PUBLIC LAW BOARD NO. 6205
AWARD NO. 3
CASE NO. 3

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 (On The Spot Glass and/or Fisher Painting) to perform B&B Subdepartment work, i.e., preparing the surface, mixing, blending and applying primer and paint to the roundhouse at Cheyenne, Wyoming, on the Wyoming Division, beginning June 18, 1991 and continuing (System File S-561/910730).

(2) The Agreement was further violated when the Carrier assigned or otherwise permitted outside forces (Pinnacle Cabinets and Mill Work) to perform B&B Subdepartment work, i.e., constructing and installing wooden doors on the roundhouse at Cheyenne, Wyoming from June 24 through August 9, 1991 (System File S-573/910760).

(3) The Agreement was further violated when the Carrier assigned or otherwise permitted outside forces (Weilder Williams Construction Company) to perform B&B Subdepartment work, i.e., repairing, constructing and/or renewing the wooden window sash on the roundhouse at Cheyenne, Wyoming from July 1 through August 1, 1991 (System File S-574/910768).

(4) The Agreement was further violated when the Carrier assigned or otherwise permitted outside forces (Reiman Corporation and other subcontractors) to perform B&B Subdepartment work, i.e., repairing, constructing and/or renewing brick, siding and damaged glass on the Diesel Machine Shop at Cheyenne, Wyoming on August 16, 1991 and continuing (System File S-589/920016).

(5) 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 the work referred to in Parts (1), (2), (3) and (4) above, as required by Rule 52 (a).

(6) As a consequence of the violations referred to in Parts (1) and/or (5) above, furloughed Wyoming Division B&B Painters R. L. Archuleta, S. C. Swanton, M. S. Hopkins and D. B. Westerman shall each be allowed an equal proportionate share of the man-hours expended by the outside forces at the 1st Class Painter's rate, beginning June 18, 1991 and continuing until the violation ceases.

(7) As a consequence of the violations referred to in Parts (2) and/or (5) above, B&B Carpenters R. L. Kinkade, R. M. Jackson, C. M. Tipsword and R. M. Galik shall each be allowed '***compensation for the loss of work opportunity suffered in an amount equal to three hundred and fifty (350) hours pay each at their respective Group 3 Carpenters rate of pay for this violation of the Agreement when outside forces were assigned this Construction and installation of Wooden Doors.', at the Group 3 Carpenter's rate.

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, B&B Carpenters L. W. Lamons, P. J. Kern, G. B. Roper and J. J. Callahan shall each be allowed '***compensation for the loss of work opportunity suffered in an amount equal to one hundred seventy six (176) hours pay each at their respective Group 3 Carpenters rate of pay for this violation of the Agreement when outside forces

were assigned this renewal and construction of the Wooden Window Sash on the Round House.', at the Group 3 Carpenter's rate.

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, B&B Foreman R. E. Melcher, Carpenter/Mason A. D. Reed and Carpenters C. M. Tipsword, R. M. Galik, R. M. Jackson, R. L. Kinkade and Painters R. L. Archuleta and S. C. Swanton shall each be allowed '***an equal proportionate share of the man hours worked by the contractors employees in performing the respective work of the Claimants classification; the Foreman, Mason and Carpenters commencing on August 16, 1991 and Painters commencing on September 3, 1991. ***' and continuing until *the violation ceases at their respective straight time rates.*"

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 October 9, 1990, Carrier advised the Organization of its intent to solicit bids "to cover the construction for restoration of the roundhouse at 121 West 15th Street, Cheyenne, Wyoming." By letter dated October 15, 1990 the Organization objected to Carrier's intent to contract the work, relying upon Rules 1, 8, 9 and 10 as reserving the work to employees, referencing prior employee written statements and numerous pictures furnished to Carrier in another specified file establishing the fact that employees have customarily performed this type of work and are

skilled at doing so, asserting that such work had always been performed by the employees until a few years prior, at which time the Organization has excepted to each instance of such contracting. The Organization also noted that Carrier failed to assert that any of the five exceptions to the prohibition against contracting contained in Rule 52(a) existed, and requested a conference prior to the work being performed. A conference was held on November 8, 1990 without resolution.

A subsequent notice was served by Carrier on July 2, 1991 indicating its intent to solicit bids to cover the renovation of the Steam Locomotive Repair Shop at the same location in Cheyenne, Wyoming. By letter dated July 9, 1991, the Organization objected to such contracting for the same reasons noted above, and requested a conference prior to the work commencing. A conference was held on July 22, 1991 without resolution.

This extensive record consists of four separate claims filed by the Organization protesting the contracting of parts of the overall restoration and renovation of the roundhouse and locomotive repair shop located in Cheyenne, Wyoming. Each claim protests a different aspect of the work performed between mid-June and mid-August, 1991 by various named contractors, including painting, construction and installation of wooden doors and window sashes, brick work and siding replacement. A review of each of the claims' correspondence separately reveals that similar arguments were made by the parties in each case referring to much of the same documentation concerning the employees' performance of the work in question and Carrier's practice of contracting out similar work. Accordingly, we will discuss the parties' positions for each of the four claims together.

The Organization asserts that the work in question is specifically reserved to employees by Rules 1, 8, 9 and 10 of the Agreement, and has customarily and historically been performed by them, providing voluminous documentation by way of employee statements concerning their performance of construction and renovation-type work here involved. It avers that employees were capable of completing the entire project, whatever its size, and that piecemealing was not required, while pointing to the fact that Carrier itself piecemealed the different aspects of the project to different contractors. The Organization notes that Carrier did not rely on any of the five listed exceptions to the contracting prohibition contained in Rule 52(a) in these cases. It took issue with the type of past practice evidence introduced by Carrier, contending that it exaggerated the amount of work contracted, contained instances of work performed off railroad property, and was vague as to date and contractor identity. The Organization also objected to the notice given, stating that it did not cover some of this specific work (e.g. painting) and argued that Carrier failed to meet its good faith conference obligations. It asserts that a full monetary remedy is appropriate for loss of work opportunity regardless of whether Claimants were fully employed.

Carrier argued throughout that the Scope rule was general in nature and did not specifically reserve this type of work to employees under the Agreement. It contends that it had established a well-known and documented past practice of contracting similar type of work, and relies upon the "prior existing rights" language in Rule 52(b) as well as prior precedent on the property to justify its contracting. Carrier asserted that the renovation of the roundhouse and restoration of the machine shop were major projects requiring extensive and varied types of work, and argued that it was not required to piecemeal the small portion of work

covered by these claims to employees. Carrier repeatedly took issue with the accuracy of the Organization's account of the amount of time the work took contending it to be excessive, and argues that Claimants' suffered no loss as a result of the contracting since they were fully employed elsewhere. Finally, Carrier asserts that it fulfilled its notice and conference obligations under Rule 52 prior to contracting the work in issue.

The Board initially finds that both the October 9, 1990 and July 2, 1991 notices meet the requirements set forth in Rule 52. The Organization was clearly informed of Carrier's intention to contract out work involving the construction for restoration of the roundhouse (which would include construction of doors, window sashes and associated painting along with many other aspects of the job) as well as renovation work at the locomotive repair shop (which would include renewing brick and replacing siding as part of the overall project). A review of the correspondence establishes that, even prior to the conferences held, the issues in dispute between the parties and their respective positions were clearly formed. Both notices were given with sufficient time for conferences to be held in advance of the actual contracting of the work. In fact, the first conference was held 7 months prior to the commencement of the work complained of. On the basis of this record, we find that the allegation that Carrier did not meet its good faith responsibilities under Article 52 is without merit.

The decisions concerning Carrier's ability to contract out various types of work on this property are abundant, and Carrier relies specifically on PLB No. 5546, Awards 1, 7, 8, 10, 11 and 12; Third Division Awards 28610, 29186, 29544, 29715, 29717, 30185, 30198, 30869, 31284, 32322, 32323, 32324, 32367, 32534, 32859, in arguing that it has established a past practice of contracting work involved with the remodeling of

buildings, and Third Division Awards 24888, 29037, 29038, 29121, 29716, 30066, 30200, 30280, 30691 concerning its right to contract painting work.

The Board has carefully reviewed the massive record in this case, as well as all cited contracting cases on the property dealing with similar type of work. We find that Carrier has established the existence of a mixed practice on this property with respect to the work in question. Thus, the "prior and existing rights and practices" language of Rule 52(b) permits the contracting even in the absence of any of the listed exceptions contained in Rule 52(a). See Third Division Award 30869. Accordingly, no violation of Rule 52 can be found, and the claims must be denied.

AWARD:

The claims are denied.

Margo R Newman
Margo R. Newman
Neutral Chairperson

D.A. Ring
Dominic A. Ring
Carrier Member

Dated:_____

R.B. Wehrli
Rick B. Wehrli
Employe Member

Dated: 7-5-00