PUBLIC LAW BOARD NO. 6205
AWARD NO. 8
CASE NO. 8

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 (Ron Dehil of Salina, Kansas) to perform Maintenance of Way work (cutting weeds and vegetation) between approximately Mile Post 70 neat Topeka, Kansas to approximately Mile Post 140 near Junction City, Kansas beginning September 14, 1992 and continuing (System File S-107/930046).

(2) The Agreement was further violated when the Carrier failed to properly notify the General Chairman concerning the above-referenced maintenance work and when it failed to confer with him pursuant to his request in accordance with Rule 52.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 16 Tractor Weed Mower Operators G. D. Bigler and A. L. Manning shall each be allowed at their respective straight time and overtime rates for an equal proportionate share of the total number of straight time and overtime man-hours expended by the outside forces in the performance of the above-described work beginning September 14 through 29, 1992 and continuing until the violation ceases."

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 August 31, 1992, Carrier advised the Organization of its intent to solicit bids to cover the furnishing of labor and equipment to mow the weeds, grass and brush along the right-of-way between Junction City and Menoken, Kansas. By letter dated September 8, 1992, the Organization objected to the actual contracting of the equipment and work, noting that the work in issue was specifically reserved to employees by Rule 1 and 9 of the Agreement, and Carrier possessed equipment to do this type of work which had customarily and traditionally been performed by the employees. The Organization requested that a conference be scheduled prior to any contracting. By letter dated September 16, 1992, Carrier replied to the Organization's response, indicating that the Scope Rule was general in nature and that it had a past practice of contracting similar work. It indicated its willingness to meet in conference and suggested that the Organization include the matter on the agenda for handling at their next conference on contracting. While Carrier does not have any record of this matter being conferenced, the Organization asserted that a conference was held on September 21, 1992 without resolution.

The use of a contractor to mow weeds, grass and brush along the right-of-way between Junction City and Menoken, Kansas being protested by this claim commenced on September 14, 1992. Carrier's initial response

to the claim avers that it's own equipment was being utilized on a full-time basis on the Marysville subdivision, it had no record of the named contractor performing the work, and Claimants were fully employed during the relevant period.

The correspondence on the property reveals that the Organization pointed out that this non-emergency contracting was a loss of work opportunity for Claimants who could have been rescheduled to perform it, and asserted that the work in issue had been customarily performed by employees and specifically reserved to them by Rule 9. 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 a list of 32 instances purporting to support this contention. The Organization noted that the listing of past practice was undated and vague and did not reveal whether any of the Rule 52 exceptions were applicable to the particular situation. The Organization also took exception to various arguments raised by Carrier for the first time before the Board, including the application of the "mailbox rule" to the timeliness of the notice and the Organization's onus to schedule a conference.

The main issue for resolution in this case is whether Carrier met its notice and conference obligations contained in Rule 52(a). The notice was dated August 31, 1992 and the work commenced September 14, 1992; conference did not occur until September 21, 1992, after Carrier claims the work had been completed. Carrier contends that its notice was timely as it was served 15 days prior to the date the contractor began work. The Organization notes that it did not receive the notice until September 3, 1992, and that is the date upon which its timeliness should be judged. It further states that it is clear the decision to contract was made prior to the

15 day waiting period since work began on September 14, 1992. The Organization points to its request for a conference prior to the date of the contracting decision in the September 8, 1992 response to Carrier's notice, alleging that Carrier's delay in replying until after the work commenced made any attempt to meet useless. Carrier asserts that it was the Organization's onus to schedule the matter for conference within 15 days of the date of the notice and that any fault in the timing lies with the Organization.

The Board has considered the entire record and is cognizant of the history of contracting disputes between these parties where it is common for the correspondence between them to be lengthy and repetitive. In fact, a review of many of the prior Awards sets out a pattern routinely followed by both parties. Initially, Carrier will serve notice of its intent to contract out specific work, without indicating the date of the proposed contracting. Thereafter, the Organization will file a lengthy objection to the contracting, concluding by requesting that a conference be held prior to the decision to contract and the work commencing, and noting specific topics it wishes to discuss in the conference. Next, Carrier will respond to the Organization's arguments and indicate its willingness to meet in conference, suggesting that the Organization place the matter on the agenda of the next scheduled conference on contracting notices. It appears that the parties meet monthly to discuss contracting notices on designated dates, and that, after being informed of Carrier's desire to have it heard at that time, the Organization places the particular notices it wishes to discuss on the agenda.

As noted, both Carrier and the Organization are advised about the dates of their scheduled notice conferences, but only Carrier knows during this process when it plans to actually commence work using a contractor.

Thus, only Carrier is in possession of information vital to the timely conferencing of disputes. By requesting that the conference occur before the work is contracted, the Organization is shifting the burden to Carrier to reply in a timely fashion so that the matter can be placed on the agenda of the next scheduled conference prior to the work commencement date, or to notify the Organization that a special conference should be scheduled prior to a date certain so as to afford it an opportunity to discuss the matter prior to the contracting occurring. In terms of onus, we deem this approach reasonable and in compliance with the parties' joint responsibility in this area.

The numerous cases finding violations of Carrier's notice obligations involve cases where either no notice was served, see, e.g. Third Division Award 32862, the notice was served less than 15 days prior to the actual contracting, see, e.g. Third Division Award 31652, or Carrier refused to promptly meet after conference was requested and conference was held after the work had already been contracted, see, e.g. Third Division Award 31031. We find that in this case, Carrier did serve notice "not less than" 15 days prior to the actual date of the contracting, and that the time of the Organization's receipt of the notice is not determinative. However, if Carrier knows that notice is being sent only 15 days prior to the anticipated date the work will commence, and the Organization timely requests a conference be held prior to the work starting not knowing when that date is, it is incumbent on Carrier to respond prior to the date the work begins and inform the Organization that it is willing to conference the matter prior to that time if it is going to fulfill its obligation to "promptly meet" contained in Rule 52(a). If the Organization delays requesting a conference until after the 15 day waiting period has expired, it will be held partially responsible for the delay. See, e.g. Third Division Award 31035.

In this case, the Organization requested a conference by letter dated September 8, 1992, claiming it got the notice on September 3, 1992. In any event, there remained sufficient time within the 15 day period for Carrier to respond and agree to meet prior to September 14, 1992. It did not reply agreeing to conference the matter until September 16, 1992, two days after the work commenced, and suggested the matter be put on the agenda of the next meeting which was not scheduled until September 21, 1992, after the work had been completed. Under these facts, we find that Carrier did not meet its obligation to "promptly meet" to discuss the matter and "make a good faith attempt to reach an understanding concerning [the proposed] contracting."

Under the practice adopted by the parties in handling these matters, we do not agree with Carrier that it was the Organization's onus to schedule the conference within the 15 day period even prior to Carrier indicating a willingness to meet, and suggesting a time for such discussion. Carrier was the only party who knew when the work was to begin. There is no showing that the Organization was in possession of facts indicating that the anticipated start date of the project was September 14, 1992 at the time it responded to the notice. If it had been, then it would have been incumbent upon the Organization to assure the matter was scheduled for a conference before that date. In this case, we conclude that Carrier violated its notice obligations under Rule 52(a).

With respect to the merits, although the parties have cited no prior precedent involving this specific type of work, we find that Carrier sustained its burden of establishing a mixed practice on this property of renting equipment and manpower to perform weed, grass and brush cutting related work, and that it was permitted to rely upon the "prior and

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existing rights and practices" language of Rule 52(b) in contracting this work.

In order to remedy the notice violation which occurred in 1992, we adopt the rationale set forth by this Board in Case No. 6, and find that this case represents a lost work opportunity for employees. Therefore, we direct monetary compensation at the straight time rate for Claimants despite their status of being fully employed. We shall remand this case to the parties to determine the number of hours worked by the contractor's forces performing the disputed work on the claim dates.

AWARD:

The claim is sustained in according with the Findings.

Margo R Newman
Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Carrier Member
Dissent To Follow
Dated:_____

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