

PUBLIC LAW BOARD NO. 4402

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

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned outside forces (Osmose Wood Preserving, Inc.) to perform bridge repair work on Bridge Nos. 495.00 and 496.30 on the Alliance Subdivision beginning on September 28, 1987 through October 3, 1987 (System File C-88-C100-8/DMWA 88-1-29B).
2. As a consequence of the afore-stated violation, B&B Foreman D. Johnson, First Class Mechanics S. T. Bennett and B. N. Welte and Truck Driver S. L. Bickford shall each be allowed one hundred twenty-five (125) hours of pay at their respective straight time rates.

OPINION OF BOARD

This dispute concerns the contracting out of certain bridge repair work. Because of the development of the facts through the exchange of correspondence between the parties, those relevant portions of the on-property handling are set forth below.

By letter of August 19, 1987 the Carrier informed the Organization's General Chairman that:

For you information we are going to contract in-place repairs to the concrete substructure of two bridges on the Alliance 8th and 9th Subdivision.

Similar repairs also may be done on three bridges on the 1st and 3rd Subdivisions pending evaluation of inspections thereof. This work requires experience, expertise and use of special equipment and materials which Burlington Northern Railroad does not have. It involves use of epoxy materials and injection equipment properly used by trained personnel to obtain effective repairs to the substructure components of our bridges.

Work will start on the 8th Subdivision September 14, 1987.

By letter of August 21, 1987 the Organization requested a conference and asserted that:

Employees represented by the Brotherhood of Maintenance of Way Employees have skills needed to perform this work and the equipment is available.

By letter of December 30, 1987 the Carrier stated:

* * *

The work in question done by Osmose Company on Bridge 495.00 and 496.00 was a process called epoxy injection, where they inject epoxy under pressure into cracks in concrete bridge members, (usually caps or piers), to seal the cracks and weld the concrete together. This is a process developed by Osmose and many of their procedures and formulas are trade secrets.

The last time any work of this type required Osmose epoxy injection on the Alliance Division was in 1978 when they injected the piers on Bridge 74.43 at Sidney, Nebraska.

It would hardly pay us to invest in the equipment and training needed for this type of work considering the few times we need this work done.

* * *

By letter of January 29, 1988 the Organization responded:

* * *

The work performed on these bridges can only be construed as maintenance to a bridge structure which is clearly defined in the Note to Rule 55 as work customarily performed by maintenance of way employees. Maintenance of Way Bridge and Building Department employees have performed the type of work involved herein on numerous occasions on other Seniority Districts on the former C.B.&Q. portion of the Burlington Northern Railroad Company.

A conference was held on this contemplated work on August 26, 1987. At this conference the Carrier representatives were informed that the material and equipment is available through suppliers and vendors. Therefore, maintenance of way employees could perform the work without the use of contractor employees. One such supplier is Abatron at 141 Center Drive, Gilberts, Illinois, suburb of Chicago. This supplier can supply all types of epoxy for concrete repair. The equipment needed to perform this type of repair can be procured thru various equipment rental companies such as Auto Engineering in Chicago, Illinois and Lilly Engineering, also in Chicago, Illinois. These equipment vendors can supply equipment to perform both epoxy repair and shot concrete equipment. In addition, Paragon Construction Company, Inc., St. Paul, Minnesota, can supply all material, equipment and technology to have this work performed by Bridge and Building forces. All of this information was presented to the Carrier at conference on this issue.

* * *

The Claimants, and all Bridge and Building forces, are very knowledgeable of how to perform this work and this type of work has been part of the training program for the B&B supervisors and foremen at Kansas City, Missouri for quite some time. I must further point out that the Carrier has an obligation to

train its employees in new technology and has the capability of doing so at its facilities in Kansas City. This work could easily be expanded into that program.

* * *

By letter of March 4, 1988 the Carrier took the position that it did not violate the Agreement, particularly the Note to Rule 55 and Appendix Y, because the work involved was not exclusively performed by the employees. By letter of August 24, 1988 the Carrier further took the position that:

... [T]his work has been performed for several years by contractors specializing in this type of work with no claim from your Organization. Burlington Northern Railroad supervision and employees do not possess the expertise or experience required to determine the extent of the cracking, condition of the concrete and other facts necessary for developing required work procedures.

As evidenced by the attached copy of literature from Osmose Company, their technicians perform sounding, probing, measuring and test coring to determine the extent of damage and repairs required. After cleaning, the injection epoxy material is then formulated from a number of variables including crack characteristics, ambient temperatures and modulus requirements. Their formulations are hydrophilic with variable viscosities to allow full depth penetration, regardless of crack size.

You furnished statements where five B&B employees had limited experience with epoxy on the Chicago Division. However, you have furnished no evidence that our employees, more especially the claimants, have any experience in evaluating or making repairs necessary for correcting internal structural cracks in concrete using an injection method as developed and performed by Osmose Company on Burlington Northern bridges since 1978. Attached are copies of contracts dating back to 1978 as examples of work performed by Osmose Company in the past with no objection from you Organization.

* * *

By letter of September 19, 1988 the Organization responded stating:

* * *

... [T]here are at least two (2) companies that supply the material needed besides Osmose. These are Abatron, Inc. and Paragon Constructors, Inc. The correspondence from these two companies show that a special expertise is required to use these products. The Paragon Company, in addition, also states they have supervision available to instruct and teach our B&B employees how to do this work.

We also provided a list of companies that rent the necessary equipment needed to perform the epoxy injection and other procedures that Osmose is currently doing. The equipment availability linked with the product availability from the two (2) companies previously listed provide the Carrier with the capacity to perform this work under Appendix Y of our Agreement.

Also, we provided a statement signed by several members of the B&B crew stating that they have been involved in all steps of the operation of the epoxy

injection with the Osmose Company at several locations.

* * *

In addition, I must bring to your attention that on the Yellowstone Division the Carrier's own employees already are performing this work.

* * *

In the statement of March 24, 1987 referred to in the Organization's letter of September 19, 1988, five employees stated: .

I/We the undersigned have worked with the Osmose company, while engaged in the pumping of epoxy into bridge piers on the Chicago division of the Chicago region on the fourth sub-division.

The following locations were completed by the Osmose company, and the district B+B forces. The Wisconsin River bridge, located south of Prairie Du Chien Wi., and the Chippewa River bridge, located south of Pepin Wi.

On both of these projects I/WE were involved in all steps of the overall operation, aside from the quality control portion of the work.

There was no special training or tools involved, and we were quite capable of handling all parts of the operation.

The employees furnished by Osmose were not professional in any way, in fact most help, other than the supervisors, were students who worked part time in the summer months.

A November 4, 1988 letter from Assistant General Chairman-Secretary Treasurer

G. A. Holder stated:

Referring to the Osh-mose [sic] Contractors at Treapuleau, Wisconsin on Br. 319.89.

The process that I observed which was contracted out by the Osh-mose was the same the District B&B Gang did to the bridge at Jacksonville, Illinois. This being the old concrete was busted off the piers down to good concrete, holes were then drilled at an angle for the re-rods. The only epoxy injection I seen that could have been used was tubes of epoxy that was mixed with a drill then used with a caulking gun to inject into the holes. This was in order to hold the rerods which was used to hold the new facing on the piers that was somewhere from at least 4" of new facing up to as much as 12". It was then formed and new concrete was poured.

The bridge at Jacksonville, Illinois which was reconstructed by the District B&B Gang, consisted of work that included busting away the old scale of concrete down to the good, drilled holes at angles for the rerods, injected an epoxy, which was bought by the B.N. from Osh-mose, mixing it with a drill and injecting it into the holes with a caulking gun to hold the rerods which hold the new facing on the piers with approximately 6 to 8 inches of new concrete, then set the forms and poured concrete.

As far as I could see there was nothing done by Osh-mose that was not done by the B&B Gang when they reconstructed the bridge in Jacksonville, Illinois.

The Carrier responded by letter of December 5, 1988:

* * *

In some instances we have utilized B&B forces to perform some bridge repairs in the past. By the same token, as evidenced by copies of contracts supplied to you dating back to 1978, the Osmose Company has routinely applied their injection method to repair bridges on this property also.

* * *

The Organization responded by letter of December 28, 1988 referring to an understanding reached on the Yellowstone Division (dated May 3, 1988) wherein, without prejudice to existing claims, the Carrier agreed to work the B&B crews with the Osmose crews for 1988; the B&B employees would perform certain work under Osmose supervision; and Osmose would have a maximum of three employees performing work associated with epoxy injection and grouting.

The Carrier responded by letter of January 3, 1989 reiterating that the work has continuously been contracted out as far back as 1978 on the former CB&Q territory system-wide. In a letter of March 6, 1989, the Carrier set forth reasons why the epoxy cartridge techniques used by Abatron, Inc. (previously referred to by the Organization) would work for minor concrete repairs such as basement wall cracks but would not, in the Carrier's opinion, work on concrete bridge structures. The Carrier further supplied a printout obtained from Osmose showing the number of instances of bridge repair work it performed on the Chicago, Nebraska, Colorado and Yellowstone Divisions. That listing shows that on varying dates, mostly between 1978 and 1988, approximately 142 bridges were repaired by Osmose.

Recently, in PLB 4768, Award 10 that Board held in a similar dispute arising on the Yellowstone Division:

As discussed in other Awards of this Board, Note to Rule 55 is applicable only to work "customarily performed by employees described herein". Even where this threshold condition is met, such work may be contracted to outside concerns under special situations listed therein, provided

the advance notice and opportunity for conference thereon is provided.

In this instance, it is the Carrier's position that the particular bridge work herein required epoxy structural repair, a technique which has not been employed by Carrier employees as part of their customary duty and which, more significantly, has been performed by the Osmose Company on the Carrier's property since 1976. While the Organization offered evidence that Carrier employees have performed similar work and/or that the work is not as complex as the Carrier would describe it, the fact remains that the Organization has not demonstrated that the type of work involved here has been "customarily performed" by Carrier employees.

The Board need not review other subsidiary aspects of this dispute where the underlying test of customary performance is not met. This conclusion does not, of course, diminish the Organization's right, as referenced by the cited Rules, to bridge repair work in general. Indeed, some aspects of the work here under review may well have come within the parameters of such work. There is, however, insufficient support, in this instance, for a finding that the epoxy repair work could have been assigned efficiently on a piece-meal basis between Carrier forces and those of the outside concern. The strictures of Note to Rule 55 are not applicable where a showing of customary performance of the work is not clearly demonstrated.

The conclusion reached in PLB 4768, Award 10 is not palpably erroneous and is equally applicable to the similar dispute in this case. The above-quoted correspondence, while showing that there is a significant difference of opinion as to whether the Carrier's employees could perform the specific work performed by Osmose through the obtaining of equipment and supplies from outside sources, does show that for a substantial period of time prior to this dispute Osmose has been performing the disputed type of bridge repair work involved in this case. Indeed, the record satisfactorily establishes that prior to the raising of this dispute and the dispute resolved by Award 10, the Carrier has contracted out this type of work for a number of years on its various divisions without objection.

Under the Note to Rule 55, the "customarily performed" requirement is a threshold showing and, because this is a contract claim, that showing must be made by the Organization. Although that language does not equate with "exclusively performed" (*see* Award 20 of this Board), the kind of showing made by the Organization in this case does not reach the level required by the Note to Rule 55. As found in Award 10, based upon the record before us we cannot say that the Organization has demonstrated that the

employees have "customarily performed" the specific disputed work as is its burden under the Note to Rule 55. We shall therefore deny the claim.

In light of the disposition of this matter, the Carrier's other arguments need not be addressed.

AWARD

Claim denied.



Edwin H. Benn
Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Chicago, Illinois

Dated: _____