PUBLIC LAW BOARD NO. 6205
AWARD NO. 7
CASE NO. 7

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 887.75 near Bridger, Wyoming and Mile Post 915.50 near Evanston, Wyoming and between Mile Posts 930.75 to 933 near Curvo, Utah on the Wyoming Divisions on August 27, 28, 31, September 1, 2, 3, 4, 8, 9 and 21, 1991 (System File R-99/930030).

(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 Operator D. L. Squibb shall be allowed eighty (80) hours' pay at his respective straight time rate and twenty (20) hours' pay at his respective time and one-half 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 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. Apparently a conference was held without resolution.

This claim filed on October 1, 1992 covers the period from August 27 - September 21, 1992 and protests Carrier's use of Jacobs Inc. to perform the right-of-way cleaning and tie removal work using REO equipment with logging attachments at various locations on the Wyoming Division rather than utilizing Claimant, an Eastern District Roadway Equipment Operator. It alleges that the notice given did not cover this work. Carrier's initial response dated November 5, 1992 avers that it has used contractor forces in the past to clean debris along the right-of-way, and that it does not

possess the equipment and resources to properly dispose of tie butts and debris.

The correspondence on the property reveals that the Organization provided pictures and literature the on "Lucky Loader" tie handling cranes in Carrier's inventory that it claimed has the ability to handle 19 ties per lift and outperform the actual REO equipment utilized by the contractor in this case, alleging that it was the most efficient and productive tie handling equipment since it rides on the outer edges of gondola cars making right-of-way access convenient. The Organization also pointed out that this non-emergency contracting was a loss of work opportunity for Claimant, and asserted 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, attaching a 37 page summary of prior contracting purporting to support this contention. Carrier also noted that proper notice had been served and conference held in compliance with Rule 52, and that Claimant was fully employed during the relevant time period.

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.

In its Submission to the Board, Carrier argued for the first time that this dispute involved the sale of Carrier property to the contractor on an "as is where is" basis, attaching a copy of the purported contract. It also asserted that the Organization's attempts to bargain a change of language of the Scope rule during negotiations represents a tacit admission that such rule is not exclusive with respect to the work in issue, attaching a copy of a Section 6 Notice served by the Organization on February 25, 1980. It is accepted practice that this Board will not consider any arguments or documents not discussed or presented by the parties on the property. Thus, these arguments and documents come too late and have not been relied upon by the Board in rendering its decision herein.

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 unloading, pickup and disposal of crossties in this case. The Organization *met its initial burden of showing that work of this nature is encompassed* within the Agreement, see Third Division Award 28817, and has been customarily performed by employees, as admitted by Carrier. The burden then shifts to Carrier to show why it was permitted to contract out the work.

Carrier relies upon the "prior rights" language of Rule 52(b) in arguing that its past practice permits it to engage in the instant contracting. In support of this argument, Carrier submitted a 37 page summary of prior instances of contracting, as well as arguing *stare decisis*, citing Third Division Award 30063 and PLB No. 5546, Award 14

However, the evidence of past practice presented in this case falls far short of establishing any practice of having contractors unload, pickup or

dispose of crossties. As noted by the Organization in rebuttal to Carrier on the property, the listing of 467 instances of contracting on uncertain dates in the past contains only 3 references to ties and none to tie butts and related debris, and has only 4 references to removal of abandoned trackage. The bulk of the "past practice" evidence relates to work of demolition and dismantling of buildings and structures, sale and removal of structures, grading and unrelated non-right-of-way cleaning. As found in Third Division Award 30005, "the instances of 'past practice' cited by Carrier is unconvincing as to the 'pickup, removal, disposing and loading' work involved here."

The Board has reviewed the cases relied upon by Carrier and find them distinguishable on their facts. In Third Division Award 30063 (dealing with the work of removing ties and debris) as well as PLB No. 5546 Award 14 (dealing with pickup and disposal of ties), it was found that the Organization failed to meet its burden of rebutting Carrier's evidence of past practice of contracting out similar type of work. The Board noted in PLB No. 5546, Award 14 that Carrier had submitted an exhibit showing at least a dozen instances of similar type of work being subcontracted on each of over 30 pages, and in Award 30063 some 43 instances of prior contracting were established. We are unable to know with certainty the type of evidence of past practice submitted by Carrier in those cases, so we cannot say that those findings were palpably erroneous. However, on the basis of the record before us, the showing of past practice by Carrier is clearly not the same, and has been adequately rebutted by the Organization. It is interesting to note that Carrier did not take issue with the Organization's rebuttal to its past practice evidence on the property.

We note that, in the instant case, Carrier defended its right to contract out the work on the basis of the "prior rights" language of Rule 52(b), not on the basis of the existence of an exception listed in Rule 52(a). While Carrier did aver in its initial response to the claim that it did not possess the equipment or resources to properly dispose of the tie butts and debris involved, it did not offer any proof of such fact and failed to rebut the Organization's evidence that its "Lucky Loader" equipment could perform the job at least as well as the equipment utilized by the contractor. Thus, unlike the fact situations decided in Cases 1 and 2 of this Board, there is no showing in this case that specialized equipment was required herein or that such equipment could only be leased with operators.

There are numerous awards on this property which hold that Carrier violated the Agreement by contracting out the work of cleaning of right-of-way ties, see Third Division Awards 28817, 29561, 30005, 30528, 31037, 31042, 31044, 31045, and unloading crossties, see Third Division Awards 28590, 31025, 31038, 31041. The record in this case supports a similar finding.

With respect to the appropriate remedy, the Third Division has provided financial reimbursement to fully employed claimants under a theory of make whole relief for lost work opportunities on this property in cases involving a violation of Seniority District Rules (see e.g. Third Division Awards 32331, 30408, 31228, 31292, 31569), notice violations in subcontracting cases (see e.g. PLB No. 5546, Awards 5 & 7, Third Division Awards 32862, 29577, 29472), and on other properties in cases finding subcontracting violations (see e.g. Third Division Awards 32335, 31798, 31752, 31521). We also note that the Board in Third Division Award 28817

(followed specifically in Third Division Award 30528) on this property directed monetary relief to claimants regardless of their furloughed status where a subcontracting violation was found based on the merits. However, it appears that a subsequent body of precedent has developed between these parties specifically finding that remedial relief in cases of a subcontracting violation solely based on the merits and unrelated to Carrier's notice obligations under Rule 52 is limited to employees in furlough status. See e.g. Third Division Awards 32397, 31045, 31044, 31042, 31041, 31038, 31037, 31025, 28590. Upon reviewing these awards, we cannot say that such finding is palpably erroneous. While the result may seem inequitable, for the purposes of stability we are obliged to follow this precedent. The record in this case establishes that Claimant not only was employed during the claim dates, but, on occasion, worked some overtime. We must therefore deny monetary relief to Claimant, since he was not shown to be in furlough status during the claim dates and the Organization did not otherwise establish a loss of work opportunity.

AWARD:

The claim is sustained in accordance with the Findings.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

D. A. Ring

Dominic A. Ring
Carrier Member

Dated:

R. B. Wehrli

Rick B. Wehrli
Employe Member

Dated: 7-5-00