PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(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 to perform Maintenance of Way and Structures Department work (install culvert under existing tracks) at Mile Post 78.52 on the Clinton Subdivision on September 5, 6, 7, and 8, 2002, instead of System Pipe Jacking and Boring Gang employes R. Knipfel, R. Jesse, Jr. and J. Peterson (System File SYSWJ-7352T/1349048 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Knipfel, R. Jesse, Jr. and J. Peterson shall now '*** each be compensated at their respective rates of pay for an equal share of the 162 man/hours of work performed by Contractor forces in performance of the culvert installation cited herein.'"

FINDINGS:

Public Law Board No. 7098, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Although the claim alleges that the Carrier failed to furnish the General Chairman with proper written notice of its intent to contract out the disputed work, the record shows that by letter dated April 12, 2002, the Carrier served notice of its intent to contract out work involving labor, equipment, materials, and supervision to perform various types of work "in connection

with construction of universal crossover at Bertram and second main line at Cedar River." The specific work listed in the notice included "install culvert," which is the work here claimed by the Organization for Carrier employees in the Maintenance of Way and Structures Department. Many other pieces of work were also listed in the notice including, among others, grading, placing subballast, constructing bridge spans and abutments, removing bridges, paving crossing approaches, removing and installing fencing, and related incidental work.

A conference was held on April 25, 2002, at the General Chairman's request to attempt to reach an understanding concerning the contracting, but none was reached. The Organizations's notes of the conference show an effort on its part to arrive at a compromise, while the Carrier took the position that it was not required to have the work done piecemeal. On the property there was a difference of opinion between the parties on whether this dispute was governed by the Chicago and North Western Agreement or the Union Pacific Railroad Agreement.

The record is silent regarding the reason(s) that the universal crossover at Bertram and second main line at Cedar River project was contracted out. If it is assumed, however, that the Chicago and North Western Agreement governs in this case, then the fact that the Organization has not filed a claim regarding any segment of the project than the culvert installation work permits the inference that the Carrier let the project in accordance with the second paragraph of Rule 1B. of that Agreement. That paragraph states:

> By agreement between the Company and the General Chairman, work as described in the preceding paragraph [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], which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's 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 unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet.

The third paragraph of Rule 1B provides for notice by the Carrier to the General Chairman of the Carrier's plans "to contract out work because of one of the criteria described herein" and for a

meeting between the parties at the General Chairman's request to "make a good faith attempt to reach an understanding concerning said contracting. . . ." If no understanding is reached, however, Rule 1B. states, "the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith."

The Carrier contends that it has no obligation to assign the culvert work to the Claimants on a piecemeal basis, and, in reply to the Organization's appeal of a denial of the claim, asserts that the installation of a culvert must be done in conjunction with the grading and other surrounding groundwork in order to get it properly done.

The Organization did not reply directly to the Carrier's assertion that the installation of a culvert must be done in conjunction with the grading and other surrounding groundwork in order to get it properly installed. The only assertion by the Organization on the property to counter the Carrier's position regarding piecemeal assignments is that "the C&NW System B&B Gang did perform work on some of the aspects of this same general project." However, the Organization did not identify the work or contend that the Carrier's employees did any grading work or related groundwork. Moreover the Carrier's notice of intent to contract included the following statement: ". . . and furnish equipment and operators to support track work by railroad forces . . . ." For all that this Board can tell from the Organization's general language about "work on some of the aspects of this same general project," the reference may have been to such track work. There is no evidence in the record that Carrier employees performed any of the specifically enumerated pieces of work listed in the notice of intent to contract or that the project "was divided between outside forces and Carrier forces" as in Award 25 of Public Law Board No. 4768 cited by the Organization.

Unfortunately neither party presented evidence on the question of whether the installation of a culvert can be efficiently handled as a self-contained project even when a contractor is performing grading and other surrounding groundwork in the same location or whether the installation of the culvert must be done in conjunction with the other work in order to get it

properly installed. In that respect this case differs from Third Division Award No. 37576 where, on the property, the Organization presented employee statements specifically contradicting the Carrier's position that special skills and equipment necessitated the use of contractors instead of the Carrier's BMWE-represented employees. The Carrier there did not counter the Organization's statements with statements of its own witnesses, and the Organization prevailed in the case. In the present case neither party presented employee statements, and the Carrier's assertion about the necessity of doing the work of installing a culvert in conjunction with the grading and other surrounding groundwork stands unrefuted in the record.

In its own submission to this Board the Organization attempts to persuade us that the Carrier has already "piecemealed" part of the overall project based on an unrefuted assertion on its part that the C&NW System B&B gang performed some aspects of the project. Organization Submission, p. 18. The Organization is thus implicitly proceeding on the basis of a rule that an unrefuted assumption may be accepted as fact.

If this Board were to adopt such a rule, the Carrier would have to prevail in this case because its assertion about the interrelationship between culvert work and grading and other surrounding groundwork is undisputed in the record. Here the Organization has not contested the permissibility of the Carrier's contracting out of the grading and related groundwork. Because the culvert installation had to be done together with the grading and associated groundwork (accepting the Carrier's unrefuted assertion) for a proper job, the Carrier had no obligation to assign the culvert work on a piecemeal basis to the Claimants.

However, in the absence of the citation of authority that unrefuted assertion is accepted as fact, the Board will not decide this case on the basis of such a rule.[1] Nevertheless in the light of

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[1]Indirect support for such a rule, however, is found in Third Division Award No. 29592, where the Board stated, "The Organization's assertions about past practice and Scope coverage counter the Carrier's assertions. As a result, Carrier's position is left unsupported by evidence." The implication of the quoted language is that uncontested assertion may be accepted as evidence.

the Carrier's unrefuted assertion plus two additional considerations the Board will place the burden of proof on the Organization in this case. In addition to the fact that the Carrier's assertion about the interrelationship of the culvert and the grading work is not disputed on the record, it is significant that the assertion is reasonable on its face. It makes sense to the Board that in order to install a culvert properly under a railroad track in an area of the railroad property where grading and related groundwork is taking place, it would be important to do the culvert work in conjunction with the other work. Thus the nature of the work involved supports the Carrier's unchallenged assertion. Stated another way, it is not self-evident that the culvert installation work at issue in this case was a self-contained piece of work that did not have to be done together with the grading and other surrounding groundwork in the area for optimal results.

This case is therefore readily distinguishable from Third Division Award No 16440 where the carrier hired a contractor to load embankment material in trucks at a pit site off the railroad property, to haul the embankment material from the pit site to a siding extension site on carrier property, and to grade or level the embankment material at the siding extension site. The organization filed a claim asserting that it was a violation of the agreement to assign to a contractor the work of leveling and grading fill material used in connection with the construction of an extension of a siding on the railroad. The Board agreed with the organization, declaring, "It is clear that the leveling and grading of fill material on the property can easily be separated from the loading and trucking of such fill material."

The same is true of Third Division Award No. 29310 where the work involved was building concrete forms and pouring and finishing concrete runways in railroad yards. There the carrier did not even contend that the work could not stand alone. Rather its position was that the claimants did not have the skills necessary to do the work. Similarly, in Public Law Board No. 4768, Award No. 25, the contracted out work was constructing 14 miles of a four-strand barb wire fence on each side of the right-of-way. Such work, absent special circumstances, would normally stand on its own. In the present case, by contrast, one could not state with any sense of

assurance that installing a culvert under a railroad track in an area where grading and related groundwork is being done is work that can be properly performed without consideration of the grading and other groundwork being done in the same location.

The second additional consideration that is important for determining the burden of proof is that the facts and circumstances are equally within the knowledge of both parties. On the Organization's side there are the employees who are assigned to the Pipe Jacking and Boring Machine gang who, according to the Organization, customarily and historically perform culvert work and should therefore be knowledgeable about the interrelationship, if any, between such work and grading and other surrounding groundwork being performed at the site. The foreman or some other experienced member of the gang would be able to provide the Organization with a statement regarding the connection, or lack thereof, between the two types of work and the reasons therefor. On the Carrier's side, there is the contractor or a supervisor familiar with the work who could provide the Carrier with such a statement. The Board would then have to make a determination as to which of the statements was the more persuasive.

The three considerations discussed above make it reasonable to place the burden of proof on the Organization in this case regarding the issue of whether the installation of the culvert was a self-contained independent piece of work that could stand alone or, instead, had to be done in conjunction with the grading and other groundwork in order to be installed properly. First, the Carrier's assertion that the culvert installation had to be done in conjunction with the grading and other surrounding groundwork for proper installation is not disputed in the record. Second, unlike the contracting out awards relied on by the Organization permitting piecemeal assignment of disputed work, the culvert work in the present case was not on its face work that could stand alone. Rather, the Carrier's assertion regarding the need to do the installation of the culvert in conjunction with the grading and other surrounding groundwork seems reasonable in view of the nature of the work. Third the Organization was equally able with the Carrier to sustain the burden since the facts and circumstances were in the knowledge of both parties. On this record

the Board finds that the burden of proof in this case is properly placed on the Organization.

The Organization has not carried its burden of proof. It has not introduced any evidence which would support a finding that piecemeal separation of the culvert installation work from the remainder of the contracted out work would be appropriate. Unlike other awards relied on by the Organization in contracting out cases where the Board sustained the claim on the basis that the claimed work was self-contained, no evidence was presented that the culvert work was independent of the grading and other surrounding groundwork being performed by the contractor at the same site. The only information in the record on that issue is the undisputed assertion of the Carrier that the installation of a culvert must be done in conjunction with the grading and other surrounding groundwork in order to be properly installed. No claim has been filed by the Organization protesting the contracting out of the grading and surrounding groundwork incidental thereto. The Board finds that the Organization has not met its burden of proof and that the claim must therefore be denied.

The Organization correctly points out that the Carrier's notice in this case did not comply with the Letter of Agreement dated December 11, 1981, which states, ". . . In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor." Although the Carrier's notice identified the work to be contracted, it did not give the reasons therefor. That omission was a violation of the December 11, 1981, Letter. However, in this case, at the General Chairman's request, a meeting was held between the parties months before the disputed work was performed, and the Organization had the full opportunity to ask for explanations regarding the reasons for using a contractor to have the work done.

There is no evidence or assertion in the record that the Carrier refused to give an explanation for contracting out any of the work. Under these circumstances it cannot be said that the failure of the Carrier's notice to include the reasons for contracting out the work was prejudicial to the Organization so as to justify sustaining the claim. No precedent was cited by

the Organization where a claim was sustained on the basis that an otherwise proper notice did not contain the reasons for contracting out the work in a situation where a timely meeting was nevertheless held between the parties at the General Chairman's request to discuss matters relating to the contracting transaction. That said, the Carrier should nevertheless strive to include in its notice the reasons for contracting out work, as provided for in the December 11, 1981, Letter of Agreement, in addition to identifying the work .

The Board's determination regarding the allocation of the burden of proof applies strictly to the facts of this case. No opinion is expressed on how the burden should be allocated in a different fact situation. With regard to the question of whether the C&NW Agreement or the Union Pacific Agreement applies in this case, the Board does not find it necessary to determine that question because, even assuming that the C&NW Agreement governs, the record does not establish a violation.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants not be made.

Sinclair Kossoff, Chairman & Neutral Member

Dominic A. Ring, Carrier Member

Roy C. Robinson, Employe Member

Chicago, Illinois
Dated: August 12, 2008