BEFORE PUBLIC LAW BOARD 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

Case No. 14

STATEMENT OF CLAIM: Claim of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Herzog Contracting Corporation) to clean the right of way of crossties, tie butts and debris between Mile Post 285 and Mile Post 250 on the Kansas Division from January 7 through February 1, 1991 (NRAB 91-3-652).

(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, failed to timely meet with the General Chairman and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, furloughed Eastern District Roadway Equipment Operators C. D. Steuben and D. K. Melius shall each be allowed one hundred sixty (160) hours of pay at their respective rate of pay.

FINDINGS:

At the time of this dispute, Claimants C. D. Steuben and D. K. Melius were employed as roadway equipment operators in the Carrier's Roadway Equipment Department on the Eastern Seniority District.

On October 9, 1990, the Carrier notified the Organization of its intention to subcontract the "picking up and disposal of ties at various locations on the Union Pacific

for 1991 and 1992".

On October 23, 1990, the Organization responded by offering to use its forces to clean the ties, timbers, and other debris from the right-of-way and "place them at an accessible point for removal and disposal by an outside concern". The Carrier responded by acknowledging that the work in question has been subcontracted in the past.

On November 9, 1990, the Organization again responded to the Carrier's response stating that this work has historically been performed by its forces and requested a conference to discuss this matter further.

Beginning January 7 and ending February 1, 1991, the Carrier employed a subcontractor to clean up scrap crossties, tie butts and debris between Mile Posts 285 and 251. Two contractor employees worked eight hours per day for a total of 20 days.

On February 13, 1991, the Organization filed a grievance on behalf of the Claimants contending that this type of work has been historically reserved for its forces and that the Carrier did not provide proper notice of its intent to subcontract in a timely fashion. The Carrier denied the grievance arguing that the Carrier followed past practice when it subcontracted the work. The Carrier also pointed out that the Claimants were fully employed at the time that the work in question was performed.

The parties not being able to resolve the issues, this matter comes before this Board.

The Organization has filed a 74-page submission plus numerous exhibits and awards in support of its claim. Basically the Organization contends that the work

involved in this case is reserved to BMWE represented employees by the clear and unambiguous contract language. In addition, the Organization claims that it has been Carrier forces who have customarily performed this type of cleaning the right of way of ties work in the past. Finally, the Organization contends that the Carrier failed to issue a timely notice of its intention to contract out the work involved in this case and, therefore, violated Rule 52.

The Carrier, in its 26-page submission with numerous attached exhibits, states that this case should be decided on the basis of *stare decisis* because numerous cases similar to this have been found in the Carrier's favor. The Carrier also indicates in its submission that it has the right to subcontract this type of work on the basis of past practice because the work in question is not preserved by the Scope Rule for the exclusive performance by Company employees. The Carrier finally argues that nothing in the Agreement prevents the Carrier from subcontracting this type of work.

This Board has reviewed the extensive submissions and documentary evidence in this case and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it subcontracted the work of cleaning the right of way of crossties, tie butts and debris to an outside company. This Board finds that the type of work that was subcontracted by the Carrier had been subcontracted on numerous occasions in the past. The Carrier submitted a 37-page exhibit each page of which contained at least one dozen instances of a similar type of work being subcontracted by

the Carrier throughout the Carrier's system. Consequently, this Board must find that the Carrier's practice is a "mixed practice" in this type of work and by previous awards between these parties, the Carrier has the right to subcontract this type of work as it has done in the past.

Rule 52 of the parties Agreement allows the Carrier to subcontract work. In Award 30063 which involved the same Carrier and the removal of ties and debris such as this case, the Board held that several awards support the Carrier's position and were dispositive of that case. The Board held that the Carrier had established a long history of contracting out similar work over a 30-year period. Therefore, this Board cannot find that the Carrier violated the Agreement when it subcontracted the work at issue. The doctrine of *stare decisis* has been upheld by other Boards when dealing with this issue and we continue to uphold it here. Work that has been performed by both Company employees and subcontractors is called a "mixed practice" type of work and therefore, cannot be considered under Rule 52(a) to have customarily been performed by employees under the Agreement.

With respect to the notice, the record reveals that the original notice was sent to the General Chairman on October 9, 1990. The Organization responded to the notice on October 23, 1990. The Carrier replied to that response by the Organization on October 31, 1990, and the Director of Labor Relations indicated that he would be willing to meet with the Organization in conference to discuss the notice. On November 9, 1990, the

Organization sent a 17-page letter to the Carrier once again objecting to the subcontracting. The work did not begin until January 7, 1991, and was completed on February 1, 1991. This Board must find that the Carrier gave the Organization sufficient notice to discuss this proposed subcontracting. There is nothing in the record that indicates that the Carrier refused to discuss the matter prior to beginning the work two months later.

For all of the above reasons, the Organization's claim must be denied.

AWARD

Claim denied.

PETER R. MEYERS
Neutral Member

Carrier Member

Organization Member

DATED:

DATED:
(Dissent Attached)

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 14 OF PUBLIC LAW BOARD NO. 5546
(Referee Meyers)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the Award is not based on the on property handling and prior precedent between the parties. Such is the case here.

The Board properly recognized that the removal of cross ties, tie butts and debris from the right of way work was work that Organization represented employes have performed in the past. This conclusion should have been easily reached based on the precedent established in Third Division Award 30005 which held:

> "Without addressing further the question of advance notice, the Board nevertheless determines that, as described by both the Carrier and the Organization, the work is of a nature customarily performed by employees represented by the Organization. The instances of 'past practice' cited by the Carrier is unconvincing as to the 'pick up, removal, disposing and loading' work involved here. Simply put, the Carrier has not demonstrated any convincing basis which required or permitted the contracting of such work under Rule 52. ***"

However, rather than following Award 30005, the Majority took it upon itself to again review the alleged past practice material submitted by the Carrier and held:

> "*** This Board finds that the type of work that was subcontracted by the Carrier had been subcontracted on numerous occasions in the past. The Carrier submitted a 37-page exhibit each page of which contained at least one dozen instances of a similar type of work being subcontracted by the Carrier throughout the Carrier's system. ***"

The Majority in Third Division Award 30005 had already reviewed that same past practice instances submitted by the Carrier and had rejected it. Award 30005 is not a general award which was referenced by the Organization for general principles on contracting. The work at issue in Award 30005 is the same work at issue in Award 14 and since the list submitted by the Carrier had already been rejected as not demonstrating any convincing basis for contracting, the Majority's attempt to now lend credence to that same list clearly illustrates that it did not understand the case and did not base the decision on the facts of this record.

The notice proffered by the Carrier was received by the Organization on October 12, 1990 and the Organization responded thereto on October 23, 1990 requesting that a conference be held prior to the work being assigned and performed by a contractor which is exactly what the rule (Rule 52) of this Agreement requires. The Majority then erroneously held that:

> "*** The work did not begin until January 7, 1991, and was completed on February 1, 1991. This Board must find that the Carrier gave the Organization sufficient notice to discuss this proposed subcontracting. There is nothing in the record that indicates that the Carrier refused to discuss the matter prior to beginning the work two months later."

First, the rule does not require that the Organization request a specific hearing date. Second, the Organization specifically requested that a conference be held prior to the work being assigned and performed by a contractor. Finally, Rule 52(a) stipulates that if a meeting is requested, the designated representative of the company shall promptly meet with him for that purpose. It further stipulates that said company and organization representatives 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 therewith. It is obvious that the rule presupposes that a meeting will be held prior to the work being performed and once the Organization makes the request the burden falls to the Carrier to schedule the meeting prior to the work commencing. Consequently, the Majority clearly misinterpreted the factual basis of the on property handling and then compounded the error by misinterpreting the language of the rule.

The award is therefore palpably erroneous and of no precedential value.

I, therefore, dissent.

Respectfully submitted,

R. B. Wehrli
Organization Member

CARRIER'S RESPONSE

TO

ORGANIZATION MEMBERS DISSENT

TO

AWARD 14 OF PUBLIC LAW BOARD NO. 5546

Contrary to the Organization Members assertion in his "Dissent", Award No. 14 is based on similar on-property handling and therefore the Referee did not err in his findings nor is the award palpably erroneous.

The Organization Member in his submission to the Board Hearing and in the Executive Session advanced the same arguments contained in his "Dissent". Apparently he is attempting to rehash his old arguments one more time. The Organization Member is clearly avoiding any reference to Third Division Award 30063 (BMWE vs Union Pacific) another on-property Award. Apparently, Referee Vernon (in presently one of the more analytical Awards rendered over the issue of cleaning the right of way) also did not subscribe to the alleged precedent the Organization Member is placing on Third Division Award 30005. Further, the Organization Member's reference to the lists of the Carrier demonstrating practice is based upon the ignoring that the lists did contain similar type work. This issue was also previously discussed. Simply put, the Referee did not err.

Another contention of the Organization Member in his "Dissent" concerns the issue of the Notice of the intent to subcontract the work involved in the dispute and the scheduling of conference. What the Organization Member is clearly overlooking is the language of the following Awards dealing with similar circumstances. These Awards are Third Division Award 30690 (issued January 31, 1995) and Third Division Award 30034 (issued February 17, 1994) by Referee Herbert L. Marx, Jr; Third Division Award 30287 (issued July 19, 1994) by Referee Gil Vernon; and, Third Division Award 24888 (issued July 28, 1984) by Referee Marty Zusman. Obviously Referee Meyers in issuing the above Award, and three (3) other distinguished Referees cannot be considered to be in error because the Organization Member is dissatisfied.

In any event, the Carrier considers the Award to have precedential value and the Carrier will continue to cite the above findings in similar disputes.

D. A. Ring
Asst. Director Labor Relations
Union Pacific Railroad
Carrier Member to PLB 5546