

PUBLIC LAW BOARD NO. 2206

AWARD NO. 57

CASE NO. 59

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 Agreement was violated commencing September 21, 1978, when the Carrier allowed contractor forces to construct a 100 foot by 60 foot by 15 foot high building of masonry wall, concrete floor and tar and gravel roof near Belnap Street, Superior, Wisconsin. (System File T-W-14300
- (2) Bridge and Building FOREMAN Stuart A. Starika, FIRST CLASS CARPENTERS Robert L. Ralya, John Freeman, TRUCK DRIVER Gordon Massberger, CARPENTER HELPERS Richard L. Eastman, Daniel L. Hoeffing and BRICKLAYERS Gordon Ramsdell, Dennis Weir be allowed equal proportionate shares of the 1865 man hours worked by contract forces at their respective rates of pay because of violation referred to in part one (1) of claim.

OPINION OF BOARD:

Under date of February 24, 1978 Carrier notified the General Chairman of an impending subcontract of work, as follows:

Mr. F. H. Funk, General Chairman February 24, 1978
Bro. of Maintenance of Way Employees
730 Hennepin Avenue File MW-84(c)-Misc.
Minneapolis, Minnesota 55403

Dear Mr. Funk:

As discussed in conference on February 23, 1978, a dissolved Air-Flotation waste water treatment plant will be constructed at sewer lagoon site, Belnap Street Shop area in Superior, Wisconsin.

This project includes construction of a 100' x 60' x 15' high masonry building with PH control, flocculation, dissolved air flotation, filtration, and sludge handling equipment; influent, effluent, water, air, sanitary sewer; modification of the lagoon and oil separator skimming systems; and dredging the existing lagoons.

It will be necessary to contract construction of the building as there are only two bricklayers on Seniority District No. 12. They have only performed small maintenance items in the past, having never laid an entire building, and do not have the capability to handle a building of this magnitude. The process equipment to be placed inside the building is technically complicated and must be installed by personnel who are familiar with it and can handle start-up and initial de-bugging. Building construction and equipment installation must be totally coordinated in order to meet state-imposed deadlines for completion.

It will be necessary to have contract forces clean the lagoons with a specially designed "mud cat" dredge which can remove deposits on the lagoon bottoms without causing scarring or undue disruption of bottom sediments. The Company does not possess such special equipment.

Company forces will be utilized to install outside utilities to serve the building which will include water lines, sewer lines, and roadway.

Sincerely,

L. K. Hall
Asst. to Vice President
EJK:af20

Following disagreement by the General Chairman and a conference, the Organization advised Carrier on March 23, 1978 as follows:

Dear Mr. Hall:

Please refer to your letter of February 24, 1978, File MW-84(c)-Misc., concerning your desire to contract the construction of a 100' x 60' x 15' high masonry building in Superior, Wisconsin.

I have discussed this matter with our Local Chairmen and our Vice General Chairmen, who also discussed this matter with the bricklayers in Seniority District #12 and B&B employees at the Superior-Duluth area and all feel that we could accomplish this work within a reasonable time and therefore we are not agreeable to contracting the construction of this building.

With proper assistance two Maintenance of Way bricklayers can lay one side of this building 15' high by 100' in approximately six (6) days, not to mention the fact that there are two additional B&B employees in the Superior-Duluth area who are capable of laying cement block. We see no reason to permit contract forces to construct this building.

Carrier rejected the General Chairman's contentions by its reply of May 30, 1978, as follows:

Referring to your letter dated March 23, 1978, concerning proposal to contract construction of waste water treatment plant at Superior, Wisconsin.

The Carrier does not concur with your contention that our forces would be capable of constructing a building of this magnitude in a reasonable length of time to meet completion schedule. In addition, the building will have a tar and gravel roof and the Carrier's forces do not have the skilled manpower and specialized equipment to perform this work.

The two bricklayers, which you have mentioned in your letter of March 23, 1978, do not have the capability to handle a building of this magnitude having only performed small maintenance items in the past. For these reasons, and those set forth in my letter of February 24, 1978, it will be necessary to contract construction of this building.

Thereafter, Carrier subcontracted the construction work at issue, specifically the pouring of concrete footings, brick work, and tar and gravel roofing. It is not disputed that installation and construction of water lines, sewer lines and roadway were reserved for and performed by Carrier's B&B forces. Thereafter, the present claim was initiated on November 17, 1978, as follows:

We are in receipt of information that Burlington Northern Inc. violated the current agreement with the Brotherhood of Maintenance of Way Employees dated May 1, 1971 when they contracted to have a masonry building constructed.

The facts in this case are that the employees of Burlington Northern possess the skills necessary to construct this building. The building constructed was 100 ft. long, 60 ft. wide and 15 ft. high, to be used as a waste water treatment plant in the Burlington Northern Shop site near Belnap Street, Superior, Wisconsin. The construction started September 21, 1978 and contract was awarded to J. R. Jenson & Son, Superior, Wisconsin.

By referral, Rules 1, 55 and note to Rule 55, also Rule 69 are made a part of this letter.

Due to the violation of the Brotherhood of Maintenance of Way Employees Agreement we are presenting a claim in behalf of Crew Members of the Bridge & Building Crew located in Superior, Wisconsin and the Bricklayers holding seniority on Lake Seniority District #12. The claimants are, Dale E. Bartz - Foreman, Stuart A. Stariha, Robert L. Ralya, & John Freeman - First Class Carpenters, Gordon Mossberger Truck Driver, Richard C. Eastman, Daniel L. Hoeffling - Helpers, Gordon Ramsdell and Dennis Weir - Bricklayers.

The claim is for all straight time and overtime hours worked by the contractor and that a like number of straight time and overtime hours be allotted to the claimants to be equally divided at their respective rates of pay. This is a continuous claim beginning September 21, 1978 and continuing until the contractor has completed the work or has been relieved from the contract by Burlington Northern Inc. It is estimated that 1865 man hours have been expended by the contractor to this date.

This claim is consistent and sustainable under the rules of the current agreement dated May 1, 1971. We request information relative to the amount of payment for each claimant and the pay period payment will be received.

The claim was denied on the property on grounds that: 1) Carrier had complied with the notice and consultation requirements of the Note; 2) Carrier had demonstrated existence of several of the conditions in the Note under which subcontracting is permitted; 3) time constraints imposed by State mandates and penalties for late completion created "emergency time requirements"; 4) Carrier was not required to "piece-meal" the project according to Award 3-5304; and 5) arguendo the amount of man hours of damages claimed were unsubstantiated and Claimants all were "fully employed" on claim dates. The matter remained unresolved, following which it was appealed to us for determination.

It is apparent from the record that the specific work at issue is block laying, some cement finishing and the construction of the tar and gravel roof. The water lines, sewer lines, and roadway work were performed by B&B forces, and the lagoon dredging and modification, as well as the processing equipment and utility installation, were not contested. With respect to the block laying, Carrier asserts that its B&B forces did not possess "sufficient skills" to complete the project as quickly as did the contractor's masons. Given the wording of the Note (i.e., "...such work may only be subcontracted provided ..."), the evidentiary burden is upon Carrier to prove that its employes did not possess "special skills" required to do the work; that it did not own "special equipment" required to do the work; that it was not adequately equipped to handle the work; or that "emergency time requirements" existed

which made the undertaking beyond the capacity of Company forces. (Emphasis added.) Although the Company has made assertions or conjectures in the direction of each of these alleged inadequacies, it has provided insufficient evidence to establish fulfillment of any of those conditions which would have permitted the subcontracting of the cement work, block wall construction and roof construction, notwithstanding the objections of the General Chairman. The primary defense by Carrier has been the alleged existence of an "emergency time requirement" whereby it had to complete the project by April 1, 1979 or face "possible penalties up to \$10,000 per day". Nowhere is this assertion supported with probative evidence sufficient to establish fulfillment of the conditions in the Note. Arguendo, absent speculation and conjecture, there is no probative evidence to establish that B&B forces could not have completed the cement floor, block wall construction and roofing in time to permit compliance with the alleged deadline of April 1, 1979. It is not refuted that at least three of the Claimants were experienced bricklayers and/or previously had constructed block wall buildings. In light of these facts, we find unpersuasive Carrier's assertions that its employes lacked required "special skills" to construct this concrete block water treatment plant. Finally, Carrier's bare assertions that it lacked required "special equipment" or was "not adequately equipped" to build the tar and gravel roof are rebutted by the General Chairman's unrefuted counter assertions that Carrier possessed an adequate tar pot and that Carrier forces had in fact constructed an even larger tar and gravel roof on the Car Shop at Brainerd. Based upon the foregoing, we find that Carrier has failed to provide persuasive evidence that it met the conditions for an exception to the subcontracting prohibitions of the Note to Rule 55. Accordingly, we shall sustain Part One of this claim.

With respect to Part Two, we find that the Organization has failed to support its claim for 1,865 man hours in damages. In connection with the block work, the Organization has not rebutted Carrier assertions that the outside bricklaying crew of four (4) employes completed the block laying in two weeks. In the absence of evidence one way or the other, we shall assume eight hour days/forty hour weeks, or 320 man hours. The record is absolutely barren of any probative evidence regarding the actual time spent by contractor's forces on the concrete flooring or tar and gravel roof work. The Organization has the burden of proving every material aspect of its claim, including the basis upon which it asserts specific compensatory damages. We find on the record before us the only demonstrated damages to Claimants were the loss of 320 man hours of work opportunity for which we shall make them whole.

AWARD

Part One of the claim is sustained. Part Two of the claim is sustained to the extent of ~~equal~~ proportionate shares for each Claimant of ~~320~~⁴⁰ man hours at ~~their~~^{his} respective rates of pay. Carrier is directed to comply with this Award within thirty (30) days of issuance.

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F. H. Funk
Employee Member

Walter H. ...
Carrier Member
if correct to Part 1

Dana E. Eischen
Dana E. Eischen, Chairman

Date: April 22