BEFORE
PUBLIC BOARD No. 7100

Award No. 12
Case No. 12

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:

Appeal by the Organization on behalf of D. Caspers regarding the Carrier's assignment of work to outside forces to perform routine Maintenance of Way Roadway Equipment Operator's work (disc right of way for fire guard) along the main track between Mile Post 181 and Mile Post 234 on the Powder River Subdivision, from July 28, 2005 through August 4, 2005,[1] instead of assigning the work to D. Caspers, a Roadway Equipment Operator ("REO").

In addition, the Organization alleges the Carrier failed to furnish the General Chairman with the proper advance written notice of its intent to contract the work in dispute and failed to make a good faith attempt to reach an understanding concerning the subcontracting of the work as provided by Rule 52 of the Agreement. As a remedy, the Organization asks for D. Caspers to be compensated for forty (48) hours straight time and forty eight (48) hours at time and a half rate of pay at the applicable rate of pay for the lost of work opportunity.

FINDINGS:

The following facts are undisputed: Claimant has a seniority date of September 4, 1973. He holds seniority as a REO in Carrier's Roadway Equipment Subdepartment since July 13, 1976. During the time in question, Claimant was assigned and worked

[1] All dates herein referred to the year 2005 unless otherwise specified.

operating a 644 end loader on Gang 5037, headquartered at Lusk, Wyoming, and His regular work schedule was Monday through Friday, 6:30 a.m. to 3:00 p.m.

By letter dated January 3, entitled "15 Day Notice of Intent to Contract Work", sent by Deland Humphreys, the Director of Track Maintenance, to General Chairmen David D. Tanner and Kent Bushman[2], Carrier stated, *verbatim*, the following:

> THIS IS TO ADVISE OF THE CARRIER'S INTENT TO CONTRACT THE FOLLOWING WORK:
>
> PLACE: At various locations on the North Platte Service Unit.
>
> SPECIFIC WORK: Providing fully operated, fueled and maintained tractors, mowers and other equipment necessary to control vegetation. Commencing January 3, 2005 to December 31, 2005.
>
> THIS WORK IS BEING PERFORMED UNDER THAT PROVISION OF THE AGREEMENT WHICH STATES "NOTHING CONTAINED IN THIS RULE SHALL AFFECT PRIOR AND EXISTING RIGHTS AND PRACTICES OF EITHER PARTY IN CONNECTION WITH CONTRACTING OUT."
>
> SERVING OF THIS "NOTICE" IS NOT TO BE CONSTRUED AS AN INDICATION THAT THE WORK DESCRIBED ABOVE NECESSARILY FALLS WITHIN THE "SCOPE" OF YOUR AGREEMENT, NOR AS AN INDICATION THAT SUCH WORK IS NECESSARILY RESERVED, AS A MATTER OF PRACTICE, TO THOSE EMPLOYEES REPRESENTED BY THE BMWE.
>
> IN THE EVENT YOU DESIRE A CONFERENCE IN CONNECTION WITH THIS NOTICE, ALL FOLLOW-UP CONTACTS SHOULD BE WITH THE LABOR RELATIONS DEPARTMENT.

By letter dated January 7, Tanner to Mac McNully,[3] the Organization notified Carrier it considered the notice vague and inadequate pursuant to the requirements of

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[2] The Organization's Submission Exhibit A-2.

[3] The Organization's Submission Exhibit A-2.

Rule 52 of the Agreement, inasmuch as it failed to identify the location or times for each instance the work was to be performed. In addition, the Organization requested a conference and made a request for certain information related to the work mentioned in Carrier's notice.

On January 21, a conference was held between the parties to discuss Carrier's intent to subcontract the work in dispute. Thereafter, by letter dated January 24, sent to Tanner by T.M. Lee, the Manager of Labor Relations, Carrier advised the Organization it was going to proceed with the contracting of the work in dispute stating its determination was *not* in violation of the Agreement since "the Carrier has a strong mixed practice of contracting out such work."[4] In its letter, Carrier referred to a letter dated February 16, 1997, which contained several exhibits of listings provided by Carrier to the General Chairman regarding past work contracted by the Carrier to outside forces.

By letter dated February 3, sent by Tanner to Toby Lees, the Assistant Director of Labor Relations, the Organization reiterated its position the Carrier has not routinely contracted the work in dispute to outside forces and stated in the past the work in dispute has been performed by BMWE employees. The Organization also stated Carrier possessed the equipment needed (vacuum trucks) to perform the work in dispute. Further, the Organization stated the lists of work contracted to outside forces submitted by the Carrier was not relevant to the instant case because the works mentioned were performed after 1973 (where no notice was given) or are unrelated to the nature of the work in dispute.

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[4] The Organization's Submission Exhibit

On Thursday, July 28, and continuing through Thursday, August 4, Carrier assigned to Caylor & Genz Earth Movers, Inc. ("Caylor & Genz"), a contractor, the disc right of way for fire guard along the main track between MP 181 and 234 on the Powder River Subdivision.

The Organization argues disking the right of way for fires has been customarily and historically performed since the inception of the Powder River Subdivision by Maintenance of Way employees to help control the fires along side of the track. It maintains the work involved did not require any special equipment or special skills to be performed; and Carrier possessed or could have leased the necessary equipment in this case. The Organization claims Caylor & Genz used one (1) employee (not covered by the Agreement) who worked twelve (12) hours per day on six (6) of Claimant's regularly assigned days and two (2) of Claimant's rest days to perform the work in dispute. According to the Organization, Caylor & Genz' the employee used an "ordinary tractor type machine to pull a disc attachment to perform the routine fine lane right of way maintenance." Further, it argues Claimant is qualified to perform the work; has performed the work in previous years; and was available to perform the work. The Organization contends Carrier's assignment of the disputed work to Caylor & Genz was in violation of Rule 1, 2, 3, 4 Group 19(a), 5, 52(a) of the July 1, 2001 Agreement.

RULE 1- SCOPE OF THE AGREEMET

This Agreement will govern the wages and working conditions of employees in the Maintenance of Way and Structures Department listed in Rule 4 represented by the Brotherhood of Maintenance of Way Employees Organization.

RULE 2- DEPARTMENT

The Maintenance of Way ad Structure Department as used herein means the Bridge and Building Subdepartment, the Track Subdepartment, Roadway Equipment Subdepartment and Miscellaneous Subdepartments as constituted as of the effective date of this Agreement.

RULE 3- SUBDEPARTMENTS

The following subdepartments are hereby established within the Maintenance of Way and Structures Department covered by this Agreement:

Bridge and Building Subdepartment
Track Subdepartment
Roadway Equipment Subdepartment
Miscellaneous Subdepartment

Any subdepartment hereafter established, including Groups and Classes within such Subdepartment, will be by negotiations and agreement between the parties to this Agreement.

RULE 4- SENIORITY GROUPS AND CLASSES

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ROADWAY EQUIPMENT SUBDEPARTMENT DISTRICT:

Group 19 (a) Roadway Equipment Operator

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RULE 5- CLASSIFICATION OF WORK

Positions will be classified and paid in accordance with work performed in conformity with the classification listed in Rule 6 through 12, and as established by Agreement, rules, and/or traditional practice.

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RULE 52-CONTRACTING

I. 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 owner by the Company, or special material available only when applied or installed through a 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 Company's forces. **In the event the Company plans to contract out work because of one of the criteria described herein, it will 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 Company will promptly meet with him for that purpose. Said Company and organization representative will make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting**, and the Organization may file and progress claims in connection therewith.

II. **Nothing contained in this rule will 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.**

III. 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.

IV. 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 contractor.

(Emphasis added)

December 11, 1981

Mr. O. M. Berge
President Brotherhood of Maintenance
Of Way Employes
12050 Woodward Avenue
Detroit, Michigan 48203

Dear Mr. Berge:

The Carrier assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, include the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore.

The Organization further contends the work performed by Caylor & Genz falls within the Track Subdepartment and the Roadway Equipment Subdepartment as defined in Rules 2, 3, 4 Group 19(a) of the Agreement. It asserts the statements submitted by Claimant and twenty (20) other employees shows the work performed and the equipment used, was recognized by the employees on the Powder River Subdivision as Maintenance of Way's work. It also insists the equipment used to perform the work in dispute has been ordinarily used by these employees. Specifically, Claimant states as follows:

January 24, 2006

To Whom It May Concern:

This is in response to Mr. D.A. Ring's letter dated 1-05-06 File #1433247 organization File # UPRM 968T concerning right of way fire guard disking, so as to put the carrier in compliance with Wyoming State Law requiring a twenty foot fire guard path be disked and maintained on both sides of RR right of way.

Mr. Ring states the B.M.W.E. has not proven that this work has been performed by B.M.W.E. in exclusion of all others on a system wide basis.

I, David A. Caspers 0030600, 32 year seniority CNW 1973-1996; UPRR 1996 to present; working in South Dakota, North Dakota, Nebraska and the colony line state of Wyoming; the issue of disking fire guard never came up. Neither BMWE nor contractor did it. It wasn't required.

I first became aware of the fireguard disking requirements upon the inception of the CNWRR Powder River Coal Line MP159-MP271. This disking began in the mid 1980's and continues to present, and has always been done by B.M.W.E employees. Usually two road equipment operators working in relay, one disking and one opening gates and other support duties

The CNWRR purchased a new Rome construction grade disc at this time (mid 1980's) for the exclusive purpose of fire guard disking.

The disc was pulled by a John Deere Crawler tractor JD850B, machine # 174038, owned by the railroad. This crawler tractor was modified to pull above names disk. The John Deere Crawler tractor #174038 has since retired in 2002.

The UPRR has since leased rubber tracked crawler tractors to pull above-mentioned disk.

Road equipment operators of the B.M.W.E. have also always operated the lease equipment.

In closing, fireguard disking has always been done by B.M.W.E. forces on the Powder River Subdivision. One exception, that being the time claim UPRR-9684T, now in dispute

Sincerely
David A. Caspers

The statement signed by twenty (20) employees state the "right of way disking has been done exclusively by B.M.W.E. forces since the inception of the Power River Subdivision. Twenty feet as required by law in Wyoming MP 271-179 each side of the railroad right of way. Also one pass ten feet has been done in Nebraska MP 179-160, not required, just prudent practice."

In addition, the Organization argues Carrier violated Rule 52(a) of the Agreement and the December 11, 1981, Letter of Understanding, when it subcontracted the work in dispute without providing proper advance written notice to the General Chairman and when failed to make a good faith effort to assign its Maintenance of Way forces the fire guard work in dispute. It claims the Notice sent by the Carrier was vague because it failed to state when and where the "vegetation control" work would be perform. Further, is insists none of the exceptions detailed in Rule 52 of the Agreement (to justify subcontracting of work) was present in this case. In this regard, it argues the equipment used was a tractor-type machine with a disc attachment was "common to virtually every farm." The Organization refutes Carrier's assertion Claimant has no exclusive right to the work in dispute to the exclusion of others. The Organization argues the exclusivity argument has been rejected by the Board in contracting dispute. Finally, the Organization refutes the Carrier's argument Claimant is not entitled to the remedy requested because he was employed on the dates involved in the dispute. The Organization contends the Third Division has awarded monetary compensation and made whole fully employed employees for lost work opportunity in subcontracting cases.

Carrier, on the other hand, argues it has a historical practice of subcontracting the

work of fully operated tractors, mowers and other equipment needed to control vegetation on a system wide basis. It contends the work in dispute falls within the "existing rights and practices" exception contained in Rule 52 (b) of the Agreement. It further maintains the work of controlling vegetation is not exclusive to the BMWE employees covered by the Agreement. Furthermore, it argues, the fact the work in dispute has never been subcontracted on the Powder River Subdivision is of no relevance. It contends "the existing rights and practices" under the Agreement are based on a system wide basis. It also contends the Third Division in countless awards has held pursuant to Rule 52 (b), where a "mixed practice" exists of contracting the work out *and* using employees covered the Agreement, Carrier has the right to use its discretion to have either contractors or BMWE employees to do the work.[5] In this respect, Carrier argues the Organization never disputed its past practice on a system wide basis. It notes during the on property handling of the Claim it provided the Organization with various lists documenting its past practice of contracting out plowing fire guards. Specifically, it cited to documentation provided in 1996 by Carrier to the General Chairman to establish a mixed practice of contracting out the work of "plowing fire guards and destroying weeds" in various locations in Wyoming and Colorado.

Therefore, Carrier insists it did not violate the Agreement since it provided the General Chairman with the required advance written notice; the notice conformed with the requirements of Rule 52 inasmuch as it was timely and provided the Organization with a description of the work; and a conference was held between the parties to discuss the contracting of the work in dispute. In these circumstances, it contends, Carrier showed the

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[5] Third Division Award No. 30287, PLB 5546, Case No. 15

good faith required by Rule 52 of the Agreement.

With regard to the remedy requested, Carrier asserts Claimant is not entitled to any monetary relief. It argues even if the Board finds Carrier violated the Agreement when it subcontracted the work in dispute, the remedy in subcontracting cases is confined to furloughed employees. Here, Carrier maintains, it is uncontested Claimant was fully employed during the period in question.

After reviewing the record facts, the Board finds the grievance must be denied. It is well established pursuant to Rule 52 of the Agreement and the December 11, 1981, letter Carrier is required to provide advance written notice and confer, if requested, with the Organization in all instances where Maintenance of Way work is to be contracted; and to engaged in good faith efforts "to reduce the incidents of subcontracting and increase the use of their maintenance of way forces."[6] The Board finds the Carrier complied with the Notice and conference requirements contained in Rule 52 of the Agreement. The Notice was timely and contained a description of the work and there reasons thereon. Further, it is uncontested the parties held a conference to discuss the work in dispute.

A review of the record shows the contracting in this case falls within the "existing practice" exception provided in Rule 52(b) of the Agreement, which states, "nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out." Here, the record evidence supports Carrier's contention about its system wide practice for using contractors in certain subdivisions to perform the work in dispute. The fact Carrier has not used contractors in the Powder River Subdivision

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[6] Third Division Award Nos. 28590, 31025, 31038, 31041 and 35736

is not determinative. The Carrier presented extensive documentation submitted to the General Chairman R.B. Wehrli in 1996 regarding its past contracting practices on all phases of track, roadbed and bridge & building work. This documentation included work which involved plowing fire guards, ditch right of way cleaning, mowing, ditching and grading and weed control. The Third Division has held in numerous cases Rule 52(b) permits the subcontracting of work when Carrier has a "mixed practice" of using outside contractor and employees to perform the work in dispute.[7] The Board finds the Carrier has successfully established a "mixed practice" of using contractors and employees covered by the Agreement to perform the work in dispute.

The Board agrees with the Organization's argument the use of a tractor to pull a disc for fire guard does not fall under any of the exceptions provided in Rule 52(a) of the Agreement. The Board believes Claimant was qualified and available to do the work; and Carrier could have used the equipment in its possession or leased the equipment to perform the disputed work. Nonetheless, Carrier did not rely on Rule 52(a) of the Agreement when it subcontracted the work in dispute. Rather, Carrier asserted the "existing practice" exception contained in Rule 52(b) of the Agreement. Therefore, the Organization's argument is misplaced. Accordingly, the Claim is denied.

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[7] Third Division Award Nos. 37490, 37365, 29539 and 30287

AWARD

Claim denied.

Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Organization Member

Dated: March 4, 2009

Brotherhood Case 12.awd