PUBLIC LAW BOARD NO. 7099

BROTHERHOOD OFMAINTENANCE OF WAY EMPLOYES, DIVISION OF I.B.T. **CASE No. 14**

-And-

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

The Claim, as described by the Petitioner, reads as follows:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Scarcella Brothers) to perform routine Maintenance of Way work (transport Maintenance of Way equipment) from Trentwood, Washington to Portland, Oregon on January 24, 25 and 31, 2005 instead of Oregon Division Group 15 Truck Operator L. Rucker (System File C-0552-108/1421874)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and when it failed to make a good-faith attempt 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 referenced to in Parts (1) and/or (2) above, Claimant L. Rucker shall now be compensated for thirty-six hours' pay at his respective time and one-half rate of pay.

The Carrier has declined this claim."

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record of this case together with the parties' presentation, the Board finds that the claim should be disposed of as follows:

The Claimant has established and holds seniority in the Track Subdepartment dated from September 15, 1969. He established Two Ton + Truck Operator seniority on June 22, 1970, and Six Ton + Truck Operator seniority on April 1, 1974. He was regularly assigned as a Group 15(b) System Truck Operator and was working on the Oregon Division on the date the instant dispute arose.

On or about December 14, 2004, the Carrier provided former General Chairman Tanner with a " 15-day notice of our intent to contract the following work" at "various points across the Union Pacific system":

> Operated trucks and lowboy trailers to assist in hauling and or moving misc. equipment on the Union Pacific system for calendar year 2005.

General Chairman Tanner was thereupon invited to conference the matter. By letter dated December 20, 2004, former General Chairman Tanner objected to the "blanket notice" provided by the Carrier as not meeting the Carrier's obligations under either Rule 52 and/or the December 11, 1981 Letter of Understanding.

Notwithstanding Mr. Tanner's stated objections, and without having served any further Notice to then General Chairman Tanner, on January 24, 25 and 31, 2005, the Carrier assigned outside forces from Scarcella Brothers Contracting to perform the transporting of Maintenance of Way equipment – a speedswing, a backhoe and a welding truck from Trentwood, Washington to Portland, Oregon. Scarcella Brothers expended twelve (12) hours on each of the three claim dates, for a total of thirty-six (36) hours performing such service.

We first determine whether the Carrier's December 14, 2004 notice satisfied its requirements under Rule 52. Rule 52 provides, in relevant part:

> (a) . . . . 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 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 Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning *said contracting* but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection herewith.

(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.

(Emphasis added)

As we read Rule 52, it is our understanding that this rule requires notice to the General Chairman for *each instance* where the Carrier intends to contract out work customarily performed by Maintenance of Way forces. Given that the purpose of the Rule is to provide a framework for good faith discussions over the Carrier's intention to contact out such work, it makes no sense that the Carrier could satisfy its obligation under Rule 52 with the type of blanket notice it provided to the organization on December 14, 2004. Accordingly, we find and conclude that the Carrier failed to abide by its obligations under Rule 52 prior to assigning the challenged work to Scarcella Brothers Contracting.

During the on-property handling of this matter, the Carrier asserted that the work was of a mixed practice variety and that the Claimant did not "[p]osses sufficient fitness and ability to safely and efficiently perform the duties or operate the equipment in question." Respectfully, this claim on behalf of the Carrier begs the question since no contractually mandated notice was ever given and accordingly, no conference was afforded to discuss these specific claims. Indeed, as observed in Third Division Awards 35735 and 35736, "[t]he mutual intent of the contracting Parties is that such advance notice is supposed to provide the opportunity for good faith discussion of precisely these kinds of issues."

Finally, while the Carrier maintains that the Organization has failed to demonstrate that it has "exclusively" performed the challenged work, it is well accepted that the Carrier's reliance on an

exclusivity test is not well founded. While the exclusivity test may very well be an appropriate standard in jurisdictional disputes, here, the Carrier is obligated to provide a Rule 52 notice where work to be contracted out is "within the scope" of the Organizations Agreement. (See, e.g., Third Division Award No. 27012). In the instant matter, there can be no dispute that the transporting work at issue is work customarily and historically performed by BMWE represented forces. Had this not been the case, presumably the Carrier would not have provided its blanket December 14, 2004 notice to the General Chairman.

As to the requested remedy, the Carrier asserts that there is no basis for the monetary relief requested by the Organization since the Claimant was fully employed by the Carrier at all relevant times. Such an assertion has been rejected numerous times on the basis the basis that a remedy such as that requested here represents an appropriate penalty for a loss of work opportunity, coupled with the unmitigated violation of the Carrier's contractual obligation to notify and confer if timely requested by the General Chairman before contracting out such work. (See Third Division Award No. 35736 together with other Third Division Awards cited therein.)

AWARD

Claim sustained.

Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

Dated: October 31, 2008

Buffalo, New York