

PUBLIC LAW BOARD NO. 4402

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned outside forces to perform track maintenance work, i.e., application of "in track" tie preservative (ADZ-LIFE), at various locations within the Ottumwa Division beginning on July 9, 1987 (System File # 3 Gr./GMWA 87-12-1D).
2. The Carrier also violated the Note to Rule 55 when it failed to timely schedule and hold a meeting to discuss its plans to assign said work to outside forces as requested by the General Chairman in his letter dated June 24, 1987.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above Foreman C. C. Burkhalter, Truck Driver L. R. Ament and Sectionmen R. L. Littlejohn, P. D. Lord, K. P. Gosser, R. J. Paris, F. N. Montgomery, R. D. Littlejohn, D. H. Jones, M. A. Bibby and J. L. Illingsworth shall each be allowed eight (8) hours straight time pay and two (2) hours' overtime pay, at their respective rates, for each work day beginning July 9, 1987 and continuing.

OPINION OF BOARD

This dispute concerns the Carrier's contracting out "in-track" tie treatment. By letter dated June 23, 1987 the Carrier's Chief Engineer J. A. Leeper notified the Organization's General Chairman P. S. Swanson:

This letter is to inform you of the Carrier's intent to contract the work of "In-track" tie treatment on this Region. We desire to initiate this work on the Galesburg Division, First Subdivision, between Galesburg and Creston, IA.

This work represents a new technology in crosstie preservation not performed prior to 1986 on the BN or any other railroad. It is similar to treatment developed by the Osmose Corp. that has been applied to timber bridge piles and other wooden structural members. The purpose of this treatment is to inhibit decay through the injection of toxic preservatives. Such treatment on bridges has historically been done by contractor.

The purpose as it related to "in track" treatment of crossties is still being refined, and rights to the material and equipment used in this application are proprietary. Despite our efforts to procure the equipment to perform this work, such equipment is unavailable for sale or lease, and is still in the prototype stages.

This preservative, known under the trademark "Adz-Life", is a patented substance and carries an Environmental Protection Agency classification as a hazardous material. As such, any person responsible for its application must be licensed according to applicable federal, state, and local regulations.

Ties treated in this manner will be warranted against additional decay for five years from the date of treatment.

Since Carrier employees are neither licensed, experienced, nor qualified in this process; and equipment required is unavailable to the Carrier, it will be necessary to handle by contractor, as has been done in the past.¹

By letter dated June 24, 1987 the Organization stated that it did not concur with the Carrier's proposed actions and, without specifying a date for a meeting, requested "a conference to discuss this matter in accordance with the Note to Rule 55." On July 9, 1987 the Carrier entered into a contract with Osmose Wood Preserving, Inc. for the performance of the work and the work commenced on that date. The Carrier and the Organization met on July 13, 1987 to discuss the Carrier's notice of its intent to contract out the work, but no agreements were reached. This claim followed on August 29, 1987.

The rules set forth in this Board's previous awards on the issue of contracting out work govern the analysis in this case. *See* PLB 4402, Awards 20 and 21.

Under the Note to Rule 55 and Appendix Y, we find that the record sufficiently demonstrates that the general work at issue (i.e., the application of wood and tie preservatives) falls "within the scope of this Agreement". *See e.g.*, Roster 3 where employees operate equipment such as Adzing Machines and Creosote Sprayers. Moreover,

¹ This notification was not the first attempt by the Carrier to contract out "in-track" tie treatment work. For example, it is undisputed that by letter dated December 16, 1986 the Carrier gave similar notification to the Organization concerning proposed contracting of that work on the Carrier's Pacific Division.

the work involved clearly falls within sectionmen's duties of "... repairing and maintaining ... track" as set forth in Rule 55Q. There is no real dispute that the employees have performed related general tie maintenance in the past.² We therefore conclude that the Organization has sufficiently demonstrated that the employees have "customarily performed" the general work at issue within the meaning of the Note to Rule 55 and hence, the Carrier was obligated to give notice of its intent to contract out the work at issue.³

Further, we find that the Carrier met its obligations under the Note to Rule 55 to give notification to the Organization of its intent to contract out the work. The Note to Rule 55 (and the duty which is reiterated in Appendix Y) obligates the Carrier to give the Organization such written notice "not less than fifteen (15) days" ... "in advance of the date of the contracting transaction". Here, the Carrier gave such notice on June 23, 1987 which the Organization asserts it received on June 24, 1987. The "contracting transaction" was not entered into and the work did not commence until July 9, 1987 - 15 days after the notification. Therefore, under the Note to rule 55, the Carrier met its obligations.

Contrary to the Organization's argument, the fact that the parties did not meet until after the work commenced does not, by itself, require a sustaining of the claim in this case on the basis that the Carrier failed to act in good faith. The Note to Rule 55 obligates the Carrier to meet "promptly" with the Organization after notification is given and upon the Organization's request. There is nothing in this record to demonstrate that the Carrier purposely postponed meeting with the Organization in order to delay or to make its actions a *fait accompli*. Indeed, the correspondence discloses that the Organization did not specify a date for a desired meeting but just requested the Carrier to contact the Assistant General Chairman "for setting a time and place for said conference". We must conclude that

² See the Carrier's January 28, 1988 letter concerning the fact that "Maintenance of Way employees in the past have made topical application of preservatives to the exposed surfaces of ties by spraying."

³ For reasons set forth in Awards 20 and 21 of this Board, we reject the Carrier's assertion that the Organization was obligated to demonstrate that the employees performed the work on an exclusive basis. The requirement in the Note to Rule 55 is that the work be "customarily performed", not "exclusively" performed.

without more, under the facts of this case, we cannot find that the Carrier failed to act in good faith as required by the Note to Rule 55 or Appendix Y. Here, our inquiry is limited to whether or not the Carrier met "promptly" as required by the Note to Rule 55. We find that it did.⁴

The inquiry then turns to whether the Carrier's contracting of this work to Osmose fell within the specified exceptions in the Note to Rule 55:

... [S]uch 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 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.

We find that the Carrier has demonstrated that "in-track" tie treatment falls within the above exceptions. First, although we have found that the type of work involved in this dispute (the application of wood and tie preservatives) is work that has been customarily performed by the covered employees, we find the specific method utilized by the contractor

⁴ Obviously, it makes good sense to hear the Organization out prior to taking action so that the Organization's point of view could be considered. Such input may provide alternatives to the Carrier not previously considered; present opportunities to resolve other related matters in dispute; or simply avoid the filing of claims. However, notwithstanding those practical considerations, in this case the clear language in the Note to Rule 55 does not require the preconditions argued appropriate by the Organization.

Third Division Award 20071 cited by the Organization is distinguishable. There, the question was whether or not the carrier met in a "prompt" fashion as required by the Note to Rule 55 after it gave notice of intent to subcontract on February 1, 1971; agreed to a meeting on February 18, 1971; delayed the meeting until at least March 10, 1971 and, during the interim, on February 18, 1971 contracted with the outside forces. No such delaying devices have been demonstrated by the Organization in this case. In that case the delay was 37 days with a postponement. Here, the Carrier met with the Organization on July 13, 1987 - 20 days after notification with *no* postponement. Again, we cannot say that the Carrier was not "prompt" in this instance. Similarly, Third Division Award 26770 is not on point. The determinative factor in that dispute was the fact that the carrier utilized a contractor because of the need to use specialized equipment and the contractor was observed performing work without the use of that equipment. Such is not the case herein.

We also find Third Division Award 28486 inapplicable. There, no notification of contracting out was given by the carrier. Such is not the case herein. Finally, Third Division Award 28590 is not persuasive. That case involved the unloading of crossties by outside forces. That case turned on the ability of the carrier to use alternate equipment to perform the work. The Board found that work could have been accomplished in alternative fashions and none of the relevant exceptions applied. In light of the uniqueness of the injection process and its results and the inability of the Carrier to obtain the necessary equipment and use of the process from the contractor, we cannot say the same in this case.

as unique with different procedures and results from those performed and obtained by the prior work performed by the covered employees. Specifically, according to the record, the employees applied preservative in a more topical application to the exposed surfaces of ties by spraying. Here, the ties are treated while in place by injecting the preservative mixture under the tie plate in a fashion with a degree of success that has not been accomplished before. The results of the injection process differ from topical application because the injection process allows the preservative to permeate from the tie's center to its surface. The end result is that the preservative mixture and the process utilized by the subcontractor extends the life of the ties more than accomplished before.

Second, the record demonstrates that at the time the dispute arose, the preservative, "Adz-Life", was a patented substance carrying an Environmental Protection Agency classification as a hazardous material and those responsible for its application were required to be licensed according to applicable federal, state and local regulations. While the preservative may have been commercially available as the Organization argues, the ability to acquire the substance is not the issue. The relevant issue concerns the Carrier's ability to *apply* the substance. Because of its hazardous classification and the licensing requirements, the lack of employees with such credentials and the fact that such licenses were possessed by the Osmose employees weighs in favor of the Carrier.⁵

Third, with respect to the process of application of Adz-Life, although at the time this dispute arose there was no patent on that process, there was a patent application pending as of March 30, 1987 which application was ultimately granted by the U. S. Patent Office on April 19, 1988. While we recognize that at the time this dispute arose, the patent application was only pending which did not completely preclude the Carrier from taking steps to apply the substance through its own resources, the fact that the application was

⁵ While the Organization asserts that obtaining such a license is not a major accomplishment and, in fact, subsequent to this dispute one of the Claimants (R. L. Littlejohn) obtained such a license, the relevant inquiry concerns the possession of that license at the time the dispute arose. The record clearly demonstrates that at the time the dispute arose, no Carrier employees had such a license.

subsequently granted lends immense weight to the Carrier's assertions that the process was unique in terms of the exceptions in the Note to Rule 55.

Fourth, prior to this particular dispute, the Carrier made specific efforts to obtain the equipment and to have Osmose use the Carrier's employees, which efforts were rejected. The record discloses two letters from Osmose dated September 23 and 29, 1986 to the Carrier rejecting such requests:

* * *

The specialized equipment and tools we are using have been built by us, since what was needed was not commercially available. We are not at all interested in selling this specialized equipment so that others can accomplish the same work.

Neither are we interested in providing supervisory staff so that the work can be accomplished by your own forces. Currently, we are charging on the basis of unit prices. It is imperative that we have total control over the forces accomplishing this work so that we retain control of production. If we were not in full control of production, it would be necessary for us to charge a per tie cost that would not be economical. The program would therefore lose all of its benefit.

* * *

We are not interested in providing supervisory staff so that the work can be accomplished by your own forces, nor are we interested in operating a work force of combined personnel (BN and Osmose)

* * *

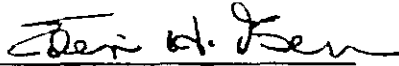
Therefore, aside from demonstrating the need for special skills and equipment not owned by the Carrier and that only the supplier could be used for this process under the exceptions specified in the Note to Rule 55, these efforts by the Carrier further demonstrate its compliance with the requirements in Appendix Y to "reduce the incidence of subcontracting and increase the use of their maintenance of way forces .. including the

procurement of rental equipment and operation thereof by carrier employees.”⁶

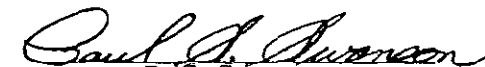
In sum based upon the record before us, we find that under the Note to Rule 55 and Appendix Y, the Carrier was obligated to give notice to the Organization of its intent to subcontract the disputed work; the Carrier complied with the notification requirements; the Organization has not otherwise demonstrated that the Carrier operated in less than good faith; and the contracting out of this work was in accord with the exceptions specified in the Note to Rule 55. As such the claim shall be denied.

AWARD

Claim denied.


Edwin H. Benn
Neutral Member


E. J. Kallinen
Carrier Member


P. S. Swanson
Organization Member

*Dissenting, written dissent
to follow*

Denver, Colorado
April 26, 1991

⁶ On the property, the Organization contended that another company (Herzog) “is doing this work in the western part of Iowa and eastern part of Nebraska ... [and t]here is another company in Washington doing this work also” Given the lack of specifics concerning the actions of these two companies and further given the clear and unmistakable position set forth by Osmose that its process was unique and only it and its employees would perform that work, we find the assertion made by the Organization insufficient to change the result. The same reasoning holds for the Organization’s arguments that the Carrier could have fabricated equipment to inject Adz-Life.