PUBLIC LAW BOARD NO. 6205
AWARD NO. 16
CASE NO. 16

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES
TO DISPUTE: and

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 (Gillman Railway Services) to perform right of way cleaning work (removal of ties, tie butts and debris) between Mile Post 76 near Menoken, Kansas and Mile Post 43 near Midland, Kansas beginning April 12, 1993 and continuing (System File H-53/930510).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intent to contract out the work involved here in accordance with Rule 52.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators G. J. Burghart and J. T. Small shall 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 Straight Time and Overtime rates of pay as compensation for the violation of the Agreement for hours worked by the outside contracting force....'"

FINDINGS:

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

By notice dated January 5, 1993, Carrier advised the Organization of its intent to solicit bids "to cover the unloading and the pickup and disposal of cross ties, switch ties, etc. in connection with the Carrier's 1993 Tie Program" listing locations within 14 different subdivisions. The Organization responded on January 12, 1993 objecting to the contracting on the basis that work had customarily been performed by employees, that Carrier had failed to assert the existence of any of the Rule 52(a) conditions, and requested that a conference be held prior to the work commencing and that Carrier be prepared to furnish it specific information in that discussion. There is no evidence in this record to indicate that Carrier replied to the Organization's January 12, 1993 letter or indicated any willingness to meet in conference. Apparently, no conference was held.

This claim was filed on April 29, 1993 and protests Carrier's use of three men employed by Gillman Railway Services to perform the right-of-way cleaning and tie removal work commencing on April 12, 1993, using REO equipment with logging attachments at various locations on the Kansas Division rather than utilizing Claimants, Eastern District Roadway Equipment Operators.

Carrier's initial denial dated June 18, 1993 indicates that it has no record of contracting with Gillman Railway Services, and avers that the material in question was sold to Gillam Railroad Services on an "as is where is" basis. It also protests the remedy requested by the Organization as excessive in light of the fully employed status of Claimants.

The Organization's August 19, 1993 appeal asserts that no proof was submitted substantiating any sale of ties and avers that even in cases where Carrier has sold ties in the past, it has used employees to pick up the ties from the right-of-way and place them at an accessible location for the outside contractor to load and remove them from the property. The Organization argues that a loss of work opportunity occurred regardless of Claimants' fully employed status, and relies upon Third Division Award 28817 among others.

Carriers final correspondence denying the claim is dated October 11, 1993 and asserts that it gave notice of its intent to contract out the work and that the Organization never docketed the subject for discussion, foreclosing its later protest of such action. Carrier submitted proof that Claimants were fully employed and even worked some overtime during the claim period.

The parties apparently met in a claims conference on February 24, 1994 where Carrier was requested, and agreed, to provide a copy of the sales agreement. By letter dated May 17, 1994 the Organization avers that no such document had been furnished and that there was no proof in the record that any such sale took place. The Organization also notes the fact that Carrier never claimed in this case, nor submitted proof of, a past practice concerning the contracting of this work. The Organization argues

that in the absence of any response by Carrier to its conference and information request contained in its January 12, 1993 letter, the Organization was in no position to set a time and date for a conference. It contends that the failure to hold a conference at any time, let alone before the work commenced, is a violation of Carrier's obligation under Rule 52(a). The Organization requests a remedy for Claimants regardless of their fully employed status and notes that some of the work was performed by the contractor on Saturdays, Claimants' scheduled rest days.

As noted in Case Nos. 7 and 11 of this Board, there are numerous awards on this property which hold that Carrier violated the Agreement by contracting out the work of cleaning of right-of-way ties, see Third Division Awards 28817, 29561, 30005, 30528, 31037, 31042, 31044, 31045, and unloading crossties, see Third Division Awards 28590, 31025, 31038, 31041. Carrier's assertion that it sold the ties in question to the contractor on an "as is where is" basis is an affirmative defense to the allegation of a subcontracting violation, and Carrier bears the burden of proving such action. It never went further than making such assertion in this case, and presented no proof of such sale despite the Organization's requests for a copy of the sales agreement. Thus, we find that no sale of the ties in question has been proven on this record, and that the contracting fell within the ambit of Rule 52 of the Agreement. See e.g. Third Division Award 28759.

The notice and conference requirements of Rule 52 are clear, and require that Carrier both furnish notice of its intent to contract work within the applicable scope of the agreement (which work of the nature here involved has been found to fall) and "promptly meet" to discuss matters relating to said contracting transaction upon request of the

Organization and make a good faith attempt to reach an understanding concerning said contracting. In this case there is no dispute that Carrier gave the required notice, but failed to "promptly meet" or even indicate any willingness to do so at any time prior to the contracting in issue. Such failure alone has been found to establish a violation of Rule 52 of the Agreement. See Third Division Awards 31171, 31031. This is not a case where Carrier delayed meeting until after the commencement of the work, see Third Division Award 30823, or the Organization was partially to blame for the delay in holding a conference. See Third Division Award 31035. In this case, Carrier never expressed any willingness to meet in conference nor provided the Organization with any indication of when the work in issue would start. In fact, Carrier never responded to the Organization's lengthy objection to the contracting notice and its request to meet prior to the work being contracted. No conference was ever held. Under these facts, we cannot accept Carrier's contention that it was the Organization who failed to docket the subject for discussion and is foreclosed from objecting to the resulting contracting.

In the multitude of contracting cases decided on this property, few have found a violation of both the notice and contracting provisions of Rule 52. See Third Division Award 31025. While we have noted our obligation to follow the precedent on this property limiting a monetary remedy to furloughed employees in cases of a subcontracting violation based solely on the merits (see our rationale set forth in Case No. 7), the matter of the appropriate remedy for notice violations has evolved over time from the finding of a loss of work opportunity only for furloughed employees (prior to the Board's 1991 admonition to Carrier that the notice requirements applied to subcontracting cases concerning work within the scope of the agreement but not necessarily performed exclusively by employees), see

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Case no. 4; Third Division Awards 29560, 29791, to full monetary relief subsequent to warnings by the Board that failure to abide by the notice requirements will subject Carrier to monetary damage awards even in the absence of a showing of actual loss. See, e.g. Case Nos. 6, 8, 10, 12; Third Division Awards 32862, 32338.

We find no basis to distinguish the cases directing full remedial relief on the fact that Carrier violated its Rule 52(a) obligation by failing to give notice in the first place, rather than failing to fulfill its "prompt meeting" and conference requirement. The purpose of the notice is to enable the Organization to determine if it has objection to the specific instance of contracting, and the purpose of the conference is to give the parties an opportunity to discuss the reasons for the proposed contracting and to reach some type of understanding. The 15 day advance notice requirement is to enable sufficient time for such discussion to occur prior to the contracting decision going forward. Carrier's failure to agree to promptly meet as much undermines the process as its failure to notify the Organization of its intention to contract out the work in the first place.

Since this dispute arose in 1993, some two years after the principle of the requirement of notice was established, coupled with the fact that Carrier has shown no basis in this record for its ability to contract out the work in issue, we find that full monetary relief is appropriate, regardless of Claimants' status at the time. The claim is sustained in its entirety with respect to its request for compensation at the straight time rate of pay. We shall remand the case to the parties to determine the number of hours worked by the contractor's forces on the dates set forth in the claim. Claimants shall be compensated accordingly.

AWARD:

The claim is sustained in accordance with the Findings.

Margo R Newman

Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Carrier Member
I DISSENT

Dated:

Rick B. Wehrli
Employe Member

Dated: 7-5-00