NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 82
and)
) Award No. 83
UNION PACIFIC RAILROAD COMPANY)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: September 15, 2005

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned outside forces (Herzog Contracting Corporation) to perform Maintenance of Way work (unload ties) between Mile Posts 63 and 76 on No. 1 main track on the Kansas Subdivision commencing June 19 through June 26, 2000 and continuing (System File W-0052-161/1241781).

2. The Agreement was further violated when Carrier failed to furnish the General Chairman with a 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 its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operator L. J. Doebele, Jr. shall now be compensated for the total number of man-hours expended by the outside forces in the performance of the aforesaid work beginning June 19, 2000 and continuing at his respective straight time rate of pay and at his respective time and one-half rate of pay for any such hours that would normally be considered as overtime hours.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Beginning June 19, 2000, an outside contractor unloaded ties from gondola cars using a cartopper on the Kansas Subdivision. The Organization contends that Carrier violated Rule 52 of the controlling Agreement. Rule 52 provides, in relevant part:

> (a) By agreement between the Company and the General Chairman work customarily performed by employees covered by this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of the criteria described herein, it shall notify the General Chairman of the Organization as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
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> (b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

The Organization contends that Carrier failed to provide the required notice prior to the contracting at issue. The Organization further contends that unloading ties is Maintenance of Way work and that Carrier failed to establish any of the grounds provided for in Rule 52(a) that justify subcontracting. The Organization seeks a remedy of paying the Claimant for the same number of hours as the contractor's employee worked performing the tie unloading.

Carrier concedes that Agreement-covered employees have performed this work in the past but contends that it has also used contractors to perform the work. Thus, in Carrier's view, there is a mixed practice with respect to the work at issue. Consequently, according to Carrier, Rule 52(b) protects its right to use contractors to perform the work without regard to the justifications required by Rule 52(a). Furthermore, Carrier urges, prior awards have recognized that the cartopper is specialized equipment within the meaning or Rule 52(a). Thus, in Carrier's view, the contracting was justified under either Rule 52(a) or 52(b).

Carrier further argues that if a violation is found, no monetary remedy is warranted because Claimant was fully employed at the time in question. Carrier cites prior awards which it maintains stand for the proposition that a monetary remedy is only available for furloughed employees

We have reviewed the record carefully. We find the issue of notice dispositive of the question of whether Carrier violated the Agreement. With respect to notice of contracting, the record reflects the following.

The Organization filed the claim on July 7, 2000. By letter dated August 31, 2000, the Manager Engineering Resources responded, among other things, that Carrier had served notice by Service Order No. 15825 on September 3, 1999, of its "intent to contract out the unloading and loading of ties and material for the year 2000 Production effort on an 'As Needed' basis." By letter dated October 30, 2000, the General Chairman appealed the denial to the Director Labor Relations. The General Chairman stated:

> In defense of the Carrier's handling of this matter, [the Manager Engineering Resources] contends, ". . . notice was furnished to the Organization." After reviewing my files, I cannot find any notice regarding the work referred to herein, therefore, I can only conclude [the Manager Engineering Resources] is Mistaken. Please provide a copy of the notice purportedly served to substantiate the Carrier's contention, and also the Organization's response therein.

In response, the Director Labor Relations stated, "[A] review of the facts and circumstances surrounding your claim reveals Carrier advised the Organization by letter dated February 2, 1999 advising of Carrier's intent to solicit bids regarding the furnishing of fully operated and maintained equipment to load and unload railroad ties and crossing timbers from and into rail cars at various locations on the Railroad system.

The February 2, 1999, notice is entitled Service Order No. 2292. It provides, "This is a 15-day notice of our intent to contract work for the calendar year 1999." On its face, the notice does not apply to the instant dispute which concerns contracting that occurred in June 2000. In its submission, Carrier relies on Service Order 15825, dated September 3, 1999. Carrier attached to its submission what appears to be the master version of Service Order No. 15825, set up as a generic form addressed to "General Chairman Name/Address" and "Mr. General Chairman Name." Service Order No. 15825 was not produced during handling on the property. Rather, when the General Chairman questioned whether a September 3, 1999, notice was ever sent to him, Carrier responded by relying on the February 2, 1999, notice. Our review is confined to the record developed during handling on the property. There is nothing in that record to indicate that a notice covering the contracting at issue was ever sent to the General Chairman.[1]

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[1]We note that the generic notice addressed to "General Chairman Name/Address" attached to Carrier's submission does not show that the September 3, 1999, notice was sent to the General Chairman with jurisdiction over the contracting at issue, or to any particular General Chairman. Bcause this notice was not part of the record

Carrier has cited numerous awards applying Rule 52 and finding that where there has been a mixed practice of using Agreement-covered employees and outside forces, Carrier has the right under Rule 52(b) to contract out the work regardless of whether the situation complies with the substantive conditions for contracting set forth in Rule 52(a). All of these awards either do not discuss the issue of notice, thereby implying that the issue was not raised or that notice of intent to contract was given, or observe that notice was given. On the other hand, numerous awards have found violations of Rule 52 where no notice was given or where inadequate notice was given, regardless of whether the work contracted had been performed in the past by a mix of Agreement-covered employees and outside forces. For example, in NRAB Third Division Award No. 27011, the Board stated, "While there may be a valid disagreement as to whether the work at issue was customarily performed by the equipment operators, Carrier may not, as a general matter, put the cart before the horse by ignoring the notice requirement." *See also* NRAB Third Division Award No. 23578 ("Rule 52 uses the mandatory term 'shall' and notice is required regardless of whether or not the erection of earth mounds for signal facilities is historically, traditionally, and customarily performed by Maintenance of Way employes."); NRAB Third Division Award No. 28443 ("Advance notice is required . . . whenever any contracting is done, whether the work is 'customarily performed' or not."). Accordingly, we conclude that Carrier violated the Agreement by its failure to give notice of the contracting at issue.

We turn now to the appropriate remedy. PLB 5546, Case Nos. 15 and 16 held that unloading ties was a mixed practice, historically performed by Agreement-covered employees and contractors, and concluded that Carrier did not violate Rule 52 by contracting out such work. Of course, in both cases there was no issue of a failure to give notice. These awards are not palpably wrong and are entitled to deference. Thus, the question posed before us is the appropriate remedy for a failure to give notice where, if Carrier had given notice and conducted a good-faith meeting with the General Chairman, it could have contracted out the work.

Some early awards have held that in such circumstances no monetary relief is appropriate for a notice violation. *See* NRAB Third Division Awards Nos. 27011, 28610, 28619, 28443. Another line of awards have found monetary relief appropriate but only for furloughed employees. *See* NRAB Third Division Awards Nos. 31030, 31039, 31040, 31171, 31283, 31284. 31285, 31652. Implicit in these awards is recognition that the giving of notice under Rule 52 is not a mechanical act devoid of meaning. Rather, the purpose of giving notice even in situations where Rule 52 does not substantively preclude Carrier from contracting out the work is to give the Organization an opportunity, through a good faith conference, to persuade Carrier not to contract out. Awarding monetary relief to furloughed employees recognizes that value and balances the need to compensate for the loss of the opportunity to persuade Carrier not to contract out the work against Carrier's substantive right to contract out the work in question.

More recent awards have looked to the particular circumstances in denying monetary

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developed on the property, we need not decide whether this document would have been sufficient to establish that notice was given.

compensation to fully employed claimants. In Award No. 31721, the NRAB Third Division, with the Chair of this Board sitting as Referee, denied monetary relief to fully employed claimants for Carrier's failure to hold a conference before the contracting work began. The Board based its denial on the fact that notice was given and, although a conference had not been held, the parties had exchanged correspondence in which they had explored their positions fully. In NRAB Third Division Award No 31730, Carrier gave notice but the Board found the notice to be inadequate. The Board denied monetary compensation to fully employed claimants because it found that Carrier's notice, although inadequate, was not intended to deceive the Organization. The Board added, "However, the Carrier is forewarned that it is obligated to give proper notice and future failures may be dealt with differently."

In NRAB Third Division Award No. 32862, the Board awarded monetary relief to fully employed claimants. The Board observed that Carrier had been placed on notice that it must give notice even in situations where it might ultimately be able to contract out the work, reasoning, "Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion."

Carrier points out that Award No. 32862 involved the former Missouri Pacific Railroad and arose under Article IV of the National Agreement rather than Rule 52. However, the principle underlying Award No. 32862 applies with equal force to Rule 52. There comes a point where Carrier has been warned sufficiently about its obligation to give notice of intent to contract that its continued failure to do so warrants an award of monetary relief to employees who were not furloughed to compensate them for the harm caused by the failure to give such notice, i.e. the loss of the opportunity to persuade Carrier not to contract out the work.

The instant case arose several years after Award No. 31730 warned Carrier that future failures to comply with Rule 52's notice obligations could result in monetary compensation awarded to fully employed claimants. Unlike Award No. 31730, this is not a case where some notice was given but the notice was ultimately judged to be inadequate. Nor is this a case like Award No. 31721 where, although a conference was not held in a timely manner, the parties had fully explored their positions through correspondence. Rather, we face a situation where the record developed on the property reflects a complete failure to give notice concerning the contracting at issue. Under these circumstances, we find an award of monetary relief is justified even though the claimant was not furloughed at the time of the contracting.

AWARD

Claim sustained.

PLB 6302
Award 83

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

3-10-06

D. D. Bartholomay,
Employee Member 3-10-06

Dated at Chicago, Illinois, February 27, 2006