AWARD NO. 14
CASE NO. 14

PUBLIC LAW BOARD NO. 7096

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
	)	
	)	**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 (Bannock Paving Company, Inc.) to perform Maintenance of Way work (clean right of way and preparation work for installation of track) at Mile Post 459.20 in the West Nampa, Idaho Yards on January 10, 11, and 14, 2002, instead of Idaho Division Truck Operators D. Hanson, E. Ibarra, D. White, Roadway Equipment Operators C. Gossage, M. Dunn, Foreman D. Stone and Sectionmen M. Cabutti, J. Marsing, B. Grever and E. Eckhardt (System File J-0252-53/1305119).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort 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 referred to in Parts (1) and/or (2) above, Claimants D. Hanson, E. Ibarra, D. White, C. Gossage, M. Dunn, Foreman D. Stone, M. Cabutti, J. Marsing, B. Grever and E. Eckhardt shall now each be allowed his applicable straight time and overtime rate a proportionate share of the total hours worked by the contractor during the work claimed as compensation for loss of work opportunity on January 10, 11 and 14, 2003.

OPINION OF BOARD

The dispute in this case concerns the Carrier's contracting of clean up of the right of way and preparation work for the installation of track after a derailment in the West Nampa, Idaho Yard, which work was performed on January 10, 11 and 14, 2002, with the Organization contending that such was an improper

contracting of scope covered work and no notice was given by the Carrier as required by Rule 52.

In pertinent part, Rule 52 provides:

RULE 52 - CONTRACTING

(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work; or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. 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 as 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 carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the carrier may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. It's 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.

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster.

(d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors.

Rule 52 applies in this case because the type of work — clean up of the right of way (including after derailments) and preparation work for the installation of track — is work which has been performed by Claimants and is therefore "... work customarily performed by employees covered under this Agreement ..." under Rule 52(a).

The Carrier's argument that the Organization must show that the covered employees performed the disputed work on an exclusive basis has been rejected in *Awards 1, 2, 3, 5, 9, 11, 12* and *13* of this Board.

In its March 13, 2002 letter, the Carrier asserted that:

* * *

> The work cited in your claim was performed in connection with a derailment. This was unplanned work undertaken on an emergency basis. ...

* * *

The Organization disputed the Carrier's assertion that an emergency existed.

The Carrier's obligations under Rule 52(a) are excused "... when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces." So the question here is whether the evidence shows that "... emergency time requirements exist[ed] ..."?

The Carrier's Manager, S. R. Adams, provided the following statement:

> The work performed by the said contractor, was under the jurisdiction of the mechanical department to remove derailed cars and parts, and to clear material out of their way to load and remove damaged cars, which they are under contract to do on derailments. Removing of damaged track and ties at derailments historically is done by outside contractors. The building of the track after the derailment was done by gag 6083 and 6384 along with local section forces ....

According to an employee statement (Claimant White), "[t]he Derailment was not on the main line, it was in the yards on yard tracks and no main line trains were ever stopped." Further, according to the Organization in its January 8, 2002 letter, "[t]he main line was not effected and there was not a stoppage of trains either on the Main Line or in the Yard Tracks."

In *Third Division Award 38349*, the parties faced the same issue involving the same contractor with an emergency asserted by the Carrier caused by another yard derailment. The Third Division sustained the claim and held:

> A review of Third Division Awards reveal that the existence of an "emergency" in a derailment situation requires a case by case analysis. (See, e.g., Third Division Award 37644 where the Board stated "(d)erailments are not 'one-shoe-fits-all,"; See also Award 31036 where the Board determined that the specific facts of that case supported the conclusion that the emergency ceased where the contractor's work forces began to fluctuate "thereby suggesting that the emergency condition did not exist for the entire period in which the work was performed." Further review of Third Division Awards support the conclusion that any claimed emergency must be bona fide where time is of the essence thereby rendering the Carrier's obligation to supply a Rule 52 notice impractical given the exigencies that then exist. (See, e.g. Third Division Award 30868 where the Board stated "the Organization

> has failed to prove that the 15 day advance notice provision has ever been applied to derailment situations where immediacy of action is required and advance notice is not practical.")
>
> The facts gathered during the on-property discussion of the instant claim demonstrate that the track at issue was impaired for approximately three hours following a derailment followed by what essentially amounted to clean up work that continued for more than four days. Given these undisputed facts, the Board finds that once the track was unimpaired and thereby useable, the emergency ceased to exist. Accordingly, the clean up work performed by Bannock Paving Company did not meet the time is of the essence criterion for the existence of a bona fide emergency.

We do not find *Third Division Award 38349* palpably erroneous and shall follow it.

In this case, the Carrier asserted that an emergency existed. But the contracted work lasted three days and involved cleaning up right of way and preparation work for installation of track after a derailment on a yard track. The state of the record as presented by the Organization is that trains were not stopped on main line or yard tracks as a result of the derailment and clean up work. We must therefore find that the Carrier has not shown that the conditions which existed on the three days in question were "... when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces" so as to support its position that an emergency existed which could excuse its obligations under Rule 52. Without that kind of showing, we cannot find that an emergency existed.

Rule 52 gives the Carrier significant managerial latitude with respect to contracting out scope covered work. But there are preconditions and obligations that nevertheless exist in that rule, which were not met in this case — particularly with the Carrier's need to show that, in fact, an emergency existed as asserted by the Carrier. On that basis, we shall sustain the claim.

Because Claimants were deprived of potential work opportunities they shall therefore be made whole for those lost work opportunities. *See Award 1* of this Board [quoting *Third Division Award 32862*]:

> ... Our discretion for fashioning remedies includes the ability to construct make whole relief. The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement ... to contract work within the scope of the Agreement. ...

* * *

> ... [M]ake whole relief for those lost work opportunities is therefore appropriate. Claimants shall be made whole for the lost work opportunities based upon the number of hours worked by the contractor on the dates in dispute.

AWARD

Claim sustained.

Edwin H. Benn
Neutral Member

D. A. Ring
Carrier Member

R. C. Robinson
Organization Member

Chicago, Illinois

Dated: 5-14-08