BEFORE
PUBLIC BOARD No. 7097

Award No. 4
Case No. 4

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	
vs.	)	**PARTIES TO DISPUTE**
	)	
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 forces from outside contractors to perform Maintenance of Way and Structures Department work (place signs and provide crossing protection) at crossings in connection with Maintenance of Way crews performing crossing and track repair work being on March 24, 2003 and continuing, instead of Seniority District T-4 employee G. A. Hudson (System File 4RM-9437T/1364774 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the above-referenced work as required by Rule 1(b).

(3) As a consequence of the violation referred to in Part (1) and/or (2) above, Claimant G.A. Hudson shall now '* * *be compensated for eight (8) hours of straight time and two (2) hours of overtime each day that the contractor's forces spent performing Claimant's work, five days a week, at the applicable rates of pay."

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over

the dispute involved herein.

Claimant has established and holds seniority as a trackman in the Maintenance of Way and Structures Department, Track Subdepartment on Seniority District T-4, dating from June 7, 1976. He was regularly assigned and working as such at Boone, Iowa on District T-4 Gang 3432 on the dates involved in this dispute.

Beginning March 24, 2003, the Carrier assigned two outside contractors (Advanced Warning Systems and Tri-State Signing) to perform the work of placing signs and providing crossing protection at crossings starting at MP 272.5 on the Boone Subdivision in connection with Maintenance of Way crews performing ordinary crossing and track repair work. According to the Organization, the contractors' employes expended at least fifty (50) hours per week performing this work. The Organization contends that this was routine Maintenance of Way track work, that the Carrier failed to give the General Chairman proper notice of this contracting out, and that the use of the outside contractors deprived Claimant of eight (8) straight time hours and two (2) overtime hours each day worked.

The Carrier responds that there was no violation of the Agreement, because the disputed work was not reserved exclusively to the Maintenance of Way Craft. For this reason, no notice to the General Chairman was required. The Carrier further contends that the remedy sought is improper.

The Scope Rule, Rule 1, states in part:

> Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. . . .

As many Awards have illustrated, this first paragraph of Rule 1is a specific reservation of work to BMWE employees, which is subject to exceptions in the second paragraph of the Rule that permit the contracting out of such work. See, e.g., Third Division Award No. 37022. That contracting out, however, may be accomplished only "[b]y agreement between the Company and the General Chairman." Rule 1 goes on to place a further restriction on the contracting out of work:

> 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 time requirements must be met which are beyond the capabilities of Company forces to meet.

If the Carrier does plan to contract out such work, then pursuant to Rule 1, "it shall notify the General Chairman of the Brotherhood 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." The Organization may then request a meeting to discuss the contracting out and to make a "good faith attempt" to reach an understanding that will obviate the need to file any claims.

In support of its contention that the work contracted out was within the scope of the Agreement, the Organization presented the statements of twenty-three employes, many with many years of service with the Carrier, all stating in various ways and with varying degrees of detail that in the course of their employment with the Carrier they had routinely and historically handled tasks such as erecting crossing barricades and "road closed" signs, and protecting and flagging crossings. The Organization thereby made out a *prima facie* case that the work came within the scope of Rule 1. In response, the Carrier offered the statement of Manager Track Projects Callaway that:

> Past practice has allowed the use of contracting forces for road/highway closures. Union Pacific is not in a position to secure road detours as governed by the various states. The railroad does not have the necessary signs or personnel to adequately close crossings and set up detours as outlined by D.O.T. Therefore it has been the practice to use outside contractors for this specialty type of work.

However, the question is not whether the work previously had been contracted out. Even work that is within the Scope of the Agreement may be contracted out, <u>if the requirements of Rule 1 are met.</u> The MTP's statement establishes only that the work may have been contracted out; it does not refute the Organization's evidence that the work was itself within the Scope of the Agreement as work performed "in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property . . . ." Although the Carrier has suggested that the disputed work was outside the scope of Rule 1, because it was not performed "on the operating property," this Board must reject that suggestion on the record before us: The argument was never raised during on-

property processing of the claim, and there is insufficient evidence as to the location of the work to refute the Organization's *prima facie* case on this point.

Thus, the Board finds that the disputed work was within the Scope of the Agreement and could only be properly contracted out if it met one of the exceptions listed in the Rule. The Organization having met its burden to show that the work was within the scope of the Agreement, the burden of proof shifts to the Carrier raising the defense to show that one of the exceptions is applicable. The MTP's statement is relevant in this regard, for he asserts that the Carrier "does not have the necessary signs or personnel to adequately close crossings and set up detours as outlined by D.O.T.," apparently in support of the contention that the disputed work required "special skills not possessed by the Company's employees [and/or] special equipment not owned by the Company" that would allow the Company to contract out the work under the second paragraph of Rule 1.

However, this Board finds it unnecessary to determine whether the Carrier has met its burden to show that the exception applies, for if the contracting out were permissible under Rule 1, it is undisputed that the Carrier failed to give advance notice of the contracting. There is no evidence or argument that "emergency time requirements" were present, so the Carrier was required by Rule 1 to notify the General Chairman not less than fifteen days prior to the contracting transaction. As the Third Division observed in its Award Nos. 35735 and 35736, the mutual intent of the contracting Parties under Rule 1 is that advance notice is supposed to provide the opportunity for good faith discussion of issues like the emergency conditions or the need for special skills or equipment purportedly giving rise to the need to contract out. By failing to give that notice, the Carrier violated the Agreement.

The remaining issue is the proper remedy for that violation. The Carrier asserts that a monetary payment to Claimant would be improper because he was "fully employed" and therefore suffered no employment loss. That argument has been rejected in Third Division Awards 35735, 35736, and 37022, particularly in light of the importance of the Rule 1's pre-contracting notice and conference requirement, and we do so here. The Organization asserts that Claimant was available and willing to perform the work had he been assigned. Once the Carrier assigned contractors' employees to perform the work, Claimant lost the opportunity to perform that work, whether on overtime or otherwise. While the Carrier may contend that the work would have gone to an employee on furlough, the Organization is entitled to select its Claimant. Given that the Carrier was the party in possession of the work records and contractor invoices to establish the work schedules of the outside contractors' employes, and failed to provide any documentation to refute the Organization's claim of lost work opportunity, the appropriate remedy is that Claimant be compensated for that loss.

As for the amount of compensation due, the only record of the work done is the Organization's assertion that the one contractor employee worked from March 24, 2003 through March 28, 2003 and the other from March 31, 2003 "and continuing," each ten hours a day, five days a week. The appropriate measure of loss is that Claimant be compensated at his applicable straight time and overtime rates of pay for the hours actually worked by the contractors' employees.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

Lisa Salkovitz Kohn
Neutral Member

Carrier Member

Organization Member

Dated: June 6, 2008

CARRIER Dissents