

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 rail grinding work at various locations on the Alliance Division beginning on March 1, 1988 (System File C-88-C100-47/DMWA 88-3-3).
2. As a consequence of the afore-stated violation, the senior furloughed welding foreman on Seniority District #10 and the two (2) senior furloughed grinder operators on Seniority District #10 shall each be paid, at their respective rates, for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work involved here, beginning on March 1, 1988 and continuing.

OPINION OF BOARD

This dispute involves the contracting out of certain rail grinding work.

By letter of January 29, 1988 the Carrier advised various General Chairmen:

This is to inform you of the Carrier's plans to continue the ongoing program of rail grinding on the Burlington Northern Railroad System in 1988 and beyond.

The program for 1988 calls for the use of seven (7) switch and crossing grinders and three (3) production grinders across the entire System.

This program utilizes specialized equipment which is owned, operated and maintained by the contractors performing the work. Rail grinding has been performed in this manner over the past several years on the Burlington Northern, and will continue to be done in an effort to extend the life of the rail, switch points, frogs and crossings. Company forces accompany these machines on each territory to perform work incidental to the machines' operation such as hand grinding and fire prevention.

In order to keep you informed regarding the nature of future grinding programs attached is a tentative production rail grinding schedule for 1988. Obviously, this schedule is subject to change as the work season progresses.

Conference after the Organization protested the Carrier's action did not result in resolution satisfactory to the Organization. This claim followed protesting the use of

outside forces on the Carrier's Alliance Division commencing March 1, 1988.

As found in earlier awards of this Board, the Organization need not demonstrate that the involved employees exclusively performed the disputed work. *See, e.g.*, Award 20 of this Board. The narrow question here is whether the Carrier's use of Jackson Jordan Company to perform the disputed rail grinding and that contractor's use of the Jackson Jordan Rail Grinder with its own forces rather than the performance of this work by the Carrier's forces fell within the "special equipment" provision of the Note to Rule 55. We find that it does.

The specific work performed by the Jackson Jordan Rail Grinder is found in the Carrier's letter of September 27, 1988:

... The machines of this dispute are self propelled locomotive size machines with multiple grinding heads controlled by computer program.

* * *

These new rail grinding machines have an entirely different mission than performed by hand grinders or simple machine grinders. The early grinders were used for grinding down excessive weld or fitting switch points. That work remains today undisturbed by the new technology. The new machines perform a work function that was not previously in existence and that is the reshaping of rail to provide a proper rail ball contour for more effective and longer term life span. This new work was not previously performed at all by anyone

See also, the Carrier's letter of April 4, 1989:

... While Maintenance of Way Employees have operated and do currently operate single stone hand grinders the machines referred to here are a totally different type of equipment with a different concept of operation. ... The Switch Grinders being referred to here are a much larger piece of equipment having 8 grinding stones each for a total of 16 stones which are operated and controlled by a complex computer system requiring more skill to operate and much more daily maintenance due to the size of the machine and the large volume of metal which they are able to remove. The single stone hand grinders which BN employees operate could not remove the amount of metal and restore the profile on the rail in the switches like the Switch Grinders are capable of. However, Maintenance of Way employees still perform touch-up grinding on frogs, [s]witch points and stock rails with the single stone grinders in connection with the Switch Grinders.

The work performed by these Switch Grinders is an extension of the work done by the Loram Production Rail Grinders which have 80 to 88 grinding stones. These machines and ones owned by Speno have been operated on the BN since 1984 on an extensive basis, and were operated on the BN on a limited basis for many years prior to 1984.

The production grinders have always been operated by the contractor's employees. The production grinders are not capable of profile grinding rail in switch and road crossing areas. The purpose of the Switch Grinders is to grind the areas that the production grinders cannot grind, or to grind spot areas as compared to the production grinders that usually grind out-of-face across the railroad.

* * *

The Switch Grinders required to perform this work are not owned by the Carrier and are not available to the Carrier for operation by Carrier forces.

A letter from Jackson Jordan dated May 7, 1987 confirms that:

... Jackson Jordan offers its SCG-23 Switch and Crossing Grinder on either an outright purchase basis or on a long term lease agreement using Jackson personnel to operate and maintain the grinder.

Operation by skilled Jackson personnel is required because of the complexity of the equipment and our desire to provide levels of performance necessary to insure continued economic justification of switch and crossing grinding.

The relevant portion of the Note to Rule 55 provides that work customarily performed by the Carrier's employees:

... may only be contracted provided that ... special equipment not owned by the Company, [is] required ...

The record shows that the Carrier does not own the type of grinder that performs the function described by the Carrier which is needed to accomplish the disputed switch and crossing grinding work. As described by the above, that grinder is "special equipment" within the meaning of the Note to Rule 55. Under that portion of the Note to Rule 55 quoted above, the Carrier can therefore contract out the work in dispute.

We are not satisfied that the Organization has demonstrated that the Carrier could have leased the equipment elsewhere as described in the Letter of Agreement of December 11, 1981 (Appendix Y). As does Jackson Jordan, letters from Fairmont Railway Motors and Loram Maintenance of Way found in the record show that, if leased, such an arrangement for use of the equipment by the Carrier must be with use of the contractors' employees as operators.

Moreover, the arguments made by the Organization that such leasing

arrangements were entered into by the Canadian National Railroad with use of its employees as opposed to contractor's employees is not sufficiently established in this record on a factual basis. The record is in dispute over whether there was such a lease arrangement as contended by the Organization or if the CN purchased the equipment and then used its employees. Without more, such an argument does not show that a leasing arrangement with use of the Carrier's forces can be achieved, particularly in light of the contractors' statements of their unwillingness to lease the equipment for operation by the Carrier's employees.

We have also considered the Organization's arguments that the Carrier is attempting to avoid the provisions of the scope rule, the Note to Rule 55 and Appendix Y through its reliance upon outside contractors utilizing technologically advanced equipment to the detriment of the covered employees. We need not address that general allegation in this matter. Each case must be examined on its individual merits and in each case the Carrier will be required to establish that its actions fall within the confines of the Note to Rule 55 and Appendix Y. In this specific case, however, we find that the requirements of the Agreement have been met.

As we have stated in other awards, we do note that Appendix Y provides that the Carrier agrees to "the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." The status of this record shows that the Carrier could not do so because of the requirements of the contractor that its forces be used to operate the equipment. Our award in this matter is again confined to the existence of the factual premise that the Carrier could not lease such equipment for operation by its forces.

AWARD

Claim denied.


Edwin H. Benn
Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Chicago, Illinois

Dated: _____