AWARD NO. 15
CASE NO. 15

PUBLIC LAW BOARD NO. 7096

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
	)	
	)	**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 (Knox Kershaw, Inc.) to perform Maintenance of Way and Structures Department work (operate and maintain an undercutter) in removing and replacing ballast on the right of way starting at Marysville, Kansas and heading west commencing on July 31, 2002 and continuing, instead of System Group 20 Roadway Equipment Operators R. Wehrer, R. Hutchinson and H. Lambert (System File C-0252-110/1337651).

(2) The Agreement was further violated when the 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, Claimants R. Wehrer, R. Hutchinson and H. Lambert shall now 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 Group 20 straight time and overtime rates of pay as compensation for the violation of the Agreement for hours worked by the outside contracting force in operating and maintaining recognized Maintenance of Way Equipment, a group 20 REO Undercutter. This claim for compensation includes that Claimants be compensated for the loss in what is normally considered overtime hours for Maintenance of Way Employees.

OPINION OF BOARD

The dispute in this case concerns the Carrier's contracting of undercutter work, which commenced July 31, 2002.

The relevant rules governing covered work and contracting out that work provide:

RULE 9 - TRACK SUBDEPARTMENT

Construction and maintenance of roadway and track, such as ... ballasting ... will be performed by the forces in the Track Subdepartment.

* * *

RULE 10 - ROADWAY EQUIPMENT SUBDEPARTMENT

(a) Work in connection with the operation, care, maintenance (running repairs) and servicing of roadway equipment (including attachments thereon) assigned to work in the Roadway Equipment Subdepartment will be classified as Roadway Equipment Operators.

* * *

RULE 52 - CONTRACTING

(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under 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 one of the criteria described herein, it shall notify the General Chairman of the Organization in writing 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.

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. It's 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.

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster.

(d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors.

The record reveals the following with respect to notices given to the

Organization by the Carrier of its intent to contract undercutter work:

By letter dated September 25, 1999 and referencing "Service Order 16030", the Carrier notified the Organization that:

> This is a 15-day notice of our intent to contract the following work:
>
> Location: Railroad's system-wide trackage.
>
> SpecificWork: Provide supervision, labor, and track production undercutting equipment to assist Railroad forces in track maintenance on an "as needed" basis.

* * *

Conference on that notice was held between the parties on October 21, 1999.

By letter dated October 22, 1999, the Carrier advised the Organization that:

> This letter is to document conference held via telephone on October 21, 1999.
>
> Service Order 16030
>
> Notice Provided September 25, 1999
>
> Work to be performed: Provide supervision, labor, and track production undercutting equipment to assist Railroad forces in track maintenance on an "as needed" basis ...
>
> The Carrier agreed to issue more accurate notice prior to any consideration of scheduling this work. Should the Carrier consider contracting this work, it will issue another notice.

* * *

Referencing Service Order 16030, by letter dated October 28, 1999, the Organization responded:

> Any future notice in connection with this specific project is considered untimely pursuant to Rule 52.

By letter dated April 10, 2000 and again referencing "Service Order 16030" and the Carrier's letter "... dated October 22, 1999 concerning the Notice which had been given of the Carrier's intent to subcontract 'track production undercutting equipment to assist Railroad forces' ... the Carrier held that the notice given was a proper notice of the work to be performed ... [but] advised you that we would issue a more accurate notice and another notice." In that April 10, 2000 letter, the Carrier then notified the Organization as follows (and requested contact if a conference was desired):

> This is to advise of the Carrier's intent to subcontract the work of supervision, labor, and track production undercutting equipment to assist the Railroad forces across the territory of the North Platte Subdivision, Clinton Subdivision, Boone Subdivision, Marysville Subdivision and Kansas Subdivision.

* * *

A similar letter — once again referencing "Service Order 16030" — was sent by the Carrier to the Organization dated April 12, 2000 notifying the Organization that:

* * *

> This is to advise of the Carrier's intent to subcontract the work of supervision, labor, and track production undercutting equipment to assist the Railroad forces across the territory of the LaGrande and Huntington Subdivisions (between Stanfield and Huntington) and across the territory of the Ayer Subdivision (between Hinkle and Fish Lake).

* * *

By letter dated April 17, 2000, the Organization responded to the April 10 and 12, 2000 notices from the Carrier, assenting that those notices were improper under Rule 52, stating, in part, that "[b]lanket notices such as this do not meet the Carrier's obligations as required by our Agreement ...."

According to the claim, the contracted undercutter work in dispute commenced July 31, 2002.

In its August 19, 2002 letter protesting the contracting of the work, the Organization asserted that "[s]earch of our files indicates there was no prior notice given by the Carrier in connection with the work in question in this instant case at the referred to location."

In its October 14, 2002 letter, the Carrier did not specifically address the notice question raised by the Organization, but responded, in pertinent part, that " ... the Carrier has entered into a contract with the named contractor to perform undercutting on the Carrier's property under Service Orders 16538 and 18450."

In its December 5, 2002 letter, the Organization again asserted that no advance notice had been given by the Carrier for contracting the disputed undercutter work.

In its letter dated "January 13, 200[3]", the Carrier responded to the Organization's December 5, 2002 letter stating, in pertinent part:

* * *

> The Carrier served proper notice by Service Order 16030 pursuant to Rule 52 - Contracting, and the notice was conferenced in good faith on April 18, 2000. The contract notice covered expired on December 31, 2002. The notice specifically included the subcontracting of work supervision, labor and track production undercutting equipment to assist Railroad forces across the territory of the North Platte Subdivision, Clinton Subdivision, Boone Subdivision, Marysville Subdivision and Kansas Subdivision. The Carrier pointed out in conference this work has been contracted out in the past and is not exclusive to your craft pursuant to Rule 52(b) of the

> agreement. Enclosed is a copy of the April 10, 2000 letter sent by the Carrier.
>
> * * *

By letter dated June 26, 2003, the Organization stated the parties' positions on the notice expressed when the claim was conferenced on the property:

> * * *
>
> In conference, the Carrier reiterated their previous position and insisted that Notice was given. This Organization reiterated our previous position and stated that the Notice was not applicable to the work as described in this claim as it was untimely. ....
>
> * * *
>
> ... a Notice given in 1999 and 2000 has no applicability to work performed in 2002.
>
> * * *

Focusing on the Carrier's obligation to give notice of contracting, with respect to the Carrier's argument that the employees have not exclusively performed undercutting work and that it has used contractors in the past for that work, in *Award 1* of this Board, we rejected the argument that there must be a showing of exclusivity by the Organization:

> However, "... exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims." *Third Division Award 32862* and awards cited therein. *See also, Third Division Award 30944*:
>
> ... [T]he Carrier's argument that the Organization has not shown that the covered employees performed the work on an "exclusive" basis does not dispose of the matter. On its face, Article 36 does not specifically provide that the disputed work must be exclusively performed by the employees. Rather, Article 36 addresses "work within the scope of the applicable schedule agreement". Based upon the statements of the employees that they have performed this type work in the past, we are satisfied that the work at issue was "within the scope" of the Agreement. Third Division Award 29158. ...

See also, Third Division Award 38349 between the parties ("... it is well established that 'exclusivity' is not the proper test in determining whether advance notice is required under Rule 52.").

Here, Rule 9 states that "... ballasting ... will be performed by the forces in the Track Subdepartment"; Rule 10(a) states that "[w]ork in connection with the operation, care, maintenance (running repairs) and servicing of roadway equipment (including attachments thereon) assigned to work in the Roadway Equipment Subdepartment will be classified as Roadway Equipment Operators."; and Rule 52(a) obligates the Carrier to give notice to

the Organization when contracting "... work customarily performed by employees covered under this Agreement ...." The work in dispute — undercutting — is classic Maintenance of Way work falling under Rules 9 and 10 and the Carrier thus has the obligation under Rule 52(a) to give the Organization notice when it contracts out that work.

We do not find that the Carrier met its notice obligations under Rule 52 in this case.

First, the contracted undercutting work in dispute in this case commenced July 31, 2002. The last notices referred to by the Carrier concerning contracting undercutting work issued in April 2000 — over two years and three months *prior* to the commencement of the disputed work. Open ended notices such as this are insufficient to meet the Carrier's notice obligations under Rule 52. Indeed, if open ended notices were acceptable, in theory, the Carrier could issue a notice to the Organization of its intent to contract aspects of scope covered work and then when that work is eventually performed 20 years later by a contractor, the Carrier could assert that its notice obligations were satisfied by the 20 year old notice, thereby effectively reading the notice and conference requirements in Rule 52 out of the Agreement.

Second, we are very cognizant of *Awards 3, 5, 9* and *13* of this Board where we found that a five year contracting arrangement with a contractor did not require renewed periodic notices to be issued by the Carrier during that five year term. The distinction between those cases and this matter is obvious. As we found in *Award 3* [emphasis added]:

> While logically made, the Organization's argument [that renewed notices were required for multi-year contracts] places form over substance. The contract with DeAngelo Brothers was for five years — certainly a lengthy contract. However, the evidence shows that prior to entering into that contract with DeAngelo Brothers, the Carrier met with the General Chairman and explained the contract and what the Carrier was doing. While the Organization disputes the substance of what may have been said at the meeting with respect to licensing requirements and whether the Organization stated that it did not want its members exposed to the chemicals during application, the fact remains sufficiently unrebutted that there was a meeting between the Carrier and the Organization *and the Organization was made aware of the long term contract with DeAngelo Brothers*. Rule 1(B) does not specifically address the length of contracts the Carrier can enter into (*i.e.*, the back end of such contracts). Instead, the focus of the notice obligation in Rule 1(B) is on the front end of those contractual relationships (*i.e.*, *advance* notice of the Carrier's intent to contract work). *Here, the Organiza-*

> *tion had that advance notice* and in 2001 was notified that the contract would continue for the second year. The Organization cannot now claim that it did not have sufficient advance notice of the Carrier's intent to enter into a multi-year contract with DeAngelo Brothers. We therefore find that the Carrier met its notice obligations under Rule 1(B).

There is no similar evidence in this case that the Organization was put on notice that the specific contracting arrangement entered into between the Carrier and Knox Kershaw covering the disputed work was encompassed by a similar multi-year contracting arrangement as existed in *Awards 3, 5, 9* and *13* of this Board.

Third, we note that the Carrier has effectively taken the position that the notices issued in April 2000 were not open ended. In its January 13, 2002 letter, the Carrier stated that it "... served proper notice by Service Order 16030 pursuant to Rule 52 - Contracting, and the notice was conferenced in good faith on April 18, 2000 ... [and t]he contract notice covered expired on December 31, 2002." The specific reference in that letter and in the April 2000 notices well as the predecessor 1999 notices (detailed above) all referred to "Service Order 16030". However, after the Organization asserted in its August 19, 2002 letter that it was not served with notice of contracting the disputed work, the Carrier responded in its October 14, 2002 letter that " ... the Carrier has entered into a contract with the named contractor to perform undercutting on the Carrier's property under *Service Orders 16538 and 18450*" [emphasis added]. But there is *no* mention by the Carrier *in that letter* of "Service Order *16030*" which was encompassed by the April 2000 notices (and the predecessor notices) as being applicable to the disputed work. From that letter and particularly because there is no reference to "Service Order 16030" as being the contract for which notice applied, we cannot find that the Carrier notified the Organization of its intent to contract the disputed undercutter work as being covered by the notices set forth above.

Fourth, however, in the record provided by the Carrier there are documents from the Carrier's "Contract Details for Audit Number ..." for "Service Order Number[s]: 16538 [for track undercutting and] 18450 [for ballast cleaning]" — the service orders which were referenced in the Carrier's October 14, 2002 letter. And, those documents show effective dates of the service orders to be January 1, 2000 and June 1, 2000,

respectively, with both having expiration dates of December 31, 2002. There is even a document for "Service Request 18450" (but not for 16538) titled "Labor Notifications" which states "Comments by CA for not notifying: Notification was made under SON 16030."

Those internal Carrier documents are not enough to show that the Carrier *actually* notified the Organization of its intent to contract the disputed undercutter work which commenced July 31, 2002. Missing from the Carrier's presented internal documentation is that for Service Order 16030 which was the subject of the specific notices given to the Organization in 1999 and 2000. And, most importantly, missing from the Carrier's internal documentation is anything to show that the Organization was *actually* notified *in advance* that Service Orders 16538 and 18450 concerned the disputed work for the time period in question. The bottom line here is that the Organization asserted that it was not given advance notice of the Carrier's intent to contract the disputed undercutter work which commenced July 31, 2002 as required by Rule 52(a) and, while the Carrier may have been of the opinion that its internal documentation supported its position that notice had been given, the Carrier has not sufficiently demonstrated that notices were actually given to the Organization in advance which covered this disputed work. Without more, we cannot find the Carrier's internal documents sufficient to show that it made the required advance notification to the Organization for this disputed work.

We are therefore not satisfied that the Carrier met its notice obligations pursuant to Rule 52 with respect to the disputed work covered by this claim.

Our discussion in *Award 1* of this Board with respect to the remedy in cases where notice obligations are not met applies to this case as well [emphasis in original]:

> Because the Carrier failed to *timely* notify the Organization of its intent to contract the work in dispute as required by Rule 1(B), the conference procedure established by the Agreement was frustrated. *See Third Division Award 32862, supra*:
>
> > ... [O]ur function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. Our

> discretion for fashioning remedies includes the ability to construct make whole relief. 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. ...

The same rationale applies here. The notice was given by the Carrier on the day the outside forces commenced work; the work under this claim was completed before the parties held a conference; and, as a result, the Organization was given no opportunity to use the conference established by Rule 1(B) to attempt to reach an understanding with the Carrier to attempt to prevent the contracting of the work. If, as the Carrier argues, there were special circumstances concerning the work (*e.g.*, equipment not possessed by the Carrier, special qualifications for use of certain chemicals, etc.) which would otherwise permit the Carrier to contract the work under Rule 1(B), those circumstances could have been discussed with the Organization in conference after timely notice. However, that process was not allowed to unfold because the Carrier failed to give timely notice as required by Rule 1(B).

We also emphasize the result of *Third Division Award 32862:*

> ... We recognize that the result in these cases where no notice is given may be anomalous. It may well be under Article IV that had the Carrier given notice, (and because of lack of skills of the employees, need for specialized equipment, etc.), the Carrier may have been able to contract the work. However, in failure to give notice cases, even though the Carrier may have ultimately been able to contract the work, even employees who were working could be compensated only because notice was not given. We are very conscious of that result. But, our function is to enforce [notice and conference] language negotiated by the parties. ....

See also, Third Division Award 38349, supra, between the parties for Rule 52 cases and adopting the rationale of the remedy in *Third Division Award 32862.*

As a remedy, because the Carrier's notice obligations were not met under Rule 52 for the disputed work, Claimants shall therefore be made whole for the lost work opportunities.

AWARD

Claim sustained.

Edwin H. Benn
Neutral Member

D. A. Ring
Carrier Member

R. C. Robinson
Organization Member

Chicago, Illinois

Dated: April 8, 2008