Award No. 12
Case No. 12

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
(
(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 (Herzog Contracting Corporation) to perform Maintenance of Way work (unload ties) between Mile Posts 29 and 76 on Number 1 main track and Number 2 main track on the Kansas Subdivision commencing on March 18, 2002 through April 30, 2002, instead of Group 19 Roadway Equipment Operators L. J. Doebele, Jr. and H. Frink (System File W-0252-155/1324092).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an 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 L. J. Doebele, Jr. and H. Frink shall each be compensated for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the aforesaid work beginning March 18, 2002 through April 30, 2002 at their respective straight time rates of pay and at their respective time and one-half rates of pay for any such hours that would normally be considered as overtime hours."

FINDINGS:

Public Law Board No. 7098, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 14, 2002, the 2nd Vice Chairman of the Organization submitted a claim to the Manager, Special Projects of the Carrier alleging a violation of the Agreement in that between March 18, and April 20, 2002, the Carrier used an outside contractor, Herzog Contracting Corporation, to unload railroad ties between milepost 29 and milepost 76 on the number 1 and number 2 tracks within the Kansas Division. The claim asserted that as a result of the contracting out the Claimants were deprived of work and compensation to which they were entitled by virtue of their established seniority within Group 19 of the Eastern District Roadway Equipment Operators Subdepartment.

The equipment used by the contractor for the work, called a cartopper, the claim alleged, "was nothing more than a Roadway Equipment Front End Loader with a Back-hoe attachment and one lucky loader which is very similar to the ones the Carrier has on the property" operated by its own employees. According to the claim the contractor's employees worked ten hours per day, five days per week during the period in question. The claim stated that the work in dispute has customarily been assigned to and performed by employees of the Roadway Equipment Operators and Track Subdepartments and "is specifically designated as being work of those Subdepartments under Rule 10" of the current Agreement. The claim asserted that none of the exceptions to Rule 52 of the Agreement was applicable in this case. In addition, the claim alleged, no prior notice was given in connection with the contracting out of the work.

The Manager Special Projects of the Carrier replied by letter dated July 8, 2002, in which he stated, "The Carrier has informed the Organization of [its] intent to contact the claimed work under one or more of the following service orders: 15825, 18632, and 23103." The Manager Special Projects denied the claim.

The General Chairman, David T. Tanner, appealed the denial by letter dated August 27, 2002. First, he stated that "it must be pointed out that this Organization has not received and does not have any record of the referred to service orders." He requested the Carrier to produce copies of them. Further, the appeal stated, the contracting out was not permissible because none

of the conditions stated in Rule 52 of the Agreement existed to allow the use of outside forces. Nor, the appeal asserted, did a past practice exist supporting the Carrier's contracting out the work.

Director Labor Relations D. A. Ring replied on September 27, 2002, stating, "Carrier records show the Organization was served notice of the Carrier'[s] intent to contract said work by Service Order 18632. . . ." No conference was requested or objection made to the notice, the Director stated. No copy of the actual Service Order No. 18632 allegedly sent to the Organization was ever provided to the Organization in the parties' correspondence or in conference. Instead the Carrier provided what the Director Labor Relations called "a copy of the contract information sheet and the labor notifications, which Chairman Tanner was listed as notified."

The "contract information sheet" was a model letter that stated in full as follows:

May 23, 2000

Service Order No. 18632

@<@ General Chairman Name/Address@>@

Mr. @<@General Chairman Name@>@

This is a 15-day notice of our intent to contract the following work:

Location:	Railroad's system trackage.
Specific Work:	Providing specialized, maintained, and operated equipment (multi-purpose machine) to assist Railroad forces in loading and unloading material and ditching.

Serving of this "notice" is not to be construed as an indication that the work described above necessarily falls within the "scope" of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE.

In the event that you desire a conference in connection with this notice, all follow up contacts should be made with Michael Phillips in the Labor Relations Department at phone [telephone number].

Respectfully,

Keith E Rawson
Manager Contract Services

The document called "Labor Notifications" consisted of a single page headed "Labor Notifications (Service Request #18632)." Below the heading was a table consisting of three columns headed respectively Union, Chairperson, and Territory. There were seven rows to the table with BMWE listed as the Union on each row. On one of the rows for Chairperson was the name David D. Tanner, General Chairman of the Union Pacific Territory. On the other rows were the names of other Chairpersons of other territories, such as Former C&NW Railroad.

The Director Labor Relations stated that the work in question was not exclusively that of the Organization but that there was a "mixed practice" that included contracting out all phases of track and roadbed construction/maintenance, including the work in question. He denied that there was any violation of either the Agreement Rules or past practice. The Director cited arbitration authority that he contended established that in any event the contractor used specialized equipment for the work in question and that the contracting out was therefore specifically permitted by Rule 52(a) of the Agreement. The Director further contended that bargaining history showed that the work in question was not exclusively that of the Organization and that the Carrier was free to contract out such work.

In additional correspondence between the parties more arguments were raised by them. The Board, however, will concentrate on the notice issue. In a letter to the Director Labor Relations dated April 1, 2003, the General Chairman insisted that "no notice was given by the Carrier or received by the Organization." The General Chairman stated, "We have again researched our files and have not been able to locate any notice such as the one you have provided or with a Service Order Number 18632. It is noted that you have not provided a copy of a Notice that was addressed to me and therefore it is apparent none was sent."

The General Chairman described the procedure followed by the Organization when a notice of contracting out is received. It includes the automatic request for a conference to allow

opportunity for good faith discussions. The simple explanation for no conference having been requested in this case, the General Chairman asserted, is that "we did not receive the Notice."

The Board finds that the Carrier has failed in this case to establish by substantial evidence that it give notice of contracting out the work here in dispute as required by Rule 52(a) of the Agreement. The only notice the Carrier claims to have given is one based on the model letter dated May 23, 2000, at the top of which was written "Service Order No. 18632." However, although directly challenged by the Organization to provide proof that the Service Order No. 18632 letter was ever mailed to the General Chairman, the Carrier failed to produce a copy of any letter addressed to the General Chairman. The General Chairman expressly denied that the Organization or he ever received such a letter.

The one-page document headed Labor Notifications (Service Request #18632) with General Chairman Tanner's name on it is not proof that the Service Request was mailed to him. From all that is evident from the document, it is a list of persons who were entitled to receive a copy of the Service Order, but nothing on the document shows that any of the persons on the list were actually mailed the document. In addition, the record contains a copy of a memo dated 5/23/2000 from Keith E. Rawson to various management officials asking if notification had to be done and stating that notification "will be made" to Mr. Tanner, among others, "if approved." Significantly, however, there is no copy in the record of any response to Mr. Rawson's memo approving the giving of notification.

The Board finds that the record fails to establish by substantial evidence that Service Order No. 18632 was ever mailed or otherwise given to the General Chairman of the Organization. The said Service Order is the only document relied on by the Carrier as constituting notice of the contracting out in this case. Since there is no substantial evidence that the Service Order was provided to the General Chairman, it is not necessary for this Board to decide whether, if it had been furnished to the General Chairman, Service Order No. 18632 would have been sufficient to satisfy the Carrier's obligation under Rule 52(a) of the Agreement

to provide advance notice of the contracting out that here occurred.

The failure of the Carrier to provide written notice of its intent to contract out the work in question requires a finding that the contracting out in this case violated Rule 52(a) of the Agreement. Third Division Awards Nos. 36516 and 36514. The appropriate remedy for the violation is monetary compensation even if the Claimants were fully employed at the time the contracting out was performed. Public Law Board No. 6302, Award No. 83.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Sinclair Kossoff, Chairman & Neutral Member

Dominic A. Ring, Carrier Member

Roy C. Robinson, Employe Member

Chicago, Illinois
Dated: January 30, 2009

2/26/2009