

PUBLIC LAW BOARD NO. 2206

AWARD No. 56

CASE NO. 57

PARTIES TO 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 Company violated the Agreement when contracting all work of renewing nose of west protection pier to Bridge 10 at Delta Junction, Washington on November 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 27, 28, 29, 30 and December 1, 1978. (System File S-P-183C)
- (2) Because of said contracting, B&B employees W. D. Jones, W. Kopp, M. L. Boland, C. Hester, E. Loomer and M. D. Jackson each be allowed eight (8) hours straight time at their respective rates of pay (a total of 120 hours each) on dates listed in part one (1) of claim.

OPINION OF BOARD:

The present dispute arose on September 1, 1978 when Carrier sent notification to the BMWE General Chairman, pursuant to the Note to Rule 55, as follows:

"Mr. F. H. Funk, Gen. Chmn.
Bro. of Maintenance of Way Employees
500 Northwestern Federal Building
Minneapolis, Minnesota 55403

September 1, 1978

File MW-84(c)-Bridges

Dear Mr. Funk:

As a result of damage caused by tug boat which struck the north side side of a downstream (west) protection pier and the deterioration of piling, it will be necessary to renew nose of the west protection pier to Bridge 10, Delta Junction, Washington.

Work will involve driving 35 piling, replacement of caps, braces and sheathing. All work will be performed off floating equipment including a floating pile driver.

The Carrier does not possess floating equipment required in this project and it is therefore necessary to perform the work by contract.

Sincerely,

/s/ L. K. Hall
Asst. to Vice President"

The General Chairman responded by letter of September 7, 1978 declining to concur in the subcontracting and requesting a conference, which was held on October 10, 1978. Following that conference, Carrier advised of its intention to proceed with subcontracting of all the bridge repair work, with special reference to sheathing, as follows:

This will refer to conference held October 10, 1978, at which time you discussed with Mr. E. J. Kallinen of my staff, the proposal to contract work to renew nose of west protection pier to Bridge 10, Delta Junction, Washington.

As you were informed at this conference, this work cannot be performed safely and efficiently without the use of special floating equipment not possessed by the Carrier. The Carrier does not possess a floating pile driver or a crane mounted on a barge required for cap replacement and sheathing work. Because of the weight of some of the timber braces, it would be very hazardous, if not impossible, to manhandle the timbers into place without the use of a crane.

As stated in my letter dated September 1, 1978, this work involves driving 35 piling, replacement of caps, braces, and sheathing. The 6" x 12" timber cap material is up to 34 feet in length. One piece of timber in this length weighs in excess of 1000 pounds. The timber sheathing is 4" x 12" material in lengths up to 28 feet, which will weigh in excess of 500 pounds.

In that the Carrier is not adequately equipped to handle this work, it will be necessary to handle by contract forces as proposed.

In the meantime, on approximately October 30, 1978 the subcontractor started removing the old caps, sheathing and piling; and then drove piles at the nost of the bridge. After the new piles were in place, the contractor's forces capped those piles and, during the period November 9, 1978 through December 1, 1978 the contractor's forces placed braces, sheathed the piles and built wooden walkway. Thereafter, the Vice General Chairman of the Organization filed the present claim on January 22, 1978, reading in pertinent part as follows:

I am filing a Claim on behalf of Bruce Morton, foreman on the B. and B. Crew at Delt, Washington and the following members of his Crew; W. D. Jones, W. Kopp, M. L. Boland, C. Hester, E. Loomer and M. D. Jackson, Boom Truck Operator, when the B. N. Inc. , hereafter known as the Company contracted all of the work on Bridge 10, Delta Junction, Washington on or about October 30, 1978.

The Company is in violation of the following but not limited to Rules of our effective Agreement dated May 1, 1971: Rule 1-C, 2-A, 5-E, 55-B, 55-C, 55-F, 55-G, 55-O, 55-P, and Notes to Rules 55, 69-A and 69-C.

This Claim is for 8 hours straight time for each of the above named Employees at their respective rates of pay for the following days; November 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 27, 28, 29, 30, and December 1, 1978.

The Contractor started work on this project about October 30, 1978 and removed the old caps and piling and drove piling. On November 9, 1978 the Contractor started placing braces and sheating and a wooden walk-way on this protection pier. In the past we have agreed to contracting the driving of the pilings and the placement of the caps and the Company has agreed to the Employees of the Company completing the rest of the work. The following are an example; Mr. T. C. DeButts letter of October 30, 1974 on Bridge 368 at Seattle, Mr. DeButts letter of April 14, 1975 on Burrard Inlet Dock at Vancouver B. C., Mr. DeButts letter of July 25, 1975 on Bridge 12-A at Whitmarsh, Washington, Mr. DeButts letter of September 30, 1975 on Bridge 12-A at Whitmarsh, Washington, Mr. DeButts letter of April 6, 1976 on Bridge 10, Delta Junction, Washington. There are many more similar to the above agreed to projects which were agreed to and the Contractor does the work that requires the floating equipment not available to the Company forces in the area, and Company forces finish the project.

Due to the above mentioned past work, I see no reason why the Company had to Contract the placing of braces, sheating and building of a walk-way (which the Company did not request) on Bridge 10 at Delta, Junction.

The claim was denied at all levels of handling on the property, following which it was appealed to this Board.

At the outset we find unpersuasive Carrier's procedural arguments and rule that this claim properly is before us for disposition. From the record it is plain that the work of bracing, sheathing, and walkway construction on bridge protective piers has been reserved by custom, practice and tradition of exclusive system-wide performance by B&B forces over the years since 1971. This brings the work within the coverage of the general Scope Rule language of Rule 1. Additionally, the work reservation language of Rule 55 colorably governs much of this work. Accordingly, it cannot seriously be contested that Carrier was required to comply with the notice provisions of the Note to Rule 55. Further, if Carrier proceeds to subcontract over the objections of the Organization, it is required to show that it was free to do so under one of the exceptions in the Note to Rule 55. There is no question but that Carrier complied with the notice and conferencing requirements of the Note. The question thus narrows to whether Carrier has demonstrated the applicability of one of the exceptions to the Note, as

follows:

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, 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 shipped 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 Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may proceed to contract out the work.

Carrier urges that it did not have a floating crane available and that such was essential to proper performance of the work at issue. However, evidence developed on the property that Carrier forces, using a floating raft and telescoping crane from the bridge structure overhead, could do and have done that work on several occasions in the recent past. There is no question that all other equipment and materials required to perform the work were available or obtainable from Carrier's stores. It must be observed that the Note does not make an exception just because a subcontractor has better equipment or equipment which would make the work easier, quicker or less expensive. Rather, subcontracting is prohibited unless Carrier can show among other things that special equipment not owned by the Company is required or the Company was not adequately equipped to handle the work. On the record before us we are not persuaded that the floating crane was required to do the bracing, sheathing and walkway construction, nor that the Company did not have equipment adequate to do that work (emphasis added). Specifically, we find unsupported by probative evidence Carrier's assertions that performance of the work by subcontractor forces off the floating crane was the only way properly to protect the newly driven piles. Finally, Carrier cites Award 3-5304 for the proposition that the work of driving piles, capping, bracing, sheathing and walkway construction was a homogeneous project which could not and should not be "piece-mealed" to permit B&B forces to do the bracing, sheathing and walkways. We do not know what facts underlay the dicta in Award 3-5304, but the holding from a foreign Carrier under a different Agreement cannot be deemed controlling on this record. The simple facts before us demonstrate that on this property the parties have developed a consistent practice whereby the pile driving and capping frequently have been subcontracted due to lack of

equipment, but the bracing, sheathing and walkway construction have been reserved for performance by Carrier B&B forces. This record shows us no adequate justification under the Note to Rule 55 for departing from that practice in the present case, and the claim accordingly must be sustained.

AWARD

Claim sustained. Carrier is directed to comply with this Award within thirty (30) days of issuance.

J. H. Funk
Employee Member

Walter Holzner
Carrier Member

Dana E. Eischen
Dana E. Eischen, Chairman

Date:

April 20, 1982