PUBLIC LAW BOARD NO. 2206

AWARD NO. 59

CASE NO. 61

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when permitting outside forces to install 100 feet of 24 inch corrugated metal pipe, 2 catch basins, 360 feet of 12 inch corrugated metal pipe, 350 feet of 6 inch sewer line, 375 feet of 2 inch water line and constructing forms and pouring a 18 inch by 40 foot concrete strip at Auburn, Washington between August 15 and October 2, 1978. (System File S-P-178C)

(2) Because of said violation Claimants J. R. Mobley, A. G. Robinson, K. C. Beazley, L. J. Scheer, L. M. Richards, S. R. Fulkerson and L. A. Fisher now be allowed 73 hours each at their respective straight time rates of pay for violation recorded in part one (1) of claim.

OPINION OF BOARD:

Under date of July 27, 1978 Carrier advised the Organization's General Chairman, ostensibly pursuant to the Note to Rule 55 as follows:

> It is proposed to construct a new automobile unloading facility at Auburn, Washington for Volkswagen of America, Inc.
>
> Construction of the facility, to be in operation by October 1, 1978, will involve construction of trackage, grading, paving, drainage and fencing. The following items of work will be handled by contract forces:

2206 - AWD 59

Place 3,000 cubic yards of embankment for track construction.

Place 100 ft. of 24-inch corrugated metal pipe.

Excavate 3,000 cubic yards of top soil and sod.

Place 6,000 cubic yards of embankment for paved area.

Place 3,500 cubic yards gravel base for paving.

Place 15,300 sq. yds. of asphalt paving (four inches thick).

Place two parking lot type catch basins.

Place 360 ft. of 12-inch corrugated metal pipe.

Construct 350 lineal feet of six-inch sewer line.

Construct 375 lineal feet of two-inch water line.

Provide striping.

It will be necessary to handle the work as outlined above by contract because of the magnitude of the project, time constraints and lack of equipment. The borrow material for the grading work will have to be hauled by a fleet of trucks or special grading equipment which we do not have at Auburn. The paving work will require special paving equipment not possessed by the Carrier. Placement of the CM culvert pipe will be coordinated with the grading operation. Installation of the water and sewer lines is required to be contracted because of the need for licensed personnel. Placement of catch basins and drain line will be coordinated with the paving operation. The Carrier does not possess equipment required to perform the striping work.

The General Chairman objected to this proposal and, following a conference to discuss the matter, notified Carrier on August 28, 1978 as follows:

Please refer to your letters of July 27, 1978 and August 4, 1978 concerning your desire to contract construction of new automobile unloading facility at Auburn, Washington for Volkswagen of America, Inc.

During conference August 10, 1978, I informed you that I cannot agree to this work other than the placement of base material prior to placement of the asphalt pavement. Therefore, I must advise that we desire to perform all other work in connection with this project.

Permitting of contract forces to place the gravel base for asphalt surfacing would only be with the understanding that it does not establish a precedent or waiver or rights of employes represented by our Organization to perform this work in the future.

Carrier went forward with project using outside forces, following which the present claim was filed on October 4, 1978:

> I am filing a claim on behalf of; Norman J. R. Mobley, Carpenters, A. G. Robinson, A. C. Beasley, L. J. Scheer, L. H. Richards, Operator of Backhoe #422-0049 S. R. Fulkerson, S. and B. Crew located at Auburn, Wa. and water service Mechanic L. A. Fisher located at Auburn, Washington, when the Burlington Northern Inc., hereafter referred to as the Company hired outside forces to do the following work: place 100 foot of 24 inch corrugated metal pipe, place 2 parking lot type catch basins, place 300 foot of 12 inch corrugated metal pipe, place 350 foot of 8 inch sewer line, place 375 foot of 2 inch water line and build forms and pour an 18 inch wide by 40 foot long strip of concrete at an unloading facility at Auburn, Washington for the Volkswagen of America Inc., on Company property between August 15, 1978 to October 2, 1978.
>
> The S. and B. Forces and Machine Operators are most capable of doing this type of work. Early this year, they completed a similar project at the white water treatment plant a Auburn Washington.
>
> The Company is in violation of the following but not limited to rules of our effective agreement dated May 1, 1971, Rules 1-A,B,C, 2-A, 55-a,c,e,G,K, also and note to Rule 55. This Claim is for a total of 511 hours at 73 hours for each Employe at their respective rate of pay for each above named employee.
>
> Please advise if this Claim will be allowed as presented. A conference is desired and requested at an early date.

The claim was denied by Carrier on familiar grounds of "non-exclusivity", applicability of one or more of the conditions subsequent in the Note to Rule 55, and "full employment". However, by letter of July 25, 1979 Carrier's top appeals officer denied the claim on an additional and alternative ground, as follows:

> This refers to conference held June 21, 1979, at which time you discussed with Mr. E. J. Kallinen of my staff your appeal of claim on behalf of J. R. Mobley and six others for 73 hours each between August 15 and October 2, 1978, when contractor constructed a new automobile loading facility at Auburn, Washington, for Volkswagen of America, Inc., your file S-P-178C.
>
> As discussed in conference, the new automobile receiving terminal to serve Volkswagen of America, Inc., is a facility for the shipper and is not for use in the operation of the company in common carrier service. This facility is no different than grain elevators located on railroad property and leased to a grain company. Work on this project was

progressed only after assurance had been obtained by the shipper from the carrier that the premises would be covered by a formal lease. Attached is copy of lease No. 229,774 which was ultimately signed on October 31, 1978. The portion of Note to Rule 55 quoted below makes it clear the Carrier has specifically reserved the right to contract work when the conditions as stated above are present:

> "... perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures, or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service ...." (Emphasis added)

In view of the foregoing, there was no necessity to serve notice of intent to contract the work. In any event, serving such notice of intent to contract, in error, does not constitute admission that the disputed work is covered within your scope rule.

It is well established that serving notice of intent to contract does not establish exclusive Scope Rule coverage of the work involved, as stated in Third Division Award 20920:

> "Additionally, Petitioner contends that the giving of notice as to the contracting constituted an admission by Carrier that the disputed work was covered by the Scope Rule.
>
> "We cannot agree. Such notice is required under the Agreement in the event Carrier plans to contract out work. The giving of such notice, therefore, merely serves as formal compliance with the Agreement; it does not of itself establish exclusive Scope Rule coverage of the disputed work, negatively or affirmatively. For example, had the Carrier elected not to give notice it would not logically follow that the work was not within Scope Rule coverage."

Third Division Award 14263, Referee Lynch, MW v. SP, denied a similar claim, wherein the carrier leased ground to Western Freight Association and engaged a contractor to construct a building thereon:

> "There have been seven recent claims progressed by the Organization to the Third Division involving these same parties and the same issue. They were considered by six referees, and denial awards were issued in all seven cases, Award Nos. 9602, 10080, 10722, 10986, 11150, 11462, 14019."

* * *

The foregoing contentions by Carrier with respect to the nonapplicability of the Note to the project were not effectively rebutted by the Organization, either in handling on the property nor in written submissions and oral argument before this Board. Carrier buttressed and corroborated its positions with unrebutted documentary evidence showing that the facility was built off Carrier's right of way; that it was constructed to serve Volkswagen of America, Inc., which entered into a year-to-year lease of the facility; and that it was not used in the operation of the Carrier in the performance of common carrier service. On the basis of the foregoing we are persuaded that the Note to Rule 55 did not prohibit the subcontracting of the work on that project. The claim must be denied.

AWARD

Claim denied.

Employe Member

Carrier Member

Dana E. Eischen, Chairman

Date: April 20, 1982