BEFORE PUBLIC LAW BOARD NO. 5546

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
UNION PACIFIC RAILROAD COMPANY

Case No. 2

STATEMENT OF CLAIM: Claim of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (West Side Grading, Inc.) to perform B&B Subdepartment work (installing asphalt) at railroad grade crossing approaches at Mile Posts 649.25 and 650.11 near Delta, Utah on April 13 and 14, 1992 (System File R-1/920402).

2. The Agreement was further violated when the Carrier failed to provide a proper advance notice and make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Group 3 Carpenters S. D. Mortensen and T. J. Murray shall each be allowed twenty-four (24) hours' pay at their respective straight time rates.

FINDINGS:

On April 13 and 14, 1992, the Carrier used an outside contractor to lay down asphalt on two separate crossing approaches in Delta, Utah. The work in question was performed by four non-Carrier employees working six hours each on each day.

The Organization argues that Claimant Mortensen and Murray were available, willing, and capable of performing said work. Furthermore, it argues that it was not properly notified by the Carrier of the Carrier's intent to use an outside company to perform a job which had been traditionally performed by B&B employees represented by

the Organization.

The Carrier contends that the contractor did not perform any track work, that the Organization was notified of the Carrier's intentions to use an outside contractor, that the Carrier has used contractors in the past to perform this type of work, and that the Claimant's were fully employed at the time this work was being performed.

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

This Board has reviewed the procedural issue raised by the Carrier and we find it to be without merit. Therefore, this matter is properly before this Board for a ruling.

With respect to the substantive issue, this Board has reviewed the extensive record in this case, and we find that the Carrier failed to serve proper notice, as required by the Rules, on the Organization that the subcontracting at issue was being contemplated. The Carrier admitted at the hearing that it failed to serve any notice.

There is no question that laying asphalt has historically been performed by the B&B Department of the Organization employees. The Organization's submission includes statements from numerous Organization members who have performed the same type of work for over 33 years. However, as the Carrier notes, the Organization has not shown that it has exclusively performed that work or that the Carrier has never subcontracted that work in the past. Moreover, the Carrier cites Third Division Award No. 29966, in which the Board found:

> As in other disputes before the Board, the Carrier has demonstrated that work of this particular nature has been contracted to outside forces over an extended period and in

> a substantial number of instances. The Board has no reason to dispute the Organization's contention that Maintenance of Way forces also perform this and similar type of work. In the face of the Carrier's demonstration of past practice as to asphalt work, however, attention must be paid to that portion of Rule 52, Contracting, which reads as follows:
>
> "(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."

Consequently, it appears that this matter relating to asphalt work has been resolved. It is an accepted principle that once an issue between the same parties has been decided, subsequent arbitration of that same issue will follow the original holding unless it can be shown that the original decision was palpably erroneous.

Although this Board is finding a violation of the notice requirements, this Award should not be interpreted as precluding the Carrier from utilizing outside contractors to perform this type of work in the future. This Carrier has been placed on notice in previous Awards that a failure to issue the appropriate notice to the Organization to allow for some discussion over this issue is a serious violation of the Rules. The parties' mutual Agreement contemplates that if the Carrier plans to subcontract work, it will meet with the Organization to discuss the work prior to actually beginning the work. The Organization has bargained for the opportunity to attempt to convince the Carrier to use its own employees represented by the Organization.

Once this Board has determined that there is a violation of the Rules, we next turn

our attention to the type of relief sought by the Organization. The record reveals that the work in question was performed by four non-Carrier employees working six hours each on two days. That is a total of 48 hours. The Organization is seeking relief such that each of the two Claimants be paid 24 hours at their respective straight-time rates because the Carrier was in violation of the Rules by failing to give proper advance notice. This Board believes that that type of relief would provide a very good incentive for the Carrier to abide by the notice provisions in the future. However, as the Carrier points out, previous awards have been consistent in holding that a Board is precluded from providing the claimants with pecuniary relief when they have not proved a loss of work opportunity or loss of earnings due to the carrier's failure to tender the required notice. It should be noted that if the carrier has flagrantly or repeatedly failed to comply with Rule 52, the door has been left open for the award of monetary relief in the future. Although this Board is not ordering monetary relief in this case, this Board reminds the Carrier of the language of those awards relating to flagrant or repeated violations and states that it will not refrain from ordering monetary relief in the future if the Carrier continues to fail to issue proper notice to the Organization.

For all of the above reasons, this Award will be sustained in part and denied in part. The Carrier violated the Agreement by failing to give the appropriate notice. However, the Carrier was within its rights in the subcontracting of the work and will not have to make any monetary payments to the Claimants.

AWARD

Claim sustained in part in accordance with the above findings.

PETER R. MEYERS
Neutral Member

Carrier Member

DATED: 9/23/94

Organization Member

DATED: 9-30-94