PUBLIC LAW BOARD NO. 2206

AWARD NO. 8

CASE NO. 14

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

- and -

Burlington Northern, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when assigning contractor forces to clean cars at Staple, Minnesota, on the former Northern Pacific (NP) August 22, 1977 and continuously thereafter using contract forces in violation of the current Agreement dated May 1, 1971 under which pre-existing rights accruing to employees were preserved. (System File T-M-205C)

(2) Claimants F. R. Webster, P. L. Braith, T. M. Pohl, R. H. Tholl, R. A. Braith and B. C. Van Norman be allowed 96 hours each at their respective straight time rates of pay for the violation between August 22, 1977 and August 30, 1977 and an equal proportionate of all hours consumed by conctractor forces continuing after August 30, 1977 until Track Sub-department forces are reassigned and used to perform the car cleaning work."

OPINION OF BOARD:

In this claim the Organization alleges violation of Rules 1(c), 69(c) and the Note to Rule 55 by Carrier contracting with the Omni Car Cleaning Company to perform the work of car cleaning at Staples, Minnesota. Claimants hold regular assignments as Sectionmen on a section crew headquartered at Staples which, prior to the BN merger in 1970, was a point on the former Norther Pacific Railway (NP). In handling on the property and again after referral to our Board, allegations of third-party interests by several other labor organizations were advanced by Carrier. Pursuant to Paragraph 8 of the Agreement establishing this Board, third-party notices describing the dispute and offering an opportunity to be heard were sent to the respective General

Chairmen of the Brotherhood of Railway, Airline and Steamship Clerks, the Brotherhood of Firemen and Oilers and the Brotherhood of Railway Carmen. None of the notified unions chose to intervene in this case.

The record reveals that the former NP and subsequently the BN, from 1946 to 1974 ran a car cleaning operation at Darling Pit, Minnesota, some 28 miles from Staples. For all those years, a section crew headquartered at Darling Pit exclusively performed car cleaning at that point. In August of 1972 Carrier established another car cleaning operation at Jamestown, North Dakota, another former NP point, some 200 miles from Darling Pit. At Jamestown Carrier contracted with the Stanley Corporation to perform car cleaning at that location. Apparently from 1972 to 1974, Maintenance of Way Employees continued to do car cleaning at Darling Pit and the outside contractor did car cleaning at Jamestown. Two years later, in 1974, car cleaning was discontinued at Darling Pit. Subsequently in 1977 Carrier established a car cleaning operation at Staples and discontinued the outside contractor operation with Stanley Corporation at Jamestown. At Staples, Carrier has utilized the service of another outside contractor, Omni Company.

There is some dispute on the record concerning whether the Omni operation at Staples is a new transaction or just a continuation of the outside contractor relationship Carrier had at Jamestown. Carrier avers that Omni took over the Stanley contract at Jamestown in July 1977 and just switched locations to Staples in August 1977. The Organization maintains that the Omni contract dates from August 15, 1977 and constitutes a separate and discrete contracting relationship at Staples. The only hard evidence on this point is the contract between Carrier and Omni. That document supports the Organization's position since it bears effective date of August 15, 1977 and deals solely with work at Staples, Minnesota. These points are important because Carrier raises a threshold defense of timeliness and asserts that this claim, filed September 20, 1977,

is more than 5 years too late on the theory that the violation occurred, if at all, in 1972 when the car cleaning operation at Jamestown was established. The Organization answers that this claim is timely because it involves a "continuing violation" and, alternatively, that a separate gravaman occurred August 15, 1977. We find no merit in the suggestion that this is a "continuing violation" under Rule 42D. Such rules, under the better reasoned awards, have been construed to apply to recurring violations but not to single occurrences, even if the liability flowing therefrom might arguably be "continuing". See Awards 6365 and 7581 (2nd Division); 15691, 18667 and 20631 (3d Division); 2234 (4th Division). On the other hand, we are persuaded by the Organization's contentions in this case, supported by record evidence, that the August 1977 transaction with Omni Company was a discrete grievable occurrence. Cf. Award 18667. And in the circumstances of this case, we do not find any basis for an estopple or laches to bar such a claim. Cf. Award 6365. Accordingly, we will not dismiss this claim under the Time Limits Rule. Turning to the merits, the Organization relies most heavily upon Rule 69(c) to support its claim. On its face, Rule 69(c) is retrospective and takes its meaning by reference to the Scope Rules on the merging Companies, in this case the former NP. Identical provisions have been construed to "freeze" as they existed prior to merger date. Award 6365. A determination of the pre-existing right, therefore, is dependent upon the former NP Scope Rule, which was "general" in nature. See Award 16640, 19224. Under well established principles, reservation of work under such rules must be established by clear and convincing evidence of exclusive system-wide performance of the disputed work. The only conclusion to be drawn from the foregoing is that in order to prevail under Rule 69(c) the Organization must establish that it exclusively performed car cleaning on a system-wide basis on the former NP. Indeed,

that very question has already been litigated between these same parties and Rule 69(c) has been construed in just that way. See Award 21844. We can see no reason to deviate from applying the principles enunciated in Award 21844 herein since the present case is directly on all-fours regarding Rules 1(c) and 69(c):

> ...Accordingly, it is the considered opinion of this Board that the Organization has failed to establish that track sub-department employees on the former Northern Pacific had the exclusive, system-wide right to perform car cleaning work. And since they did not have this exclusive right prior to the merger, they did not have it subsequent thereto. The claim must therefore be denied.

For other decisions so construing identical language see 2nd Division Awards 6867, 7424 and 7487.

An additional element distinguishes the present case from Award 21844, however, and that is the Organization's additional and alternative theory that Carrier violated the Note to Rule 55 by contracting this car cleaning work. The critical question presented in that connection is whether the Organization can prevail under the Note by showing a point practice rather than the system-wide exclusivity required under the general Scope Rule. Stated differently, does the concept of system-wide exclusivity also apply to the rights protected under the Note to Rule 55 or may a practice at a particular point establish an exclusive right to work under that Note? There is a split of authority on this issue and each of the parties has cited awards favoring its view. The Organization insists that the former practice at Darling Pit (which it equates to Staples) is enough to establish exclusive entitlement to the work under the Note. See Awards 20338 and 20633. Carrier, on the other hand, cites Awards 12952 and 16640, both of which construed and applied Letter Agreements between the former NP and the BMWE, which are the historical bases for the Note to Rule 55. We have read and analyzed carefully each of the cited conflicting

authorities. In our considered judgement, Awards 12952 and 16640 are soundly reasoned and based upon historical analyses and construction of the Letter Agreements which form the genesis of the Note. We find these authorities must more persuasive that Award 20633 which touches on the critical point only in passing and which apparently relies upon a non sequitor from Award 20338 to support its ultimate conclusion. At bottom line we find ourselves in agreement with the Board in the earlier awards and conclude that rights encompassed under the Note to Rule 55 are coextensive with the rights encompassed by the Scope Rule of the particular controlling Agreement. The Scope Rule of the parties' Agreement, like that of the NP, is a general Scope Rule. In such circumstances the Organization, to prevail under the Note to Rule 55, must show reservation of the disputed to Maintenance of Way Employees by exclusive system-wide.

The record evidence shows that employees represented by the Organization performed car cleaning at Darling Pit and at many other locations on the former NP. However, employees represented by the Clerks, the Firemen and Oilers, and the Carmen crafts also performed such work on the former NP. Accordingly, the evidence does not establish a violation of Rule 69(c). Regarding Rule 1(c) and the Note to Rule 55, it is established that, in addition to Maintenance of Way Employees, employees represented by the Clerks, the Firemen and Oilers, the Carmen, as well as outside forces, performed car cleaning. Accordingly, no violation of Rules 1(c) and the Note to Rule 55 are established on this record. Based upon all of the foregoing, the claim must be denied.

FINDINGS:

Public Law Board No. 2206, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was not violated.

AWARD

Claim denied.

Dana E. Eischen, Chairman

F. H. Funk, Employee Member

L. K. Hall, Carrier Member

Dated: June 7, 1978