solicit bids "to cover the construction of concrete dock ramp, extension of existing dock and ramp, installation of overhead door and various items of related work at the Signal Shop, Pocatello, Idaho." By letter dated July 7, 1992, the Organization objected to Carrier's intent to contract the work, relying upon Rules 1 and 8 as reserving the work to employees, referencing prior employee written statements and numerous pictures 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 also noted that Carrier failed to assert that any of the five exceptions to the prohibition against contracting contained in Rule 52(a) existed, and requested a conference prior to the work being performed. Carrier responded to this request on July 14, 1992, relying upon the fact that the Scope rule is general in nature and indicating that it has a past practice of contracting this type of work. It agreed to conference the matter and asked the Organization to set it down for discussion on the agenda of the next scheduled conference on contracting notices. The record does not reveal when a conference was held on this notice.

Another notice was served by Carrier on July 6, 1991 indicating its

intent to solicit bids "to cover preparation of existing slab to receive new concrete and pour new concrete slab at the Bearing Room in Pocatello, Idaho." By letter dated July 14, 1992, the Organization objected to such contracting for the same reasons noted above, and requested a conference prior to the work commencing. Carrier's response, dated August 14, 1992, was an exact duplicate of its prior letter of July 14, 1992 referenced above with the exception that it specifically related to this correspondence. A conference was held on August 19, 1992 without resolution.

This extensive record consists of five separate claims filed by the Organization protesting the contracting of various aspects of concrete work involved with the relocation of the Omaha Material Distribution Center to Pocatello. Each claim protests a different aspect of the work performed between mid-June and mid-September, 1992 by the two named contractors. A review of each of the claims' correspondence separately reveals that similar arguments were made by the parties in each case referring to much of the same documentation concerning the employees' performance of the work in question and Carrier's practice of contracting out similar work. Accordingly, we will discuss the parties' positions for each of the five claims together.

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, providing voluminous documentation by way of employee statements concerning their performance of concrete work here involved. The Organization notes that Carrier did not rely on any of the five listed exceptions to the contracting prohibition contained in Rule 52(a) in these cases. It took issue with the type of past practice evidence introduced by Carrier, contending

that it exaggerated the amount of work contracted, contained instances of work performed off railroad property, and was vague as to date and contractor identity. The Organization also argued that Carrier failed to meet its good faith conference obligations with respect to the notices given. It asserts that a full monetary remedy is appropriate for loss of work opportunity regardless of whether Claimants were fully employed, since they could have been reassigned to work on this project, there was no showing that the work they were performing could not have been rescheduled by Carrier, and they were subjected to furloughs.

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. Carrier repeatedly took issue with the accuracy of the Organization's account of the amount of time the work took contending it to be excessive, and argues that Claimants' suffered no loss as a result of the contracting since they were fully employed elsewhere. Finally, Carrier asserts that it fulfilled its notice and conference obligations under Rule 52 prior to contracting the work in issue.

Since a resolution of these claims turns on whether Carrier fulfilled its notice and conference responsibilities under Rule 52(a) in each case, the Board initially notes that the decisions concerning Carrier's ability to contract out concrete work on this property are abundant, see PLB No. 5546, Awards 4, 5 & 13; Third Division Awards 33420, 32864, 32433, 32309, 32277, 31730, 31284, 31172, 31170, 31039, 31036, 31035, 31028, 31027, 31000, 30689, 30287, 30262, 29310. 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. Based upon the evidence of past practice established in this record, as well as this prior precedent, we find that the "prior and existing rights and practices" language in Rule 52(b) permits this contracting of concrete work even in the absence of any of the five exceptions listed in Rule 52(a). See Third Division Awards 30869, 30185.

However, notwithstanding Carrier's right to contract out the work because it has done so in the past with the Organization's acquiescence, there still remains the issue of whether Carrier satisfied its notice and conference obligations with respect to the work in these cases. In all cases, Carrier clearly served adequate notice of the specific type of work it intended to contract, and stated its willingness to meet in conference to discuss any issues within 15 days in the notice itself. In the fact situations existing in Claims #1, 4 and 5, it is clear that the conferences were held prior to the contractor beginning the work in dispute. Accordingly, as Carrier met its Rule 52(a) conference obligations in those cases, Claims #1, 4 and 5 will be denied.

Under the facts of Claim #2, the work involved was covered by the notice issued on July 2, 1992. However, the record reflects that the work began on July 6, 1992, some four days after notice was given and prior to the holding of any conference. Thus, despite Carrier's blanket statement of its willingness to meet in conference within 15 days of serving notice, it had to admit on the property that the contractor started prematurely and prior to the expiration of the required waiting period. In its May 4, 1993 denial of the Organization's appeal, Carrier argues that such situation does not automatically validate the claim, but that in the absence of a penalty

provision in the Agreement, Claimants could only be compensated for actual loss of earnings suffered. Carrier contends that since Claimants were fully employed during the claim period, no money is owed them. It further asserts that a total of only 173 man hours were worked on five dates, and that, due to the nature of concrete work, two men could not have handled a project of this size.

Under the facts of Claim #3, the work involved was covered by the notice issued on July 6, 1992. In responding to the blanket offer to meet within 15 days, on July 14, 1992 the Organization requested that such conference be scheduled prior to the work being contracted. Carrier did not respond to such request until August 14, 1992, some one month later, and well after the commencement of the contractor performing the work on July 30, 1992. Almost all of the work was completed by the time Carrier suggested that the Organization place the matter for discussion on the next scheduled date for such conferences, which occurred on August 19, 1992, after all of the work had been performed.

In the situation occurring in Case #2, it is clear that Carrier failed to meet the Rule 52(a) requirement that it serve notice at least 15 days prior to the contracting. See Third Division Awards 31652, 31284. In Case #3, while Carrier served its notice at least 15 days prior to the contracting, Carrier offered no reason for its delay in responding to the Organization's request for a conference, which was made over two weeks prior to the start of the protested contracting. Its response was exactly the same in content as the one sent in reference to its July 2, 1992 notice, yet instead of agreeing to meet within 7 days of the Organization's request as it had in Case #2, it waited over one month and well after the work had started and was nearing completion. On the basis of this record, we find that Carrier

failed to meet the Rule 52(a) requirement that it "promptly meet" and make a good faith attempt to reach an understanding. See Third Division Awards 31171, 31031, 31288, 31287, 30823, 29472. Unlike the facts existing in Third Division Awards 31035 and 30287, we cannot attribute this delay in responding and holding the conference to the Organization.

What remains is a consideration of the appropriate remedy for these notice violations. There is no doubt that a substantial body of precedent developed on this property limiting monetary relief to furloughed employees for notice violations occurring prior to the Board's admonition to Carrier in 1991 that such violations would result in more extensive liability, see e.g. Third Division Awards 31171, 31031, 31652, 31284, 31288, 31287, although monetary relief was ordered for fully employed claimants in a few situations. See Third Division Awards 29472, 30823. However, for the reasons set forth more fully in Third Division Award 32862, we find that Carrier's failure to follow the notice and conference requirements negotiated by the parties in Rule 52(a) after having been repeatedly advised of the necessity of doing so requires that make whole relief be fashioned to protect the efficacy of that negotiated process. As noted in Third Division Award 32862:

> ".....The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement (here, notice) to contract work within the scope of the Agreement. Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion."

The Organization points out that Claimants were performing non-emergency work on projects which could have been rescheduled at the

time of the contracting to permit availability for this work, and it appears that Claimant Wallace was furloughed from his Carpenter classification and working as a Painter at the time. Thus, in order to restore lost work opportunities, we deem a monetary award appropriate in Cases #2 and 3, but only to the extent of the actual man-hours worked by contractor employees on the disputed occasions. We shall remand these cases to the parties to determine the number of hours worked by the contractor's forces performing the disputed work based upon Carrier records on the dates set forth in Claims #2 and #3. We note that the work here involved was contracted in 1992, while the work involved in Case No. 4 was contracted in 1991, before it could be said that Carrier was repeatedly informed of the breadth of its notice obligation and the possibility of future liability. Hence, the different result.

AWARD:

Claims #1, 4 and 5 are denied.
Claims #2, 3 and 6 are sustained in accordance with the Findings.

Margo R. Newman
Neutral Chairperson

D.A. Ring
Dominic A. Ring
Carrier Member
DISSENT TO FOLLOW
Dated:

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